

Maryland Judicial Ethics Committee

Opinion Request Number: 1985-02

Date of Issue: August 19, 1985

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Appellate Judge Should Recuse Him or Herself from Cases Decided by Trial-Court-Judge-Sibling

A judge of an appellate court has asked whether he or she should recuse him or herself “in any case in which [a sibling], a [trial court judge], took action which is involved in the appeal.” So far as our research reveals, it is a question that has not been ruled on in this or any other American jurisdiction.

Canon XIII of the Canons of Judicial Ethics (Md. Rule 1231) warns that:

A judge should not act in a controversy in which a near relative is a party, witness, or lawyer; he should not suffer his conduct to justify the impression that any person can improperly influence him or wrongly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person.

This canon is given specificity by Ethics Rule 2:

A judge shall not exercise his duties with respect to any matter in which a near relative by blood or marriage is a party, has an interest, or appears as a lawyer. He shall not participate in any matter in which he has a significant financial interest or in which he previously acted as a lawyer. For the purposes of this rule “near relative” shall mean connection by consanguinity or affinity within the third degree, counting down from a common ancestor to the more remote.

While it is obvious that the judge’s sibling is related to the judge “within the third degree” of consanguinity, it is equally obvious that the sibling, in his or her adjudicative capacity, is neither a “party” to the cases the sibling decides nor a witness or lawyer in those cases. But does the trial-judge sibling have “an interest” in the cases which he or she decides?

For the most part, our opinions relating to “interest” have equated that word to “financial interest.” See, e. g., [Opinion Request Nos. 1974-08 (26 December 1974) and 1977-03 (16 June 1977)]. This also seems to be the approach under Canon 3C, ABA Code of Judicial Conduct. See Thode, Reporter’s Notes to Code of Judicial Conduct 67 (1973). On the other hand, on at least one occasion, we have read “interest” in arguably non-financial terms. In [Opinion Request No. 1971-02 (unpublished)] (13 September 1971) we opined that a judge who was a “near relative” of a state’s attorney was not required to disqualify himself in “a routine criminal action” prosecuted by an assistant state’s attorney in which the state’s attorney took no part. But, we added, “if the case is one of more than usual public interest in which the State’s Attorney has played a part preliminary to the trial it would seem that he could be said to have ‘an interest’ within the intent of [Rule 2] making the disqualification of the judge preferable.” The “interest” we discerned there was not a financial one; presumably, it was the state’s attorney’s personal, professional, or political interest in successful prosecution of criminal cases. This “interest” might well be akin to that of a trial judge in the affirmance of his or her judgments. That the word “interest” may have a meaning broader than “financial interest” is further suggested by its unmodified use in the first sentence of Rule 2, as

Maryland Judicial Ethics Committee

Opinion Request Number: 1985-02

Date of Issue: August 19, 1985

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 4

contrasted to its use modified by the words “significant financial” in the following sentence.

Thus, it may be that the trial-judge sibling’s “interest” in his or her decisions would make it “preferable” that the appellate judge recuse him or herself when one of the sibling’s cases is before the appellate court. We do not, however, see that issue as necessarily dispositive, and do not decide it. More critical, in our view, are the provisions of Canon IV, dealing with the appearance of impropriety. That Canon instructs that:

A judge’s official conduct should be free from impropriety and the appearance of impropriety. ...

A frequent writer on judicial disqualification has observed that the phrase “appearance of impropriety” has the “charm of euphony and indefiniteness.” Frank, “Disqualification of Judges: In Support of the Bayh Bill,” 35 Law and Contemporary Problems 43, 60 (1970). Nevertheless, the phrase is widely used. See, e. g., Commentary to ABA Canon 2. And the concept is an important one. Frank, supra, 35 Law and Contemporary Problems at 64-65. The undergirding principle is that the law requires more than a tribunal that is impartial in fact; it requires also that the tribunal appear to be impartial. Thus, “where circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists.” 46 Am. Jur. 2d “Judges” § 86. Although the litigant’s interest in having a case decided by a neutral and detached judge is met if the judge is in fact impartial, there is another and more general interest that is achieved only if the appearance of impartiality is present. That interest is the need of “maintaining public confidence in the integrity of the judicial process. ...” Note, “Disqualification of Judges and Justices in the Federal Courts,” 86 Harv. L. Rev. 736, 745 (1973). Courts should be above suspicion. “Any other standard is one which undermines the trust and confidence of the average citizen in his government.” In Re Diener and Broccolino, 268 Md. 659, 698 (1973) (Smith, J., dissenting).

