ADVISORY COMMITTEE ON JUDICIAL CONDUCT OF THE DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO. 13
(July 9, 2014)

DISQUALIFICATION WHEN FORMER LAW CLERKS APPEAR BEFORE JUDGES

A recurring issue for judges involves whether they should disqualify themselves when former law clerks appear before them. Rule 2.11(A) of the Code of Judicial Conduct requires judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned. Judges are not automatically required to disqualify themselves whenever a former law clerk appears before them. However, an appearance within a short period of time after the end of the clerkship could, in some circumstances, cause a reasonable person to question a judge's impartiality, and a waiting period may alleviate this concern. How long that period of repose should be is a matter of judgment. The Advisory Committee on Judicial Conduct advises as a general rule of thumb that law clerks should not appear before the judges for whom they clerked within a year after the end of the clerkship. A longer period may be appropriate depending on the relationship between the judge and the former law clerk. Judges should also ensure that their law clerks understand that they may not participate in matters in which they were involved during their clerkships, and that they may not use or disclose confidential information obtained in the course of their duties.

The Advisory Committee notes that similar issues may arise when judges have had other types of relationships with lawyers who may appear before them. Judges should also be sensitive to appearance issues when, for example, the lawyer previously practiced law with the judge or worked closely with the judge on the board of an organization.

General standards

Under Rule 2.11(A), "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned …." Subsections (1-6) identify specific circumstances in which disqualification is required, but that list is not exhaustive. A judge is disqualified whenever the judge's impartiality might reasonably be questioned, even if none of the specific rules in Rule 2.11(A) applies.

Rule 1.2 provides that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Comment [5] to Rule 1.2 states, "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Under Rule 2.11 of the current Code of Judicial Conduct (like Canon 3(E)(1) of the 1995 Code), the standard we apply is whether the circumstances create "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge's impartiality." *See Coulter v. Gerald Family Care, P.C.*, 964 A.2d 170, 179 (D.C. 2009) (quotation, citation, and footnote omitted). "The standard for determining whether recusal is required under Canon 3(E)(1) is an objective one, whether an observer could reasonably doubt the judge's ability to act impartially." *In re M.C.*, 8 A.3d 1215, 1222 (D.C. 2010). The same is true for Rule 2.11(A). "Recusal is required if 'an objective, disinterested observer *fully informed of the facts* underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case.'" *Id.* (quoting *Scott v. United States*, 559 A.2d 745, 763 (D.C. 1989) (en banc) (Schwelb, J., concurring) (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir.

1985)); *see In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) (footnote and citations omitted) ("Importantly, the test is whether the facts would create a reasonable doubt about the judge's partiality in the mind of a person *with knowledge of all the relevant circumstances*."). An "edifice of conjecture" or "speculation" does not satisfy the requirements for disqualification. *Coulter*, 964 A.2d at 180 (quotations and citations omitted).

No automatic permanent disqualification

"It is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked." *In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997). "The mere fact that an attorney once served as a clerk for a judge is not sufficient to make a reasonable person question the judge's impartiality." *United States v. O'Brien*, 2014 U.S. Dist. LEXIS 14703, at *54 (D. Mass. Feb. 6, 2014). As a result, recusal is not necessarily or automatically required whenever a former law clerk appears before a judge. *See United States v. Hollister*, 746 F.2d 420, 425 (8th Cir. 1984) (trial judge was not required to recuse in a criminal case in which the prosecutor was a former law clerk who finished her clerkship three months prior to trial, the defendant "makes no claim that the district judge exhibited favoritism towards the prosecutor," and "the record demonstrates that the judge conducted defendant's trial with fairness and impartiality"); *see generally O'Brien*, 2014 U.S. Dist. LEXIS 14703, at *54-55 (collecting cases upholding refusals to recuse when a former law clerk appears before the judge).[1]

The Advisory Committee is aware of no case holding that "the appearance of a former law clerk as counsel before the court requires recusal or even disclosure of the former clerkship."

[1] As discussed below, law clerks may not appear in cases in which they were personally involved during their clerkships. This section focuses on the appearance of impartiality if a former law clerk appears before the judge in a case in which the law clerk had not been personally involved during the clerkship.

