

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

The Hon. Kenneth M. Millman, Chair
The Hon. J. Travis Laster
The Hon. Jan R. Jurden
The Hon. Andrea L. Rocanelli
The Hon. Alan N. Cooper
The Hon. Carl C. Danberg
The Hon. Alan G. Davis

JEAC 2014-1

August 7, 2014

**Re: Guidance Regarding Disqualification of a
Judge Who Previously Served as a
Prosecutor in an Unrelated Matter Involving
a Litigant Presently Before the Judge**

Background

Recently, a judge requested guidance from the Judicial Ethics Advisory Committee as to whether a judicial officer who previously served in a prosecutorial role must disqualify himself or herself from a case in two potential situations: 1) where he or she actually prosecuted, as counsel of record, a criminal defendant in a previous case that is wholly unrelated to the present criminal or civil matter; and 2) where he or she was not counsel of record in the previous case, but supervised the assigned prosecutors in a previous case that is wholly unrelated to the present criminal or civil matter. Because that judge's request reasonably could be construed as pertaining to a matter of past conduct or the subject of past or pending litigation, the Committee

respectfully declines to issue direct guidance in response to the judge's individual request.¹ However, because the request pertains to an issue that is relevant to many judges who assume the bench directly from a prosecutorial role, the Committee has decided to provide guidance on its own initiative.²

During the past three years in Delaware, there have been at least seven judicial officers appointed who served as prosecutors for significant portions of their careers. Prosecutors spend much of their time working with the specific facts of criminal cases. A prosecutor may become familiar with the facts and circumstances of a particular case and develop a subjective assessment of a criminal defendant. Both front-line prosecutors and those who serve in supervisory or "of counsel" roles can develop detailed knowledge of cases and defendants. On the other hand, prosecutors carry heavy caseloads, and it is entirely possible that a judge who previously acted as a prosecutor may have no recollection of a prior case or defendant. This is particularly true for judges who previously acted in supervisory roles overseeing the work of other prosecutors.

To limit the potential ethical issues that can arise when a judge previously acted as a prosecutor, Delaware judges who served as prosecutors immediately before being appointed typically do not hear criminal cases for a period of time after taking the bench. That respite does not prevent a judge from encountering a party in a civil proceeding who was previously a

¹ Judicial Ethics Advisory Committee Rule 4(b) states that "[t]he committee shall only issue opinions that address contemplated or proposed future conduct and shall not issue opinions addressing past or current conduct unless the past or current conduct relates to future conduct or is continuing." In addition, "[t]he committee may not issue an opinion in a matter known to be the subject of a past or pending litigation or disciplinary investigation or proceeding."

²For the Committee to issue such an opinion is rare, but permissible. Judicial Ethics Advisory Committee Rule 4(d) states: "Opinions issued on own initiative. Notwithstanding any other provision of these rules, the committee may also issue opinions at its own initiative on matters of interest to the judiciary."

defendant in a matter where the judge acted as a prosecutor. After the recusal period expires, issues can arise in criminal cases as well.

Several judges who served as prosecutors before being appointed to the bench are now reaching or recently have passed the period in which they would not hear criminal cases. These judges face the prospect of presiding over a criminal or civil matter in which a litigant³ was a defendant in an earlier unrelated criminal proceeding where the judge served as the prosecutor. Guidance on this issue is therefore timely.

Discussion

For all judges, including judges who served previously as prosecutors, Rule 2.11(A) of the Delaware Judges' Code of Judicial Conduct establishes the general rule on disqualification: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 2.11(A)(4)(b) calls for disqualification when a judge "served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy."

In a 2007 opinion, the Committee addressed the extent to which a judge who served as Delaware's Attorney General could preside over criminal matters that arose during the judge's tenure in that office.⁴ The Committee opined that a judge's impartiality could be reasonably questioned if the judge presided over criminal charges filed when that judge was the Attorney General, regardless of whether or not the judge was personally or substantially involved in the prosecution of the cases. The Committee also opined that a judge's impartiality reasonably

³ For simplicity, we use the term litigant to refer to a criminal defendant or a party to a civil case.

