

JEAC 1997-4
October 20, 1997

You have asked the Judicial Ethics Advisory Committee (the Committee) for advice as to whether you are required to disqualify yourself in a pending case in Family Court because you have recently learned that the father of a prospective witness is a painting subcontractor who is presently completing painting work in your home. For the reasons set forth below, the Committee believes that disqualification is unnecessary but that disclosure of the pertinent facts to the parties is recommended.

FACTUAL BACKGROUND

Your September 23, 1997 letter to the Committee sets out the pertinent facts. The Committee understands that the case pending before you involves alimony and custody issues. There are allegations in that case that the "alleged cohabitor" of the present custodial parent (the mother) has a drug addiction and has abused his own children both sexually and physically. The noncustodial parent (the father) objects to having the alleged cohabitor in the proximity of the parties' children. There is no allegation that the alleged cohabitor has abused the parties' children.

Your letter further explains that in late August or early September 1997 the alleged cohabitor's father did some painting work at your home in a subcontractor capacity. That work is not yet completed and, at the time he commenced the work, you did not realize that there was a potential connection of that individual to this litigation. It was not until you contacted the painting subcontractor directly that you learned of his identity as the father of the alleged cohabitor. You have had no contact with him since early September but expect him to complete the work at your home in the near future.

Previous hearings have been held on April 15, April 25, May 14, and August 7, 1997 in this case, and another hearing is scheduled for November 3, 1997.

The issues presented are whether the Delaware Judges' Code of Judicial Conduct requires: (1) disqualification pursuant to Canon 2 and/or Canon 3; and (2) disclosure to the parties of your temporary business relationship with the alleged cohabitor's father.

SUMMARY OF CONCLUSION

The Delaware Judges' Code of Judicial Conduct does not require you to disqualify yourself under either Canon 2 and Canon 3. However, the Committee recommends that the relevant facts presented in your letter to the Committee dated September 23, 1997 be disclosed to the parties.

DISCUSSION

I. The Delaware Judges' Code of Judicial Conduct Does Not Require Disqualification as Your Impartiality Cannot Reasonably be Questioned and Participation in the Pending Matter Does Not Undermine Public Confidence in the Integrity of the Judiciary.

Canons 2 and 3 of the Delaware Judges' Code of Judicial Conduct provide that no judge shall preside in a case in which that judge is not disinterested and impartial.¹ As a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge and the rules of disqualification require also the appearance of impartiality.² Such requirements have been codified in Canon 3(C)(1) and Canon 2 of the Delaware Judges' Code of Judicial Conduct.

Canon 2 of the Code provides:

- A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment....

The relevant inquiry under Canon 2 is whether your continuing to preside over the remainder of this case would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that your ability to carry out judicial responsibilities with integrity, impartiality and competency is impaired.³

A similar premise serves as the underpinning for Canon 3(C) which also governs disqualification. Canon 3(C)(1) provides in pertinent part that

[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned[.]

When presented with a situation involving possible personal bias or prejudice under Canon 3(C)(1), a judge is required to engage in a two-part analysis. First, a judge must, as a matter of subjective belief, be satisfied that he or she can proceed to hear the cause free of bias or prejudice concerning a party.⁴ Second, even if the judge believes there is no bias, situations may arise where, lack of actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.⁵ Thus a judge must engage in both a subjective and objective analysis to determine not only whether bias does in fact exist, but whether there is reasonably perceived partiality.⁶

However, the appearance of impropriety or bias standard under Canons 2 and 3(C)(1) require recusal "not merely when the judge's impartiality might somehow be questioned, but only

¹ Delaware Judges' Code of Judicial Conduct Canons 2 and 3.

² *Los v. Los*, Del. Supr., 595 A.2d 381, 383 (1991).

³ Canon 2A cmt.

⁴ The Committee notes that you are satisfied that you can in fact hear the cause free of bias or prejudice concerning a party.

⁵ *Los*, 595 A.2d at 384 (citing *State v. Walberg*, Wis. Supr. 325 N.W.2d 687, 692 (1982)); Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25, at 143 (2d ed. 1996).

⁶ *Jackson v. State*, Del. Supr., 684 A.2d 745, 752 (1996).

when it may *reasonably* be questioned."⁷ A judge's mere incidental and relatively insignificant contact with a potential witness should not cause a reasonable person to question that judge's impartiality. The mere "sound of controversy" does not automatically create a disqualifying appearance of judicial bias.⁸ In this case, your coincidental business dealings with the father of an alleged cohabitor of one of the parties sitting before you appear *de minimis* and do not warrant your disqualification. A judge's business relationship is ordinarily deemed to be legally insufficient in and of itself to require disqualification, especially where the business relationship can be characterized as remote.⁹ Furthermore, the fact that the person who is painting your house is apparently only a potential witness makes it even more implausible that a reasonable observer would doubt your ability to remain impartial.¹⁰ Thus the Delaware Judges' Code of Judicial Conduct does not require disqualification as your impartiality under these facts cannot reasonably be questioned.

The Committee also notes your concern that "referral of this case to another judge would further tax [the Court's] limited judicial resources since [you] have already held several hearings and [you] are familiar with the case." Judicial disqualification is particularly disfavored where "replacing the disqualified judge would result in a significant waste of judicial resources, as where a trial judge has acquired a good deal of familiarity with a complex and lengthy case that could not be passed easily onto a second judge."¹¹ Thus judicial economy and administrative inconvenience also militate against disqualification.

II. *Disclosure of Your Financial Relationship to the Parties is Recommended.*

A judge is ordinarily obligated to disclose to the parties those facts that would be relevant to disqualification. There are several reasons for requiring judges to disclose grounds for disqualification, some of which are applicable here:

Judges who are aware of possible grounds for their disqualification must disclose them because members of the judiciary are charged with a duty to know what their own interests are and to avoid intermingling those interests with litigation that is pending before them. In addition, if the rule were otherwise, the parties or their counsel would be obliged in each instance in which bias was suspected to undertake a factual investigation of the judge in order to unearth possible reasons for objecting to his participation. Apart from the fact that it is not clear what procedures would be available for gathering such information, the process of doing so would be undesirable; it would necessarily transform the judge from a neutral presiding officer into an adversary—or at least a potential adversary—of the investigating party.¹²

⁷ Leslie W. Abramson, *Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* 16 (2d ed. 1992) (quoting *United States v. Haldeman*, D.C. Cir., 559 F.2d 31, 133 n.297 (1976)).

⁸ Richard E. Flamm, *Judicial Disqualification* § 5.7.1, at 165 (1996).

⁹ *Id.* at § 9.2.

¹⁰ See *United States v. Kehlbeck*, S.D. Ind., 766 F. Supp. 707, 711 (1990).

¹¹ Flamm, *supra* note 8 at § 19.10.2.

¹² *Id.* (citations omitted).

Ordinarily, a judge is bound to disclose to the parties those facts that would be relevant to the parties in considering whether to file a judicial disqualification motion.¹³ If a judge fails to disclose facts that suggest the existence of an issue concerning that judge's duty to disqualify himself and, as a result, the parties were denied an opportunity to raise the issue, this failure might at least theoretically be deemed to warrant reversal of any judgment rendered by the judge.¹⁴ Although this Committee finds that the relationship between you and the father of the alleged cohabitor is not significant enough to warrant disqualification, the Committee recommends that you nevertheless advise the parties of the circumstances of your business relationship with the father of the alleged cohabitor. Disclosure is appropriate especially in light of Canon I which provides that the provisions of the Code should be construed and applied to further the integrity and independence of the judiciary.¹⁵

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for the Judicial Ethics Advisory Committee

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Canon I.