

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 488

September 5, 2019

## Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure

*Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.<sup>1</sup>*

### I. Introduction

The Committee has been asked to address judges' obligation to disqualify<sup>2</sup> themselves in proceedings in which they have social or close personal relationships with the lawyers or parties other than a spousal, domestic partner, or other close family relationship. Rule 2.11 of the Model Code of Judicial Conduct ("Model Code") lists situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some specific family and personal relationships—but the rule provides no guidance with respect to the types of relationships addressed in this opinion.<sup>3</sup>

Public confidence in the administration of justice demands that judges perform their duties impartially, and free from bias and prejudice. Furthermore, while actual impartiality is necessary, the public must also perceive judges to be impartial. The Model Code therefore requires judges to

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<sup>1</sup> This opinion is based on the Model Code of Judicial Conduct as amended by the House of Delegates through February 2019. Individual jurisdictions' court rules, laws, opinions, and rules of professional conduct control. The Committee expresses no opinion on the applicable law or constitutional interpretation in a particular jurisdiction.

<sup>2</sup> The terms "recuse" and "disqualify" are often used interchangeably in judicial ethics. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2011) [hereinafter MODEL CODE] (noting the varying usage between jurisdictions). We have chosen to use "disqualify" because that is the term used in the Model Code of Judicial Conduct.

<sup>3</sup> See MODEL CODE R. 2.11(A) (listing relationships where a judge's impartiality might reasonable be questioned, including where (1) the judge has "a personal bias or prejudice" toward a lawyer or party; (2) the judge's spouse, domestic partner, or a person within the third degree of relationship to the judge or the judge's spouse or domestic partner is a party or a lawyer in the proceeding; or (3) such person has more than a de minimis interest in the matter or is likely to be a material witness).

avoid even the appearance of impropriety in performing their duties.<sup>4</sup> As part of this obligation, judges must consider the actual and perceived effects of their relationships with lawyers and parties who appear before them on the other participants in proceedings.<sup>5</sup> If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself from the proceeding.<sup>6</sup> Whether a judge's relationship with a lawyer or party may cause the judge's impartiality to reasonably be questioned and thus require disqualification is (a) evaluated against an objective reasonable person standard;<sup>7</sup> and (b) depends on the facts of the case.<sup>8</sup> Judges are presumed to be impartial.<sup>9</sup> Hence, judicial disqualification is the exception rather than the rule.

Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those identified in Rule 2.11(A) appear before them.<sup>10</sup> After all, relationships vary widely and are unique to the individuals involved. Furthermore, a variety of factors may affect judges' decisions whether to disqualify themselves in proceedings. For example, in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and parties that are unavoidable. In that circumstance, too strict a disqualification standard would be impractical to enforce and would potentially disrupt the administration of justice. In other situations, the relationship between the judge and a party or lawyer may have changed over time or may have ended sufficiently far in the past that it is not a current concern when viewed objectively. Finally, judges must avoid disqualifying themselves too quickly or too often lest litigants be encouraged to use disqualification motions as a means of judge-shopping, or other judges in the same court or judicial circuit or district become overburdened.

Recognizing that relationships vary widely, potentially change over time, and are unique to the people involved, this opinion provides general guidance to judges who must determine whether their relationships with lawyers or parties require their disqualification from proceedings, whether the lesser remedy of disclosing the relationship to the other parties and lawyers involved in the proceedings is initially sufficient, or whether neither disqualification nor disclosure is required. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations Rule 2.11 imposes: (1) acquaintanceships; (2) friendships;<sup>11</sup> and (3) close personal relationships. Judges need not

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<sup>4</sup> MODEL CODE R. 1.2.

<sup>5</sup> See MODEL CODE R. 2.4(B) (stating that a judge shall not permit family or social interests or relationships to influence the judge's judicial conduct or judgment).

<sup>6</sup> MODEL CODE R. 2.11(A).

<sup>7</sup> *Mondy v. Magnolia Advanced Materials, Inc.*, 815 S.E.2d 70, 75 (Ga. 2018); *State v. Payne*, 488 S.W.3d 161, 166 (Mo. Ct. App. 2016); *Thompson v. Millard Pub. Sch. Dist. No. 17*, 921 N.W.2d 589, 594 (Neb. 2019).

<sup>8</sup> N.Y. Advisory Comm. on Judicial Ethics Op. 11-125, 2011 WL 8333125, at \*1 (2011) [hereinafter N.Y. Jud. Adv. Op. 11-125].

<sup>9</sup> *Isom v. State*, 563 S.W.3d 533, 546 (Ark. 2018); *L.G. v. S.L.*, 88 N.E.3d 1069, 1073 (Ind. 2018); *State v. Nixon*, 254 So.3d 1228, 1235 (La. Ct. App. 2018); *Thompson*, 921 N.W.2d at 594.