⁴ JEAC Opinion 2007-3 (June 29, 2007).

could be questioned if the judge presided over criminal charges that arose out of an investigation commenced during the judge's tenure as Attorney General if (1) the judge had substantial and personal involvement in the investigation and (2) an Attorney General's subpoena was issued during the course of the investigation. In rendering these opinions, the Committee observed that "[p]rosecutorial decisions made by deputy attorneys general without the Attorney General's input are nevertheless attributable to the Attorney General."⁵ The Committee opined that because the Attorney General had control over the deputies attorney general and ultimate responsibility for their acts and decisions, it followed that "the knowledge and action of these deputies are imputed to the Delaware Attorney General."⁶ The Committee concluded that "the officially authorized decisions and actions of the Attorney General's assistants are analytically indistinguishable from the decisions and actions of the Attorney General."⁷

The Committee believes that the principles outlined in its 2007 opinion apply to a judge who served as a deputy attorney general in an intermediate supervisory capacity by overseeing the actions of a subordinate deputy attorney general on behalf of the Attorney General. Under the reasoning of the Committee's 2007 opinion, if a judge served as the prosecutor directly responsible for filing and pursuing a criminal matter, if a judge acted in a supervisor capacity overseeing another deputy attorney general in filing and pursuing a criminal matter, then the judge should disqualify himself or herself from overseeing the matter or a related matter. Likewise if a judge had substantial and personal involvement in an investigation that later led to the filing of charges and the pursuit of a criminal matter, or if a judge supervised the issuance of

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ *Id.* at 10.

an Attorney General's subpoena in such a matter, then the judge should disqualify himself or herself from overseeing the matter or a related matter.

That guidance is definite under Rule 2.11(A)(4), as it pertains to "the particular case in controversy." Less clear, however, is the situation presented when the person previously prosecuted by the judge appears in an unrelated matter. The same 2007 opinion of this Committee provides some limited guidance. After addressing the primary issues, the Committee rendered the following additional opinion:

[W]e do not believe, absent bias or prejudice, [that] you are disqualified from presiding over any proceedings in a criminal matter against a defendant who was prosecuted on some unrelated criminal matter while you served as Attorney General. Simply because a judge has some knowledge concerning a defendant's criminal history does not reasonably suggest that the judge cannot be impartial concerning current charges.⁸

The Committee thus rejected a *per se* rule of disqualification, but it did not provide factors for a judge to consider in determining when disqualification might be appropriate. We take this opportunity to clarify those considerations and the process by which disqualification should be considered.

Disqualification Considerations

Consistent with our 2007 opinion, the Committee continues believes that there is no *per se* rule requiring the disqualification of a judge from an unrelated criminal matter⁹ if the judge formerly acted as a prosecutor in a Prior Criminal Matter.¹⁰ The judge instead must consider all the relevant facts and circumstances to determine whether, under the general provisions of Rule

⁸ *Id.* at 15-16.

⁹ This reasoning equally applies to new civil matters involving parties previously prosecuted by the judge.

¹⁰ For convenience, we refer to a prior criminal case or investigation that could give rise to a judge's disqualification as a "Prior Criminal Matter."

2.11(A), a reasonable person would have an objective basis to question the judge's impartiality. No single factor is dispositive, and the judge may place greater or lesser weight on particular factors.

A non-exclusive list of factors to be considered includes (1) whether the judge acted as the front-line prosecutor or in a supervisory role with respect to the Prior Criminal Matter, (2) if the judge acted in a supervisory role, how closely the judge supervised the prosecuting attorney who directly prosecuted the Prior Criminal Matter, (3) whether the judge has an independent recollection of the facts of the Prior Criminal Matter or the litigant, (4) whether the Prior Criminal Matter received sufficient public attention such that members of the public would associate the judge with the litigant or the prosecution, and (5) the length of time since the Prior Criminal Matter.

The more attenuated the judge's role, the less reason there is for a judge's impartiality to be questioned. All other circumstances being equal, a supervisory role is less likely to provide cause for disqualification than acting as a front-line prosecutor, and the fact that a judge previously acted solely in a supervisory capacity in a Prior Criminal Matter ordinarily should not warrant disqualification from an unrelated proceeding. Context, however, is everything. A Prior Criminal Matter could have necessitated a supervisor's extensive involvement such that the judge has a clear memory of the facts and recalls forming a subjective opinion of the litigant, and a Prior Criminal Matter that received significant publicity may have resulted in the public associating the supervisor with the prosecution of a particular litigant. A judge's participation in or supervision of a high-profile Prior Criminal Matter generally should weigh more heavily in favor of disqualification than involvement in a prosecution of an offense that was handled as a

matter of course such that the judge's role would be unlikely to be remembered by anyone other than the litigant. To reiterate, no one factor is dispositive.

