



SUPREME COURT OF PENNSYLVANIA
JUDICIAL ETHICS ADVISORY BOARD

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GENERAL GUIDANCE

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General Ethics Guidance No. 1-2024

DISQUALIFICATION AND RECUSAL

The Supreme Court of Pennsylvania has designated the Judicial Ethics Advisory Board [“JEAB”] as the approved body to render Advisory Opinions and General Guidance regarding ethical concerns involving persons subject to the Code of Judicial Conduct. The Rules of the JEAB provide that, when a Judicial Officer complies with General Guidance of the JEAB, such compliance may be taken into account in determining whether discipline should be recommended or imposed. PA.J.E.A.B. RULE 206(c). This document qualifies as “General Guidance” of the JEAB.

In addition to reviewing the JEAB’s General Guidance, Judicial Officers and candidates for judicial office may request an ethics Advisory Opinion from the JEAB. The request must be in writing and must contain the following: (1) a statement of the material facts regarding the intended conduct; (2) a concise question of judicial ethics; and (3) references to the relevant section(s) of the Code, case law, and other authority the inquirer consulted. A request must relate to the inquirer’s own prospective conduct or conduct that occurred in the past and is ongoing. A request may not relate to hypothetical situations or to facts that are the subject of past or pending litigation, disciplinary investigation or disciplinary proceedings.

Where a Judicial Officer complies with JEAB advice that is subsequently adopted as a Board Opinion, such compliance shall be entitled to substantial weight in determining whether discipline should be recommended or imposed. PA. J.E.A.B. RULE 206(b). Where a Judicial Officer complies with JEAB advice that is subsequently reversed or modified by the Board, compliance prior to the time the Judicial Officer is notified of the Board’s action shall be taken into account in determining whether discipline should be recommended or imposed. Id. at RULE

206(b). These “Rules of Reliance” provide more protection to the judge or judicial candidate than the Rule of Reliance attained by reviewing general guidance of the JEAB.

The JEAB is pleased to present this General Guidance titled “Disqualification and Recusal.”

Under the Code, disqualification and recusal are related and sometimes overlapping concepts. *See* Rule 2.7, Comment [2]. A judge has an obligation to hear and decide matters, except where the judge has recused pursuant to Rule 2.7, or when disqualification is required under Rule 2.11. A judge may not resort to disqualification or recusal to avoid cases that are difficult, controversial, or unpopular, since to do so may bring public disfavor to the court and to the judge personally. *See* Rule 2.7, Comment [1].

Disqualification

Rule 2.11 provides that a judge *shall* disqualify himself or herself in any proceeding in which the judge’s *impartiality might reasonably be questioned*, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the judge could fairly discharge his or her duties. Rule 2.11(A)(1)-(A)(6) identifies, by way of illustration, six (6) specified and disqualifying facts or circumstances (such as having personal knowledge of the facts, a personal bias against a party, or an economic interest in the proceeding), which, when present, require a judge’s disqualification from a proceeding. A judge should disqualify himself or herself whenever the judge’s impartiality might be reasonably questioned under circumstances suggesting a degree of questionable impartiality akin to the scenarios identified in (A)(1) through (A)(6). *See* Rule 2.11, Comment [1]. The specified circumstances identified under Rule 2.11 are non-exclusive, and a judge should disqualify himself or herself under circumstances suggesting a degree of questionable impartiality akin to those identified under (A)(1) through (6).

Disqualification pertains to all substantive decisions and administrative matters regarding a case. When disqualified, a judge is prohibited from attending to any matters involving the case.

Recusal

Although a judge may not be disqualified from a proceeding, a judge nonetheless may recuse himself or herself where, in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters, the judge concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether the judge should participate in the matter. Rule 2.7, Comment [2]. It is the individual judge’s responsibility to make a conscientious determination whether they can impartially preside over a proceeding. This assessment is two-tiered. First, does the judge have a personal bias or interest that would preclude an impartial review? This is a personal and unreviewable decision that only the jurist can make. Second, would the judge’s participation in the matter give the appearance of

impropriety?¹ Even if a judge is satisfied that s/he will be able to render an impartial judgment, the judge may recuse if s/he concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether recusal nonetheless should be required. *See* Rule 2.11, Comment [2] (as a corollary to disqualification).

The Board may advise as to disqualification; it cannot do so with respect to recusal since, in the first instance, a judge must conduct a self-examination regarding whether the judge believes s/he can fairly decide a matter. This first step in the recusal process, as stated, is personal to the judge and is not reviewable.

Like disqualification, recusal pertains to all substantive decisions and administrative matters relating to a case. When recused, a judge is prohibited from addressing any matters involving the case.

Disclosure

A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge believes there is no proper basis for disqualification or recusal, Rule 2.7, Comment [3], except where the judge already has made the decision that s/he is disqualified or has recused himself from a matter.

When the judge, *sua sponte*, makes the personal and unreviewable decision to recuse or finds that s/he must disqualify from a matter, disclosure is not required.

Waiver

A judge subject to disqualification or who must recuse *may* disclose on the record the basis for disqualification or recusal and request that the parties and their counsel consider, outside the presence of the judge and court personnel, whether to waive disqualification or recusal. *See* Rule 2.11(C). If the parties agree to waive disqualification or recusal, the judge shall incorporate that agreement into the record of the proceeding. Id.

However, the parties may not waive *disqualification* if the basis for such disqualification is bias or prejudice. Rule 2.11, Comment [1].

¹ The test for an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Rule 1.2, Comment [5].

Review

The Board believes the following checklist provides a useful framework to assist a jurist who is facing a scenario in which they must consider disqualification or recusal:

- 1) Is the judge disqualified from hearing the matter under any of the specified disqualifying facts or circumstances under Rule 2.11? If so, the judge is disqualified from hearing the matter.
- 2) If none of the specified circumstances under Rule 2.11 exists, would hearing the matter nonetheless suggest the same degree of concern as that suggested by the specified circumstances under Rule 2.11? If so, the judge should disqualify.
- 3) If the judge is not disqualified, does the judge believe s/he can fairly and impartially hear the matter? If not, the judge should recuse.
- 4) If a judge believes s/he may fairly and impartially hear a matter, are circumstances present that the judge believes the parties or their counsel might reasonably consider relevant to a motion for disqualification or recusal, that is, whether a substantial question exists as to prevailing facts and circumstances that could be perceived as adversely impacting the judge's honesty, impartiality, temperament, or fitness to serve as a judge? If so, the judge should disclose that information to the parties and/or lawyers so they may consider, outside the presence of the judge or court personnel, whether they want to move for recusal.
- 5) When a party moves for disqualification or recusal, the moving party bears the burden of producing evidence to establish whether disqualification or recusal is required. *See Com. v. Watkins*, 108 A.3d 692, 734 (Pa. 2014) (citation omitted). When presented with a motion for disqualification or recusal, the judge may elect to conduct a hearing to decide disputed facts and/or to create a full record for possible review. When a judge decides a hearing is necessary and the judge will be a necessary fact witness, another judge shall preside over the recusal hearing.
- 6) If disqualification or recusal is required and the parties and their counsel agree, without participation by the judge or court personnel, to waive disqualification or recusal (except for bias or prejudice requiring disqualification under 2.11(A)(1)), the judge shall incorporate the waiver into the record of the proceeding.

- 7) Finally, if disqualification or recusal is required, does the rule of necessity override disqualification or recusal? If so, the judge may be required to decide the matter subject to reasonable efforts to have the matter reassigned to another judge as soon as practicable.

END OF GENERAL ETHICS GUIDANCE NO. 1-2024