<sup>10</sup> N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at \*2.

<sup>11</sup> Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term "friend," but that is simply a title employed in that context. A judge could have Facebook "friends" or other social media contacts who

disqualify themselves in proceedings in which they are acquainted with a lawyer or party. Whether judges must disqualify themselves when they are friends with a party or lawyer or share a close personal relationship with a lawyer or party or should instead disclose the friendship or close personal relationship to the other lawyers and parties, depends on the nature of the friendship or close personal relationship in question. The ultimate decision of whether to disqualify is committed to the judge's sound discretion.

## II. Analysis

Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations. Perhaps most obviously, under Rule 2.11(A)(1), judges must disqualify themselves when they have 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. The parties may not waive a judge's disqualification based on personal bias or prejudice.<sup>12</sup>

Beyond matters in which the judge's alleged or perceived personal bias or prejudice is at issue, Rule 2.11(A) identifies situations in which a judge's personal relationships may call into question the judge's impartiality. Under Rule 2.11(A)(2), these include proceedings in which the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person (a) is a party to the proceeding, or is a party's officer, director, general partner, or managing member; (b) is acting as a lawyer in the proceeding; (c) has more than a de minimis interest that could be affected by the proceeding; or (d) is likely to be a material witness in the proceeding. Under Rule 2.11(A)(4), a judge may further be required to disqualify himself or herself if a party, the party's lawyer, or that lawyer's law firm has made aggregate contributions to the judge's election or retention campaign within a specified number of years that exceed a specified amount or an amount that is reasonable and appropriate for an individual or entity. But, while Rule 2.11(A) mandates judges' disqualification in these situations, Rule 2.11(C) provides that a judge may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers whether they waive disqualification. If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding.<sup>13</sup>

Apart from the personal relationships identified in Rule 2.11(A), a judge may have relationships with other categories of people that, depending on the facts, might reasonably call into question the judge's impartiality. These include acquaintances, friends, and people with whom the judge shares a close personal relationship.

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are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person's relationship with a judge depends on the definitions and examples used in this opinion.

<sup>12</sup> MODEL CODE R. 2.11(C).

<sup>13</sup> Disqualification may not be waived where the judge harbors a personal bias or prejudice toward a party or a party's lawyer. *See* MODEL CODE R. 2.11(A)(1) & (C).

### *A. Acquaintances*

A judge and lawyer should be considered acquaintances when their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like.<sup>14</sup> For example, the judge and the lawyer might both attend bar association or other professional meetings; they may have represented co-parties in litigation before the judge ascended to the bench; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. Generally, neither the judge nor the lawyer seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.<sup>15</sup>

A judge and party should be considered acquaintances in the same circumstances in which a judge and lawyer would be so characterized. Additionally, a judge and party may be characterized as acquaintances where the party owns or operates a business that the judge patronizes on the same terms as any other person.

Evaluated from the standpoint of a reasonable person fully informed of the facts,<sup>16</sup> a judge's acquaintance with a lawyer or party, standing alone, is not a reasonable basis for questioning the judge's impartiality.<sup>17</sup> A judge therefore has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding. A judge may, of course, disclose the acquaintanceship if the judge so chooses.

### *B. Friendships*

In contrast to simply being acquainted, a judge and a party or lawyer may be friends. "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others. For example, a judge and lawyer who once practiced law together may periodically meet for a meal when their busy schedules permit, or, if they live in different cities, try to meet when one is in the other's hometown. Or, a judge and lawyer who were law school classmates or were colleagues years before may stay in touch through occasional calls or correspondence, but not regularly see one another. On the other hand, a judge and lawyer may exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues before the

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<sup>14</sup> N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at \*2.

<sup>15</sup> *Id.*

<sup>16</sup> See *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019) ("In deciding whether disqualification is required, the relevant question is 'whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality.'" (quoting *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011)).

<sup>17</sup> N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at \*2; Va. Judicial Ethics Advisory Comm. Op. 01-08, 2001 WL 36352802, at \*1, \*2 (2001).

judge was appointed or elected to the bench; share confidences and intimate details of their lives; or, for various reasons, be so close as to consider the other an extended family member.

