

Maryland Judicial Ethics Committee

Opinion Request Number: 2009-18

Date of Issue: December 21, 2009

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Whether Judge May Be Involved in a Case after Recusal Depends on Circumstances

Issues: 1. May a judge, once recused from a case, have involvement with uncontested aspects of the case?

2. May a judge, once recused from a case, become involved in the case if there is no other judge available?

3. May a judge, once recused from a case, later become involved in the case after the reason for the recusal has been removed?

Answers: 1. No.

2. Yes, but see the discussion below.

3. Yes, but see the discussion below.

Facts: Due to a personal relationship with certain local attorneys and their families, a circuit court judge has recused himself/herself from cases involving those attorneys and their law firms. The requesting judge now inquires about circumstances under which, once recused, a judge may subsequently have involvement in a case.

Discussion: Canon 3B(12) of the Maryland Code of Judicial Conduct (Rule 16-813) states: “Unless recusal is appropriate, a judge shall hear and decide matters assigned to the judge.” In observing that directive, judges must be mindful of Canon 1, which provides in pertinent part:

An independent and honorable judiciary is indispensable to justice in our society. A judge shall observe high standards of conduct so that the integrity and independence of the judiciary will be preserved.

The integrity and independence of the judiciary is a concern addressed by Canon 3D(1), which requires that:

A judge shall recuse himself or herself from a proceeding in which the judge’s impartiality might reasonably be questioned, including an instance when:

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- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer or extra-judicial knowledge of a disputed evidentiary fact concerning the proceeding[.]

...

The inquiring judge has already determined that, due to his or her personal relationship with certain local attorneys and their families, recusal is appropriate in cases in which those attorneys and their respective firms are involved. The propriety of the recusals is not a subject of the inquiry, nor are full details of the relationships provided. The opinion is therefore limited to the questions posed regarding the proper duration of the recusals.

Canon 3E permits parties and lawyers to waive recusal, and reads:

Non recusal by agreement. If recusal would be required by Canon 3D, the judge may disclose on the record the reason for the recusal. If after disclosure of any reason for recusal other than as required by Canon 3D(1)(a), the parties and lawyers, out of the presence of the judge, all agree that the judge need not recuse himself or herself, and the judge is willing to participate, the agreement of the parties shall be incorporated in the record, and the judge may participate in the proceeding.

The Comment to Canon 3E further states:

This procedure gives the parties an opportunity to waive the recusal if the judge agrees. The judge may comment on possible waiver but must ensure that consideration of the question of waiver is made independently of the judge. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign a waiver agreement.

Absent such a waiver, if a situation calls for a judge to recuse himself or herself in order to avoid the appearance of impropriety or partiality, a recused judge should ordinarily abstain from involvement in the case, even in case matters that are uncontested.

The requesting judge also inquires about circumstances “when no other local judge is available”. The Comment to Canon 3D(2) addresses that situation:

By decisional law, the rule of necessity may override the rule of recusal. For example, a judge might be . . . the only judge available in a matter requiring

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immediate judicial action . . . When the rule of necessity does override the rule of recusal, the judge must disclose on the record the basis for possible recusal and, if practicable, use reasonable efforts to transfer the matter promptly to another judge.

Once the circumstance or circumstances giving rise to a recusal cease to exist, there is no *per se* requirement for a judge to recuse himself or herself any longer. However, while it is true that actual impartiality is central to the concerns addressed by the Code of Judicial Conduct, equally fundamental is the appearance of impartiality. For that reason, the Court of Appeals has observed that “the recusal decision . . . is discretionary . . .” *Jefferson-El v. State*, 330 Md. 99, 107 (1993). For example, the necessity for continuing recusal may depend on the posture of the case. If the case is in the very early stages when there has been no actual judicial involvement, there is likely to be little concern by either party arising from the relationship of the judge and attorney who has withdrawn his or her appearance after merely filing the complaint or answer and discovery requests. On the other hand, if the case is well along, the judge’s relationship to the attorney who once represented a party may be of concern if the opposing party believes that the judge might be influenced by the former attorney’s involvement. Similarly, if the conflict arose because of financial dealings involving the attorney and the judge, the cessation of those dealings may not, by itself, give assurance to the opposing party that the judge can now be impartial as the case progresses. Nor will the dismissal from the suit of a friend or family member necessarily remove the suggestion that the judge may have some bias against the party who filed the complaint. In other words, the analysis will often be multifaceted and not strictly an objective one.

The Committee thus feels that the question about the continuation of the recusal once the circumstances giving rise to it have ceased to exist, cannot be resolved by a bright line rule. Rather, it must be determined by the individual judge exercising his or her discretionary authority.

Application: The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, to the extent of the requestor’s compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.