Maryland Judicial Ethics Committee

Opinion Request Number: 2015-27

Date of Issue: June 16, 2015

☐ Published Opinion ☐ Unpublished Opinion ☐ Unpublished Letter of Advice

Magistrate Must Recuse Him/Herself, Under Certain Circumstances, From Matters in Which He/She Provided Legal Advice

Issue: Whether a Family Magistrate must recuse him/herself from a matter in which he/she previously provided legal advice and assistance to a pro se litigant, or whether the parties may waive any conflict?

Answers: (1) A Family Magistrate must recuse him/herself from a matter in which he/she previously provided legal advice and assistance to a pro se litigant, unless the parties to the action waive disqualification after disclosure by the Magistrate.

(2) A Family Magistrate may act without recusal, in emergency situations, but must disclose the former relationship for the record.

Facts: The Requestor is a Family Magistrate for his/her jurisdiction's Circuit Court (the "Court"). Prior to becoming a Magistrate, the Requestor worked for four years for a local pro se legal clinic, giving legal advice and assisting people in filling out court forms. The Requestor estimates that thousands of forms were filed with the court during this time and that the Requestor assisted approximately 90% of the people in filling out the forms. Recently, while reviewing a court file prior to a hearing, the Requestor recognized his/her handwriting on a form filed on behalf of one of the litigants. The Requestor thus asks whether a conflict exists that would prevent him/her from presiding over the matter and whether the conflict may be waived. The Requestor also advises that he/she is the only Magistrate for that jurisdiction.

Discussion: The Code of Conduct for Judicial Appointees ("Code"), Maryland Rule 16-814, Rule 2.11 provides, in pertinent part:

> Rule 2.11 DISQUALIFICATION[1] [2]
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> (a) A judicial appointee shall disqualify himself or herself in any proceeding in which the judicial appointee's impartiality might reasonably be questioned, including the following circumstances:

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[1]This Rule is derived in part from Rule 2.11 of the 2007 ABA Code and in part from Canon 3D of the former Maryland Code of Judicial Conduct.

[2]Under this Rule, "disqualification" has the same meaning as "recusal." Comment [1].

> (1) The judicial appointee has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
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> (5) The judicial appointee:
> (A) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association[.]

The facts indicate that the Requestor, by giving advice and completing forms for a litigant, served as a lawyer in the matter in controversy. It is assumed, based on the facts, that the Requestor's handwriting on certain forms is the only indication that he/she gave legal assistance to one of the parties now before the Court and that the Requestor has no recollection of the matter or possible advice rendered by him/her. Nothing in the facts provided indicate a reason to assume any bias or prejudice on the Requestor's part.

A Magistrate's obligations to disqualify himself/herself from a proceeding are set out in Rule 2.11. Rule 2.11(c)[3] provides that a judicial appointee must recuse when the judicial appointee has a personal bias or prejudice against or in favor of a party or a party's lawyer. *See also* Rule 2.11(a)(1). In all other situations, a judicial appointee subject to potential disqualification may comply with Rule 2.11 by disclosing on the record the basis of the judicial appointee's disqualification and affording the parties the opportunity to discuss the conflict as well as a potential agreement to waive it. Comment [2] to Rule 2.11 is clear that a judicial appointee's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed. Comment [3] to Rule 2.11 further provides that a judicial appointee should disclose, on the record, information that the judicial appointee believes the parties or their lawyers might reasonably consider relevant to a possible motion for

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[3]Rule 2.11(c) states:

> (c) A judicial appointee subject to disqualification under this Rule, other than for bias or prejudice under paragraph (a)(1), may disclose on the record the basis of the judicial appointee's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judicial appointee and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judicial appointee or court personnel, that the judicial appointee should not be disqualified, the judicial appointee may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

disqualification, even if the judicial appointee believes there is no basis for disqualification. *See In re Letters Rogatory*, 661 F. Supp.1168 (E.D. Mich. 1987) ("An occasional 'silly' result under [the federal judicial disqualification statute] is to be tolerated if it avoids casting a shadow over the individual litigation and, as importantly, prevents injury to the public perception of the judicial system before it has a chance to occur.").

Such a procedure affords the parties an opportunity to knowingly waive the recusal if the judicial appointee agrees. The judicial appointee may comment on a possible waiver, but must ensure that consideration of the question of waiver is made independently of the judicial appointee. A judicial appointee may request that all parties and their lawyers sign a waiver agreement or state clearly, on the record, that recusal is waived after full disclosure and an opportunity to discuss the issue with counsel. *See* Rule 2.11(c), Comment [4]. We emphasize that, if any of the parties refuse to waive disqualification, the judicial appointee must recuse him/herself. *See Frase v. Barnhart*, 379 Md. 100, 128 (2003) (A domestic master who had previously represented one of the parties involved in a custody dispute must recuse if a party objects to the master's continuing participation. "[E]ven if the master did not recall her previous connection with Ms. Keys at the time of the first hearing, she presumably was aware of the problem on November 4 and is certainly aware of it now."); *Sharp v. Howard County*, 327 Md. 17, 30–31 (1992) (A judge who had drafted restrictive covenants for a party to the litigation 17 years earlier must recuse when requested to do so by another party when the covenants are material to the outcome of the litigation.).

Rule 2.11 advances the policy articulated in Rule 16-814, Rule 1.2(a), that a judicial appointee "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." The standard is an objective one, which looks to whether the judicial appointee's impartiality might reasonably be questioned.

Applying this policy in light of the foregoing facts, the Committee concludes that, absent a waiver by all parties after disclosure by the Magistrate, recusal is required.

The Committee recognizes that the Code does not address, either in the Rules, or the Comments thereto, the appropriate manner in which to handle emergency matters that may arise on an ex parte basis. The Code of Judicial Conduct, Maryland Rule 16-813, Rule 2.11, Comment [3], on the other hand, does address this issue, observing that the "rule of necessity may override the rule of recusal." We believe that this reasoning would be equally applicable with respect to judicial appointees. Thus, under such circumstances, a Magistrate may act upon the emergency matter, but must disclose the basis for possible disqualification on the record both at that time and subsequently when all parties are before the tribunal.

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Application: The Maryland 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. An 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 amendments 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