See McGrath v. Everest National Ins. Co., 2009 U.S. Dist. LEXIS 115355, at *18 (N.D. Ind. Dec. 10, 2009). Other judicial ethics committees agree that no *per se* rule of automatic disqualification should exist. *See* Delaware Judicial Ethics Advisory Committee, JEAC 2009-1 (April 8, 2009) ("Judges … regularly employ and mentor law clerks who subsequently come before the Judge on their own or with other members of the Bar. Automatic recusal is generally not mandated.") (footnote omitted) (http://courts.delaware.gov/jeac/opns/JEAC2009-1Redacted.pdf); Georgia Judicial Qualifications Commission, Opinion No. 136 (Sept. 22, 1989) ("[T]he fact that a former law clerk is counsel for one of the part[ies] before the court is not specified as per se grounds for disqualification, but if, by reason of this relationship the judge is in fact biased or prejudiced or the situation is such that his impartiality might reasonably be questioned then he should disqualify.") (http://www.gajqc.com/opinions.cfm).

A period of repose

Nevertheless, when a law clerk appears before a judge soon after the end of a clerkship, an appearance issue exists because "the relationship between a judge and his/her law clerk is one of particular trust and confidence, not unlike that of long-term colleagues in a law firm." N.Y. Advisory Committee on Judicial Ethics, Opinion 08-107 (Oct. 23, 2008) (citing Opinion 7-04) (http://www.nycourts.gov/ip/judicialethics/opinions/08-107.htm). Judges rely on law clerks for research and advice, and they often have personal relationships as well. A reasonable person could question a judge's impartiality if, for example, the judge were evaluating the factual and legal arguments of a lawyer who had been the judge's trusted confidante only a week earlier. That is why *Hollister* suggests that judges "seriously consider recusal when an attorney who has *recently* served as a law clerk appears as counsel before him or her." *Hollister*, 746 F.2d at 426 (emphasis added).

"Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself," *Hollister*, 746 F.2d at 425-26, and a former law clerk's appearance within a short period of time after the end of the clerkship could, at least in some circumstances, cause a reasonable person to question a judge's impartiality. Therefore, the Advisory Committee "endorse[s] the principle that a certain insulation period should pass before a judge sits on a case in which his or her former law clerk acts as counsel." *Hollister*, 746 F.2d at 425. The Advisory Committee prefers the term "period of repose" (*Duke v. Pfizer, Inc.* 668 F. Supp. 1031, 1036 (E.D. Mich. 1987)) to the terms "insulation period" (*Hollister*, 746 F.2d at 425) or "cooling off period" (*Olmstead v. CCA of Tennessee*, 2008 U.S. Dist. LEXIS 100348, at *4 (S.D. Ind. Dec. 11, 2008)).

Another concern addressed by a period of repose is that the former law clerk should not have "intimate knowledge of the judge's inclinations regarding the case." *See Chyba v. TXU Energy*, 2013 U.S. Dist. LEXIS 16233, at *2 (S.D. Cal. Feb. 6, 2013) (quoting *Morgal v. Maricopa Bd. of Supervisors*, 2009 U.S. Dist. LEXIS 57063, at *3 (D. Ariz. June 18, 2009)). The passage of time alone does not necessarily eliminate this concern because a judge's philosophy and approach remain generally constant. However, a judge's rulings and reasoning are generally public, and in most circumstances, a law clerk would not have any greater insight than lawyers who practice regularly before the judge or talk to other lawyers who do. *See In re Martinez-Catala*, 129 F.3d at 221 ("any lawyer who studies a judge's past rulings can make an informed guess as to how the judge is likely to approach an issue."). Accordingly, although this concern does not justify a permanent or long-term prohibition against former law clerks appearing before judges, it does provide additional justification for a period of repose. This

concern may also warrant disqualification of the judge or the lawyer on a case-by-case basis, as discussed below.

How long the period of repose should be is a matter of judgment. The Advisory Committee recommends that judges should disqualify themselves if a lawyer served as a law clerk within the previous year. This advice is consistent with "the prevailing view … that a one- or two-year period of repose is enough to cure any possible appearance of impropriety." *See Duke*, 668 F. Supp. at 1036 (citing cases); *see also Marxe v. Marxe*, 570 A.2d 44, 48 (N.J. Super. 1989) ("The generally accepted policy for the Superior Court in Bergen County is to observe a one year hiatus before law clerks may appear before the judge under whom they serve."). "Courts often have prophylactic rules that forbid a former law clerk from appearing in that court for a year or more after the clerkship …." *In re Martinez-Catala,* 129 F.3d at 221 (citing First Cir. R. 46).

