

Wyoming Supreme Court Judicial Ethics Advisory Committee

W.S.C.J.E.A.C Advisory Opinion 2019-02

QUESTIONS PRESENTED

1. Where a Judge's Law Clerk has retained counsel (Retained Counsel) for representation in a legal matter pending in the District, is the Judge required to disqualify himself from **all** cases pending before the Judge where Retained Counsel represents a party, including cases that were docketed and set prior to the Law Clerk hiring Retained Counsel?
2. If the Judge is **not** required to disqualify himself from all cases involving Retained Counsel, is the Judge required to screen the Law Clerk from all cases involving Retained Counsel?
3. If disqualification is not required by the Code of Judicial Conduct, may the Judge utilize the procedures in Rule 2.11(C) so long as the Judge certifies there is no actual bias under Rule 2.11(A)(1)?

RESPONSE

The Committee answers the questions as follows:

1. No
2. Yes
3. Yes, although the procedures under Rule 2.11(C) are discretionary.

BACKGROUND

The requesting Judge has a Law Clerk who is an alleged victim of domestic violence. The Judge's Law Clerk, pursuant to the advice of a victim witness coordinator within another judicial district, retained counsel to pursue a domestic violence protection order (the DV proceedings hereafter). The Law Clerk is believed to have retained counsel on or about August 1, 2019. The Judge reports that Retained Counsel routinely practices before the Court. The Judge has never discussed legal representation by Retained Counsel with the Judge's Law Clerk nor with Retained Counsel, nor has the Judge obtained any information other than the scheduling of the DV proceedings [as a result of discussions with his Law Clerk]. The Judge has asserted to the Committee that there is no actual positive nor negative bias on his part toward Retained Counsel.

The Judge reports that he has reassigned all new cases involving Retained Counsel to other judges within the district. The Judge reports, however, there are other matters which have been pending for some time on the Judge's calendar that are now ripening. These cases arose before the

Judge's Law Clerk hired Retained Counsel and are now ready for adjudication. It is under these circumstances that the above questions arise.

APPLICABLE RULES OF THE WYOMING CODE OF JUDICIAL CONDUCT

Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.2 Promoting Confidence in the Judiciary.

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.*

Canon 2. A judge shall perform the duties of judicial office.

A judge shall perform the duties of judicial office impartially, competently and diligently.

Rule 2.2 Impartiality and Fairness.

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Rule 2.4 External Influences on Judicial Conduct.

(B) A judge shall not permit family, social, political, financial, or *other interests* or *relationships* to influence the judge's judicial conduct or judgment (emphasis added).

Rule 2.7 Responsibility to Decide.

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*

Rule 2.11 Disqualification.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice . . .

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree relationship* to either of them, or the spouse or domestic partner* of such a person is:

(b) Acting as a lawyer in the proceeding;

(C) A judge 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 judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or the court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding. (Emphasis added.)

DISCUSSION

The Committee has been asked to decide whether the Canons for the Wyoming Code of Judicial Conduct and its numbered Rules and their explanatory comments require the Judge to screen his Law Clerk from all cases involving Retained Counsel, and whether the Canons and Rules require the Judge to disqualify himself from all proceedings where Retained Counsel represents a litigant in a matter now pending before the Judge, or in the alternative, whether the Judge, where subject to disqualification under Rule 2.11 other than for bias under (A)(1), may disclose on the record the basis of the Judge's disqualification and ask the parties and their lawyers to consider waiving disqualification.

As we have opined in the past, the Canons in the Code of Judicial Conduct, and the Rules of the Wyoming Code of Judicial Conduct, regulate only judges. The question to be evaluated by the Committee pursuant to the Canons and the Rules governing and implementing the Canons is the question of whether the Law Clerk's retention or employment of Retained Counsel who may appear before the Judge who employs the Law Clerk, raises questions, either real or perceived, regarding judicial independence. The four Canons and the numbered Rules under each Canon, together with the comments, have been adopted to ensure an independent, fair, and impartial judiciary which is determined to be indispensable to our system of justice.

