Maryland Judicial Ethics Committee

Opinion Request Numbers: 2011-19, 2011-20 and 2011-21[1]

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■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Circumstances In Which Appellate Judge May Participate
In Appellate Review Involving A Corporate Appellant
In Which Such Judge Owns Or Has Owned Stock

Issue: Under what circumstances may a judge participate in the resolution of a pending appeal when the judge owns, or has owned, stock in the appellant?

Answer: If a judge presently has a significant financial interest in the appellant, or if a judge's participation would otherwise call into question the judge's impartiality or create in reasonable minds a perception of impropriety, or if such participation fails to promote public confidence in the independence, integrity, and impartiality of the Judiciary, the judge should not participate in the resolution of the appeal.

Facts: Three judges (collectively referred to as the "Requesting Judges") have individually inquired regarding the propriety of participating in the adjudication of a pending appeal by a corporate appellant in which each judge now owns or has owned shares (individually or jointly with a spouse, or through an individual retirement account (an "IRA")). None of the Requesting Judges has indicated that any such shares are or were owned by virtue of "an interest in a mutual or common investment fund," and the Committee therefore assumes that they were not. B-111(b)(1), Code of Judicial Conduct (Md. Rule 16-813) (the "Code"). As to each judge, their specific circumstances are as follows:

2011–19: Judge A and Judge A's spouse own, as tenants in common, 85 shares in the appellant's stock, having a value of $7,300. Judge A also owns an IRA which included 125 shares of the same appellant's stock, having a current value of $10,700. Judge A has not indicated what income has been received from such ownership.

2011-20: Judge B owns an IRA, which formerly included 75 shares of the appellant's stock. Those shares were sold within the last two months for $6,048 "for reasons completely unrelated to" the pending appeal. Judge B has not indicated the extent of any capital gain or loss which was realized as a result of such sale nor has Judge B indicated what other income (e.g.,

[1]Judge Eyler and Judge Kenney did not participate in this opinion.

dividends) may have been received during such ownership.[2]

2011-21: Judge C owns 350 shares in the corporate appellant's stock. Judge C acquired such shares within the last year, but has not indicated the current value of such ownership. Judge C has indicated $378 in dividend income was received as a result of such ownership.

Finally, according to Judge B, the pending appeal is from a judgment against the corporate appellant in favor of 180 plaintiffs/appellees in the amount of $147 million dollars.[3]

Discussion: While each of the Requesting Judges' inquiries has focused primarily on the extent and nature of their individual interests in the appellant, it is important to note at the outset that whether a judge has a "significant financial interest," which is implicated by a pending matter is merely *one circumstance* in which disqualification may be required.

Rule 2.11(a)(3) of the Code provides:

> (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, *including* the following circumstances:
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> * * *
>
> (3) The judge knows that he or she, individually or as a fiduciary, or any of the following persons [including spouses] *has* a significant financial interest in the subject matter in controversy or in a party to a proceeding ... [emphasis added].

As Comment 1 to Rule 2.11 notes:

> Under this Rule, a judge is disqualified whenever the judge's impartiality might

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[2] Judge B has requested an "exemption from the application of Rule 2.11(a)(3)." The Committee does not have the authority to grant such exemptions were one necessary. Judge B has also inquired whether it would be acceptable or logistically possible for Judge B to obtain the parties' consent to Judge B's participation in the appeal pursuant to Rule 2.11(c). Inasmuch as the Committee has concluded that Judge B no longer has "a significant financial interest" in the appellant or the pending matter, the Committee need not address that issue.

[3] Although none of the Requesting Judges has indicated its value, it is likely that the corporate appellant may be worth in excess of 400 billion dollars.

> reasonably be questioned, *regardless of whether any of the specific provisions in paragraphs (a) (1) through (5) apply*. In this Rule, "disqualification" has the same meaning as "recusal" [emphasis added].

None of the other circumstances listed in Rule 2.11 being implicated (i.e. (a)(1),(2),(4) or (5)), the Committee will begin with whether Rule 2.11(a)(3) requires disqualification of any of the Requesting Judges and will then discuss grounds for disqualification not specifically set forth in Rule 2.11(a). The first issue, therefore, is the extent to which any of the Requesting Judges has "a significant financial interest" in the appellant, as narrowly defined by B-111(a) of the Code.