Obligation to Raise the Issue

A judge is not required to monitor his or her docket in real-time for any Prior Criminal Matter that might create a potential issue of disqualification. In most instances it is the obligation of a party to seek disqualification of the judge by filing a submission that apprises the judge of his or her connection with the Prior Criminal Matter, sets forth the specific circumstances of the Prior Criminal Matter and the current case and explains why disqualification is warranted. A judge presented with such a motion should rule on it based upon the considerations above.

A judge should raise independently whether disqualification is required, without the filing of a motion to disqualify, if the judge readily recalls the litigant and harbors actual personal bias or prejudice towards that individual,¹¹ if the Prior Criminal Matter is one in which the public's perception of the former prosecutor and the litigant have become inextricably linked,¹² or if the judge learns as a result of the submission of documents into evidence that the judge served as a prosecutor in a Prior Criminal Matter involving the litigant.¹³

If a judge has raised the issue of disqualification independently, the judge may ask the parties to brief the issue to assist the judge in identifying and evaluating the relevant factors. A judge may consider the consent of a litigant when weighing whether disqualification is

¹¹ Rule 2.11(A)(1) requires disqualification whenever a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

¹² There are rare cases in which prosecutor's name has become closely associated a case brought against a particular defendant as a result of media coverage or other means.

¹³ The information most often will come to the judge's attention when a party seeks to enter into evidence portions of the defendant's criminal history or other documentation of previous charges.

appropriate.¹⁴ Barring actual bias, properly obtained consent from all parties should be dispositive in a civil matter where all parties are represented by counsel. In a criminal matter, or in a civil matter involving a self-represented litigant, the judge should not treat party consent as presumptively dispositive.

The approach outlined here falls within the range of reasonable approaches adopted by other jurisdictions. Many state and federal courts have determined that there is no *per se* requirement that a judge disqualify himself or herself when the case is unrelated to the Prior Criminal Matter.¹⁵ Other state judicial ethics advisory commissions have reached the same conclusions.¹⁶ Some jurisdictions place special emphasis on whether the judge acted as a supervisor, as opposed to acting as the actual prosecutor in the original case. As discussed above, the Committee believes this factor should be treated as one consideration and not given special significance.

In providing the guidance set forth in this opinion, the Committee has considered the duty to sit doctrine, which weighs against an overly liberal approach to disqualification.¹⁷ Frequent disqualification has a significant and unavoidable impact upon the workload of a judge's colleagues. Delaware is a small jurisdiction with a limited number of judges, and the workload can be distributed only so many ways before the burden becomes unreasonable. The Committee also has considered that the Delaware Judges Code of Judicial Conduct sets forth specific

¹⁴ Rule 2.11(C) sets forth a process by which the parties may consent to a judge presiding where an actual disqualifying situation exists, so long as subsection (1), involving actual bias, or subsection (4), regarding prior involvement in the current case, are not at play. For all practical purposes, this is the same process by which consent should be obtained where disqualification is still in question.

¹⁵ See, e.g., *Del Vecchio v. Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994); *Jenkins v. Bordenkircher*, 611 F.2d 162, 167 (6th Cir. 1979)."

¹⁶ For instance, the Alabama Judicial Inquiry Commission has opined that a judge is not disqualified in a criminal case against a defendant the judge previously prosecuted when the defendant is charged with a crime totally unrelated to the prior offense. (1992, Adv. Op. 92-460).

¹⁷ *State v. Desmond*, 2011 WL 91984, at*8-12 (Del. Super. Ct. Jan 5, 2011).

circumstances in which a judge should decide in favor of disqualification, indicating that disqualification should be limited to those situations and scenarios that rise to a similar level.

In opining regarding the situations when a judge should consider disqualification, the Committee has considered the difficulty of expecting judges to monitor all of their cases to identify instances of prior involvement. Requiring a judge to research independently in every case whether a connection to a Prior Criminal Matter existed would be unduly burdensome, impractical, and a poor use of judicial resources. Litigants can be expected to recognize when a situation potentially meriting disqualification arises and to raise it with the judge. Instances in which a judge has an obligation to raise disqualification independently should be limited to situations where a particular litigant or the Prior Criminal Matter springs to the judge's mind, where the former prosecutor has been linked publicly to a particular litigant because of the high-profile nature of the Prior Criminal Matter, or where the parties have introduced evidence identifying the Prior Criminal Matter and the judge's role.

Conclusion

The Committee believes the foregoing guidance will assist judges who have served previously as prosecutors in determining whether disqualification needs to be considered or is warranted. The Committee believes that a *per se* rule of disqualification is inappropriate and that a case-by-case balancing test best serves the interests of the public and the judicial system.


Hon. Kenneth M. Millman, Chair



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