Certainly, not all friendships require judges' disqualification,<sup>18</sup> as the Seventh Circuit explained over thirty years ago:

In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.<sup>19</sup>

Judicial ethics authorities agree that judges need not disqualify themselves in many cases in which a party or lawyer is a friend.<sup>20</sup>

There may be situations, however, in which the judge's friendship with a lawyer or party is so tight that the judge's impartiality might reasonably be questioned. Whether a friendship between a judge and a lawyer or party reaches that point and consequently requires the judge's

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<sup>18</sup> See, e.g., *In re Complaint of Judicial Misconduct*, 816 F.3d 1266, 1268 (9th Cir. 2016) (stating that “friendship between a judge and a lawyer, or other participant in a trial, without more, does not require recusal”); *Schupper v. People*, 157 P.3d 516, 520 (Colo. 2007) (reasoning that friendship between a judge and a lawyer is not a per se basis for disqualification; rather, a reviewing court should “look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised”); *In re Disqualification of Park*, 28 N.E.3d 56, 58 (Ohio 2014) (“[T]he existence of a friendship between a judge and an attorney appearing before her, without more, does not automatically mandate the judge’s disqualification . . . .”); *In re Disqualification of Lynch*, 985 N.E.2d 491, 493 (Ohio 2012) (“The reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party’s counsel.”); *State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008) (“The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal.”).

<sup>19</sup> *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985).

<sup>20</sup> U.S. Judicial Conf., Comm. on Codes of Conduct Advisory Op. No. 11, 2009 WL 8484525, at \*1 (2009); Ariz. Supreme Ct., Judicial Ethics Advisory Comm. Op. 90-8, 1990 WL 709830, at \*1 (1990) [hereinafter *Ariz. Jud. Adv. Op. No. 11*]; N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at \*2. *But see* Fla. Supreme Ct., Judicial Ethics Advisory Comm. Op. No. 2012-37, 2012 WL 663576, at \*1 (2012) (stating that a judge “must recuse from any cases in which the judge’s [close personal] friend appears as a party, witness or representative” of the bank where the friend was employed).

disqualification in the proceeding is essentially a question of degree.<sup>21</sup> The answer depends on the facts of the case.<sup>22</sup>

A judge should disclose to the other lawyers and parties in the proceeding information about a friendship with a lawyer or party “that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”<sup>23</sup> If, after disclosure, a party objects to the judge’s participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge’s decision to remain on the case or to disqualify himself or herself on the record.

### ***C. Close Personal Relationships***

A judge may have a personal relationship with a lawyer or party that goes beyond or is different from common concepts of friendship, but which does not implicate Rule 2.11(A)(2). For example, the judge may be romantically involved with a lawyer or party, the judge may desire a romantic relationship with a lawyer or party or be actively pursuing one, the judge and a lawyer or party may be divorced but remain amicable, the judge and a lawyer or party may be divorced but communicate frequently and see one another regularly because they share custody of children, or a judge might be the godparent of a lawyer’s or party’s child or vice versa.

A judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship. As the New Mexico Supreme Court has observed, “the rationale for requiring recusal in cases involving family members also applies when a close or intimate relationship [between a judge and a lawyer appearing before the judge] exists because, under such circumstances, the judge’s impartiality is questionable.”<sup>24</sup> A judge should disclose other intimate or close personal relationships with a lawyer or party to the other lawyers and parties in the proceeding even if the judge believes that he or she can be impartial.<sup>25</sup> If, after disclosure, a party objects to the judge’s participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge’s decision to remain on the case or to disqualify himself or herself on the record.

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<sup>21</sup> See *Schupper*, 157 P.3d at 520 (explaining that friendship between a judge and a lawyer is not an automatic basis for disqualification; rather, a reviewing court should “look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised”); Ariz. Jud. Adv. Op. No. 11, *supra* note 20, 1990 WL 709830, at \*1 (suggesting that in weighing disqualification where a lawyer who is a friend appears in the judge’s court, the judge should consider as one factor “the closeness of the friendship”); CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[4], at 4-27 (5th ed. 2013) (“Whether disqualification is required when a friend appears as a party to a suit before a judge depends on how close the personal . . . relationship is between the judge and the party.”).

<sup>22</sup> N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at \*1.

<sup>23</sup> See Model Code R. 2.11 cmt. 5 (“A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”).

<sup>24</sup> *In re Schwartz*, 255 P.3d 299, 304 (N.M. 2011).

<sup>25</sup> See Model Code R. 2.11 cmt. 5. A judge who prefers to keep such a relationship private may disqualify himself or herself from the proceeding.

### *D. Waiver*

In accordance and compliance with Rule 2.11(C), a judge subject to disqualification based on a friendship or close personal relationship with a lawyer or party may disclose on the record the basis for the judge's disqualification and may ask the parties and their lawyers to consider whether to waive disqualification.<sup>26</sup> If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement that the judge may participate in the proceeding must be put on the record of the proceeding.

### **III. Conclusion**

Judges must decide whether to disqualify themselves in proceedings in which they have relationships with the lawyers or parties short of spousal, domestic partner, or other close familial relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations those relationships create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In summary, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.

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<sup>26</sup> Disqualification may not be waived if the judge has a personal bias or prejudice concerning a party or a party's lawyer. MODEL CODE R. 2.11(C).