B-111(a) states:

> (a) "Significant financial interest" means ownership of:
> (1) an interest as the result of which the owner has received within the past three years, is currently receiving, or in the future is entitled to receive, more than $1,000 per year;
> (2) more that 3% of a business entity; or
> (3) a security of any kind that represents, or is convertible into, more than 3% of a business entity.[4]

B-111(b)(1) of the Code goes on to state:

> (b) In applying this definition:
> (1) ownership of an interest in a mutual or common investment fund that holds a security is not ownership of the security unless:

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[4] B-111(a) does not address *the value* of the interest, but what is *received* therefrom. B-111(a) appears to be focused on *income*, whether in the form of interest or dividends. The Committee believes that despite the more narrow language of B-111(a)(1), a judge could have what might colloquially be understood as a significant financial interest in a business and yet never receive a penny in income from that business. In other words, although a judge might not have been, or anticipate, receiving income from some interest which the judge owns, the size of the interest might be significant enough, if potentially diminished or enhanced by the outcome of a pending matter, to cause the judge's impartiality to reasonably be questioned, necessitating disqualification on grounds other than the specific one stated in Rule 2-11(a)(3). Though not specifically applicable to the Requesting Judges' circumstances, B-111(a)(2) and (3) and B-111(b)(1)(ii) recognize that, for example, if the "pending matter ... could substantially affect the value of the [judge's] interest" disqualification is likely required.

(i) the judge participates in the management of the fund; or
(ii) there is before the judge a pending matter or an impending matter *that could substantially affect the value of the interest* [emphasis added].

The Committee notes that correlating the definition of "significant financial interest" contained in B-111(a)(1) with Rule 2.11(a)(3) is essential inasmuch as it is the latter which determines the effect of a "significant financial interest." This correlation is particularly pertinent to Judge B's inquiry.

Judge B, who has already sold Judge B's shares, has indicated that Judge B received in excess of $1,000 in one year as a result of such sale and that, consequently, Judge B believes such receipt to constitute a "significant financial interest." The Committee doubts that that is the case. First, Judge B received such sum as a capital gain, not as a result of Judge's B's *ownership* of such shares but as a result of Judge B's *divestiture* of such shares. Mere ownership of stock in a corporation does not, in itself, result in, or entitle one to, any income other than dividends if they are declared. The fact that B-111(a)(2) and (3) focus on the relative *value* of the interest compared to the value of the entire entity (without regard to any income received or capital gain realized) reflects that additional considerations arising from the value of the investment may cause disqualification apart from whether the investment has ever produced any yearly income. While the Committee doubts, therefore, that income in the form of capital gains was meant to be encompassed by B-111(a)(1), even if this is not the case, for the reasons discussed below, the Committee does not believe Judge B must be disqualified.

While B-111(a) states that "significant financial interest means *ownership* of ... an interest as the result of which the owner has received ... , is currently receiving, or in the future is entitled to receive, more than $1,000 per year" [emphasis added] and thus reflects some concern with past, present or potential future *receipts* as a result of such ownership, B-111(a), by itself, does not clearly state *when* that ownership must exist in order to necessitate a disqualification under Rule 2.11(a)(3). It is necessary to correlate B-111(a) with Rule 2.11(a)(3) to do so.

As noted above, Rule 2.11(a)(3) provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including ... circumstances ... [in which t]he judge knows that he or she ... *has* a significant financial interest in the subject matter in controversy or in a party to a proceeding ... [emphasis added]."

The Committee believes that the present tense "has" in Rule 2.11(a)(3) means that while one might *have had* a significant financial interest in a business entity because of past ownership and income, disqualification is only required if one still "has" such an interest when the matter is pending. Therefore, even if capital gains are encompassed by B-111(a)(1)'s definition of "a

significant financial interest," because Judge B no longer "*has* a significant financial interest in" the appellant, the Committee does *not* believe Judge B is disqualified from participating in the adjudication of the pending appeal on such grounds.

In this context, the question may arise whether Judges A and C might find it a safe course to divest themselves of their interests in the appellant and thereby similarly cease to have a significant financial interest in the appellant. The Committee cannot offer any such advice. As Judge B noted, Judge B sold Judge B's shares "for reasons completely unrelated to" the pending appeal. Were Judges A and C now to sell their shares *because of* the pending matter, rather than *without regard to* it, it is possible that other motivations for such sales might be inferred (i.e., the Committee cannot foresee the outcome of the appeal or whether that outcome is likely to have any bearing upon the value of the appellant's stock or the potential for Judges A and C to realize some gain or avoid some loss by selling prior to the decision based upon information not generally known to the public and the consequent potential inference that there was some ulterior motive for any such divestiture.)