The starting point of the analysis of the questions presented by the Judge is that the Judge should immediately screen the Law Clerk from all cases involving Retained Counsel. Law clerks are in a rarified position because their work may in some, if not all circumstances, have direct input into judicial decisions. The relationship between a judge and his/her law clerk is one of a close and confidential nature. [The legal community and public perception undoubtedly is that (even when not true) a law clerk does have influence on the Judge who has employed them.] Rule 2.4. External Influences on Judicial Conduct, requires a judge to avoid influences from family, social, political,

financial or other interests or relationships which may influence the judge's conduct or judgment. The comment to Rule 2.4 reads as follows: "An independent judiciary requires that judges decide cases according to the law and facts without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influence." The Committee believes that under the present circumstances, the requesting Judge avoids the appearance of impropriety and maintains the impartiality of the judiciary where the Judge screens the Law Clerk from all matters involving Retained Counsel.

Turning to the other questions posed regarding disqualification. The Rules to Canon 2 governing a judge's duty to perform the duties of his judicial office with impartiality, competency, and diligence, discuss a wide range of circumstances governing disqualification. 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, including but not limited to the following circumstances where: the judge has an interest in the litigation, 2.11(A)(3); the judge has a personal bias, 2.11(A)(1); the judge has a close personal relationship with the parties or the person acting as a lawyer in the proceeding, 2.11(A)(2)(b).

In this case the Judge has already reassigned new cases involving Retained Counsel to judges within the District. The Judge now seeks clarification on his duty to disqualify himself from all matters wherein Retained Counsel represents a party and whether or not he must disqualify himself from cases that were docketed before the Law Clerk hired Retained Counsel. Guidance can be found in the comments under the Rule on disqualification (2.11). Comment [1] instructs that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, *regardless* (emphasis added) of whether any of the specific provisions of paragraphs (A)(1) through (5) apply." It should be noted that the Judge denies any personal bias or prejudice. Comment [2] instructs that "A judge's obligation **not** to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed (emphasis added)."

Disqualification of a judge is more disruptive to the administration of justice than the disqualification of a law clerk. In the circumstance noted above where the Judge has appropriately screened the Law Clerk from all cases involving Retained Counsel, the Judge can share the services of other law clerks to substitute for the screened Law Clerk. However, because disqualification of a judge is more disruptive, it should be carefully and cautiously considered. It is worth pointing out that the comments to the Rule also instruct at [4], "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge." This comment has bearing upon the circumstances presented in the instant scenario. Here the Law Clerk has a relationship which is undoubtedly a close professional relationship with the Judge. That fact, in and of itself, does not require disqualification under Rule 2.11(A) where the Judge has implemented an absolute screen or "Chinese wall" preventing his Law Clerk from working on all files where Retained Counsel has an involvement. There are circumstances where

a judge's disqualification is required, especially where the related lawyer is known by the judge to have an interest (financial) in the law firm that is substantially affected (Rule 2.11(A)(2)(c)).

So long as the Law Clerk is screened on all cases involving Retained Counsel, the Committee concludes that it is unnecessary for the Judge to disqualify himself pursuant to Rule 2.11(A) et sec. As a result of this conclusion, it is not necessary for the Judge to follow the procedure under 2.11(C). The Judge may, out of an abundance of caution, and taking into consideration the potential impact on the functioning of the judiciary in his District, elect to disclose his potential for disqualification and ask the lawyers and their parties to consider, outside his presence, whether to waive disqualification. The Committee finds that, where the Law Clerk has been screened from all cases involving Retained Counsel, that the Court has appropriately and diligently applied procedures which protect the judiciary from impropriety or the appearance of impropriety.

CONCLUSION

We conclude the requesting Judge may continue to preside over cases which have been pending before him and which developed before the Law Clerk hired Retained Counsel so long as the Law Clerk is screened from all cases involving Retained Counsel.

We recommend that the requesting Judge not discuss with his Law Clerk, directly or indirectly, any matters concerning the cases where Retained Counsel has appeared in a matter now pending or may be pending in the future before the requesting Judge.

Finally, we conclude that the Judge has no obligation to utilize the procedure outlined in Rule 2.11(C), unless circumstances arise which make the procedure applicable. Nevertheless, if he chooses to do so, the Judge may, out of an abundance of caution, and giving due regard to the applicable circumstances and the impact on the functioning of the judiciary in his District, use the procedure in Rule 2.11(C) to disclose to the parties appearing before him that Retained Counsel is representing his Law Clerk but that the Law Clerk has been screened completely from all matters concerning the pending litigation, and should that fact raise any concerns, those concerns may be brought to the Court's attention.

FINALIZED AND EFFECTIVE this 28th day of August, 2019 by the Wyoming Supreme Court Judicial Ethics Advisory Committee.