The Committee does not suggest that a judge would violate Rule 2.11(A) just because a law clerk appeared before the judge within a year after the end of the clerkship. When considering whether a party was denied a fair hearing before an impartial judge in a particular case, courts have appropriately "declined to establish any 'bright line' rule … mandating disqualification for a certain period of time after a clerk leaves a judge's employment, but left the matter to the judge's discretion." *See Patzner v. Burkett*, 779 F.2d 1363, 1372 (8th Cir. 1985) (footnote omitted). The one-year period of repose recommended by the Committee is simply a suggested rule of thumb.

A longer period of disqualification may be appropriate depending on the relationship between the judge and the former law clerk. For example, Rule 2.11(A)(2)(b) requires disqualification if a relative within the third degree of relationship (including not only siblings

and children but also uncles, aunts, nephews, nieces, grandparents, and grandchildren) acts as a lawyer in a proceeding. If a judge and a law clerk have a comparably close long-term relationship, disqualification will continue to be warranted even after the clerkship has been over for a year. The test is whether an objective, disinterested observer who was fully informed of the closeness of the continuing relationship between the judge and former law clerk would entertain a significant doubt that justice would be done in the case. *See In re M.C.*, 8 A.3d at 1222.

The Advisory Committee also observes that waiver of disqualification does not appear to be an option as a practical matter. Rule 2.11(C) provides for waiver of disqualification unless personal bias or prejudice concerning a party or lawyer is the basis for disqualification. Rule 2.11(C) specifies the procedures a judge must follow, starting with disclosure on the record of the basis of the judge's disqualification. Similarly, Comment [5] to Rule 2.11 states, "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." *See also In re M.C.*, 8 A.3d at 1226 (quoting the comment to Canon 3(E)(1) and citing Comment [5] to Model Rule 2.11); *Coulter*, 964 A.2d at 180. As a result, if a judge concluded that his or her personal relationship with a former law clerk did not create an actual personal bias or prejudice but created the appearance of such a bias or prejudice, and if the judge wanted to give the parties an opportunity to waive the disqualification, the judge would have to provide a full and complete explanation of the judge's relationship with the law clerk. For example, the disclosure might include a discussion of how close the relationship was and remains, how much the judge relied on the law clerk for advice during the clerkship, and the extent to which the judge and the law clerk had and have a personal

as well as an employer/employee relationship. Disclosures that involve the inner workings of a chambers would generally not be appropriate.

Constraints on former law clerks

Judges should ensure that their law clerks understand the restrictions that apply to them after the end of their clerkships.

Former clerks may not participate in any matter on which they worked during their clerkships. The D.C. Courts' Personnel Policy # 1376 provides, "After termination of employment with the District of Columbia Courts, a nonjudicial employee, judicial administrative assistant or law clerk may not practice as an attorney in connection with any case he/she was involved in while in the employ of the courts." This policy is consistent with general ethical standards for law clerks. *See* Federal Judicial Center, MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS, at 25 (2d ed. 2011) ("ETHICS FOR FEDERAL JUDICIAL LAW CLERKS").[2] Several courts have indicated that a former law clerk may not appear as counsel in a case on which he or she worked during employment with the judge. *See, e.g., Cheeves v. Southern Clays, Inc.*, 726 F. Supp. 1579, 1581-82 (M.D. Ga. 1990) (collecting cases).

A related issue is that law clerks may not disclose or use any confidential information received in the course of their duties except in the performance of those duties. *See* ETHICS FOR FEDERAL JUDICIAL LAW CLERKS at 5. This confidentiality obligation continues after a clerkship ends. *Id.* at 25. Confidential information includes the content of case-related discussions with a judge or a judge's decision-making process in specific cases, but it does not include information about a court's procedures and practices or information disclosed in public court proceedings.

[2] The Advisory Committee generally recommends that law clerks in the District of Columbia Courts abide by the same rules as law clerks for federal judges.

See id. at 6. Improper use of inside information would include use to gain an advantage in a case or to attract or keep a client.

Several courts prohibit former law clerks (or all former employees) from participating in any case pending in that court for a period of one year after their employment ends – regardless of whether the former clerk personally participated in the case, whether the case was even pending during the employment, or whether the judge for whom the person clerked is assigned to the case. *See* Supreme Court R. 7 ("nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation ...."); Eighth Circuit Rule 47G ("An employee must not participate in any way as an attorney in any case pending in the court during the employee's term of service, or appear at counsel table or on brief in any case for a period of one year after leaving court employment."); First Circuit Rule 46.0(e) ("Nor shall a staff attorney or law clerk after separating from that position practice as an attorney in connection with any case pending in this court during the term of service, or appear at the counsel table or on brief in connection with any case heard during a period of one year following separation from service with the court."). The District of Columbia Courts do not have such a prohibition.