As to whether Judges A and C are required specifically by Rule 2.11(a)(3) to disqualify themselves from participation in the pending matter, based upon the Committee's interpretation of B-111(a), the Committee believes that that narrow determination depends upon what each Judge has received from the appellant. Judge C indicates that Judge C has only received $378. The past receipt of that sum or the potential receipt of similar such sums in the future does not constitute "a significant financial interest" under B-111(a). In turn, Judge A apparently owns fewer shares than Judge C, and if Judge C's recitation of the facts are accurate and Judge A owns shares of the same class, it is even *less* likely that Judge A's interest in the appellant constitutes "a significant financial interest." In short, the Committee does not believe that Rule 2.11(a)(3) requires disqualification.

Nevertheless, the Code clearly contemplates that apart from the income an investment may have yielded, the mere ownership of an investment can prompt disqualification. Hence, B-111(1)(i) provides that if such pending matter "could substantially affect the value of ... [a judge's] interest" in such investment, disqualification is necessary. Thus, although the Code may not state that mere ownership of a party's stock may prompt disqualification and although the Code may not state some threshold where such an interest's value in and of itself requires disqualification, it is clear that the spirit of the Code is to avoid circumstances in which a judge's independent and impartial judgment may be corrupted by self-interest. Consequently, to the extent a particular disposition of the pending appeal might "substantially affect" the values of the interests of Judges A and C in the appellant, and thereby cause such Judges' impartiality to reasonably be questioned, they should disqualify themselves. While it may be that despite the magnitude of the judgment subject to appeal, the relative magnitude of the appellant's net worth is sufficient to

reliably anticipate that *any* disposition of the pending matter would not "substantially affect" the values of the interests of Judges A and C in the appellant, the Committee is not qualified to opine on such an issue and must leave such a determination to Judges A and C and to qualified professionals.

Even if the Committee is correct that the interests of Judges A and C in the appellant are not "significant financial interest[s]" under B-111, and even if Judges A and C determine that no conceivable disposition of the pending appeal would "substantially affect" the values of their interests in the appellant, as noted above, falling outside such express grounds for disqualification does not conclude the matter since "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, *regardless of whether any of the specific provisions in* [Rule 2.11] *apply*" (emphasis added).

Finally, Rule 1.2 states:

> (a) A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
>
> (b) A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

Like Rule 2.11(a), Rule 1.2 implicates both *objective* and *subjective* considerations. On the one hand, Rule 1.2(b) raises the issue of the extent to which *reasonable* minds might perceive impropriety in Judges A's and C's participation in a pending matter while they own stock in the appellant. The Committee is concerned that in an appeal involving litigation over events which have affected the lives and interests of a significant number of public citizens and received considerable publicity, it may be difficult to predict the objective boundaries of a *reasonable* reaction to such Judges' participation in the pending appeal while owning stock in the appellant. While it is conceivable that were a reasonable person to be fully and accurately apprized of the size of the appellant, the size of the judgment (whether or not altered on appeal) and the size of the Judges' investments in the appellant, such a well-informed and reasonable person might not perceive any impropriety, unfortunately, the Committee cannot be confident that "reasonable minds" will be so accurately apprized, and the Committee is therefore concerned that there is the risk of a potential perception of impropriety.

Rule 1.2(a), on the other hand, does not rely upon *reasonable* perceptions of impropriety. Instead, it imposes upon judges the obligation to "act at all times in a manner that *promotes* public confidence in the independence, integrity, and impartiality if the judiciary [emphasis added]." Considering the potential that members of the public may *not* receive a complete and

accurate recitation of the sorts of considerations raised in this opinion or otherwise necessary to form a "reasonable" perception, the Committee believes that owning stock in the appellant while deciding its pending appeal would likely *not* "promote public confidence in the independence, integrity, and impartiality of the judiciary." If this is a fair assessment, then Judges A and C are cautioned to consider whether recusal from participating in the pending matter is appropriate. (In contrast, because Judge B no longer "has" any interest in the appellant, Judge B's former interest in the appellant is not likely to be reasonably perceived to have any bearing upon Judge B's participation in the appeal and would not be likely to undermine the public confidence in "the independence, integrity, and impartiality of the judiciary.")

The Committee hopes that this opinion has been of assistance.

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.