For present purposes, “the appearance of impropriety” and the “appearance of impartiality” are virtually synonymous. Because of the closeness of that relationship, if the judge who has posed the question to us sits in decision of the sibling’s cases, any appearance of impropriety would be based on the appearance of partiality. Both ABA Canon 3C(1) and 28 U.S.C. § 455(a) (dealing with disqualification of federal judges and justices) call for disqualification if the judge’s “impartiality might reasonably be questioned.” In considering whether that is so in the matter before us, we look not only to the “appearance of impropriety” language of Canon IV, but to other provisions that may illumine this standard, including the previously-quoted words of Canon XIII and Rule 2, both of which shed some light on what may be thought to appear inappropriate or partial. See In Re Foster, 221 Md. 449 (1974) (Canons XXIV and Rule 9 applied to support conclusion of appearance of impropriety under Canon IV). This is also true of a portion of Canon XXXII, which advises that a judge

in pending or prospective litigation [should] be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

The test for appearance of partiality (or, in our context, impropriety) is whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice

Maryland Judicial Ethics Committee

Opinion Request Number: 1985-02

Date of Issue: August 19, 1985

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 4

would be done in the case. Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985). We have applied a similar test in a number of our “appearance of impropriety” opinions. See, e.g., [Opinion Request Nos. 1971-05] (1 March 1972) and [1983-03] (27 June 1983) (might appear to members of public that judge could not act objectively under certain circumstances); [Opinion Request No. 1981-07] (14 October 1981) (public might reasonably perceive that judge had an interest in enforcing private traffic regulations of subdivision where he lived). Application of that test leads us to the conclusion that an appellate judge should disqualify him or herself when a case in which a trial-court sibling has acted comes before the appellate court, at least where the correctness of the sibling’s decision is an issue on appeal.

We think that public perceptions of influence by kinship (Canon XIII) and of the trial judge’s possible non-financial interest in his decisions (Rule 2) require this result. It is supported, too, by Canon XXXII’s concerns about “social ... relations” and “friendship.” If these are matters that may raise questions about a judge’s impartiality, so may close kinship with the trial judge. Our view is further buttressed by practice of the Court of Special Appeals. On that court have served two judges who had trial-court brothers. Each of those appellate judges has assiduously avoided assignment to any panel having before it one of his brother’s nisi prius decisions.

A hypothetical case both illustrates the problem and substantiates our position. Suppose the appellate court (be it the Court of Appeals or a panel of the Court of Special Appeals) has before it a case decided by a trial judge who is a sibling of one of the judges of the court or panel. The case is decided 4-3 or 2-1, with the appellate sibling writing to affirm the trial-court sibling. What is the disinterested observer, in possession of all the facts, to conclude? We believe that he might entertain “significant doubt that justice” has been done in the case. The 4-3 or 2-1 division, it is true, may be a worst-case scenario; the perception might be somewhat different were the decision unanimous, or if the appellate sibling voted to reverse the trial-court sibling. But the problem is that such divisions do not become known until after a case has been argued. By then, disqualification is too late – if it occurs at that point, the case might have to be reargued, a procedure undesirable from the viewpoint of judicial economy and expense and delay to the litigants. Disqualification of an appellate judge should occur when the questionable case first comes to his attention, well before even the argument stage.

The question of judicial economy raises another question, however: that of inconvenience to the appellate court if there are frequent disqualifications. There are also concerns about the “inconvenience” produced by decisions by an evenly divided court. These problems are minor on the Court of Special Appeals, because of the panel system. They loom larger on the Court of Appeals, which does not sit in panels.

It has been said that “... judicial virtue is a mix of ethics and convenience.” Frank, supra, 35 Law and Contemporary Problems at 44. We think that in the matter before us, the importance of disqualification outweighs the convenience factor. A strong convenience argument can be made as to the United States Supreme Court. The argument is strong because that Court cannot designate a temporary justice to sit when one of the justices is disqualified. Nevertheless, one commentator has observed (with respect to the Supreme Court):

Maryland Judicial Ethics Committee

Opinion Request Number: 1985-02

Date of Issue: August 19, 1985

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 4 of 4

After all, if the general disqualification standard is to be made more lenient in order to avoid affirmance by an equally divided Court, then in every case where the more lenient standard actually brings about this result – i.e. a 5-4 decision – the outcome will appear to have been decided by the one Justice who, under the stricter standard, would have disqualified himself. When there are in fact reasonable grounds to question the Justice’s impartiality, the rights of any segment of the population affected by the decision may appear to have been subject to the biases of one individual.

Note, supra, 86 Harv. L. Rev. at 750.

We find that reasoning persuasive. It is supported, moreover, by the mandatory disqualification requirements of such provisions as Md. Const. Art. IV §§ 7 and 15, § 1-203(c) of the Courts Art., and Ethics Rule 2. The drafters of those provisions no doubt weighed the possible inconvenience of disqualification when a judge came within their mandates, but opted in favor of disqualification. We do likewise.

Nor do we believe that the circumstances before us suggest relief by way of disclosure by the appellate judge and waiver of disqualification by counsel and parties. While that approach may sometimes be appropriate at the trial court level, see, generally Thode, supra, pp. 71-73, we do not think it proper, under the circumstances before us, for appellate use. An appellate court’s decision, when published, constitutes statewide precedent and may often involve fundamental issues of law and policy. Accordingly, the need of public confidence in these courts is great, and that public interest is not sustained by private waiver of disqualification by litigants.

In summary, we conclude that an appellate judge should not sit in an appeal in which the correctness of a decision of his or her sibling, who is a trial-court judge, is before the appellate court. We do not reach this conclusion because of any concern that the appellate sibling will not in fact view the case impartially, but because his or her participation is likely to give rise to that appearance of impropriety which Canon IV directs judges to avoid.