

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

The Hon. Donald F. Parsons, Jr., Chair  
The Hon. Richard F. Stokes, Vice Chair  
The Hon. Robert B. Coonin  
The Hon. Mary M. Johnston  
The Hon. Bonita N. Lee  
The Hon. Michael K. Newell  
The Hon. Charles W. Welch, III

**JEAC 2009-1**

April 8, 2009

[Member of Judiciary]

**RE: Request for Opinion from the Judicial Ethics Advisory Committee**

Dear [Member of Judiciary]:

You have requested an opinion as to whether the civil Judges sitting in the Justice of the Peace Courts in [redacted] County are disqualified from hearing cases in which a former court employee will be regularly appearing as the designated representative of an artificial entity pursuant to Supreme Court Rule 57. In presenting this question to the Judicial Ethics Advisory Committee, you have expressed concern that this individual's appearance might: (a) compromise the ethical obligations of your Judges under Rule 1.2 requiring a Judge to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and avoids impropriety and the appearance of impropriety in all activities; (b) constitute a violation of Rule 2.3(b), which requires that a Judge avoid impropriety as well as the appearance of impropriety; or (c) raise an opportunity for the Judges impartiality to be reasonably questioned thereby requiring disqualification pursuant to Rule 2.11.

The committee appreciates your references to these Rules as well as your research indicating that there are currently no JEAC opinions directly on point, while providing opinions for comparison involving the appearance before the Judge by a former law clerk or former law partner or member of the sitting Judge's spouse's law firm.

**A. Applicable provisions of the Code.**

By Order dated the 16<sup>th</sup> day of October 2008, the Delaware Supreme Court adopted the most recent version of the Delaware Code of Judicial Conduct. While there are no provisions of the Code expressly addressing the issue of whether a Judge may hear a case in which a party is represented by a former employee of that Court, there are several rules which bear on this issue, specifically Rule 1.2, Rule 2.3, Rule 2.4 and Rule 2.11. The relevant portions of these Rules provide as follows:

**Rule 1.2 Promoting Confidence in the Judiciary.**

- (a) A Judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities.**

**Comment:**

*“[T]he test for appearance of impropriety is whether the conducts would create in reasonable minds, with knowledge of all relevant circumstances that a reasonable inquiry would disclose, a perception that the Judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired...”*

**Rule 2.3 Bias, Prejudice and Impartiality.**

- (b) A Judge should avoid impropriety and the appearance of impropriety in all activities.**

**Rule 2.4 External Influences on Judicial Conduct.**

**A Judge should not allow family, social or other relationships to influence judicial conduct or judgment.**

**Rule 2.11 Disqualification.**

- (a) A Judge should disqualify himself or herself in a proceeding in which the Judge’s impartiality might reasonably be questioned, including but not limited to instances where:**
- (1) The Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.**
  - (2) The Judge or the Judge’s spouse or domestic partner, or a person within the third degree of relationship, calculated according to the civil law system, to either of them, or the spouse or domestic partner of such a person:**
    - (a) is a party to the proceeding, or an officer, director, or trustee of a party.**

**Comment:**

*“[T]he fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of a Judge is affiliated does not of itself disqualify the Judge. Under the appropriate circumstances, the fact that “the Judge’s impartiality might reasonably be questioned” under Rule 2.11(a), or that the lawyer-relative is known by the Judge to have an interest in the law firm that could be “substantially effected by the outcome of the proceeding” under Rule 2.11(A)(2)(c), may require the Judge’s disqualification.*

**(4) The Judge.**

- (a) Served as a lawyer in the matter of in controversy, or a lawyer with whom the Judge previously practiced law served such association as a lawyer concerning the matter, or the Judge or such lawyer has been a material witness concerning it, or the Judge was associated with the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding;**

When you requested an opinion, you stated that you “have no doubt that the civil judges in [redacted] County could hear cases impartially with this party before them ....” Needless to say, it may be that there are specific Judges in the Court who worked in such close relationship with this former clerk that such Judge feels that his or her impartiality might reasonably be questioned. If this were to be the case, it is the ethical obligation of such Judge to recuse him or her self. That question however can only be answered by a particular Judge after considering the nature of their relationship with the former clerk and the dictates of their personal conscience. A similar personal subjective analysis has been found to be applicable to cases involving attorneys whose previous professional relationship with the Judge or a member of the Judge’s family, while not specifically prohibited by the applicable code, nevertheless could create an environment conducive to bias or, the appearance of impropriety. This Committee has considered the question of whether an attorney who had previously been employed in the Judge’s spouse’s law firm where the Judge’s spouse remained a member required recusal. The Committee found that so long as the judge or the judge’s spouse does not have a financial or other interest that could be substantially affected by the outcome and believes that no bias exists and she can act impartially in the matter, no recusal is warranted.<sup>1</sup>

Judges routinely serve as *adjunct* law professors and regularly employ and mentor law clerks who subsequently come to appear before the Judge on their own or with other members of the Bar. Automatic recusal is generally not mandated.<sup>2</sup>

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<sup>1</sup> JEAC 2007-2

<sup>2</sup> Massachusetts CJE Opinion 2002-9

**B. Conclusion.**

Absent some personal relationship between a Judge and the former clerk which could call into question the Judge's impartiality due to personal bias or prejudice, or a feeling on the part of the Judge that the former relationship will influence the Judge's decision in a particular case, the Committee does not find any prohibition against the civil Judges in the Justice of the Peace Courts in [redacted] County from presiding over proceedings in which the former clerk is the designated representative of an artificial entity party.

For the Committee,

/s/Robert Burton Coonin

Robert Burton Coonin  
Judicial Ethics Advisory Committee

RBC/sb

Cc: The Hon. Donald F. Parsons, Jr., Chair  
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