

bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonable assure the safety of any person and the community when the proof is evident or presumption is great....”).

Comments to the proposal are due by Friday, September 8, 2023.

The latest proposal, and the SCJAP’s response to the January 2022 proposal, are posted on the SCJAP website in the Members Only section.

ETHICS:

DISQUALIFICATION AND RECUSAL Ethical Decision Making in Advance of Trial

Submitted by:

The Honorable Lindy L. Sweeney

The Honorable Jayne F. Duncan (Retired)

“To be, or not to be, that is the question.”

Hamlet, Act 3, Scene 1

William Shakespeare

The oft-quoted words of Shakespeare’s Hamlet define the existential crisis of human existence. In contemporary jurisprudence, the prevailing existential crisis is perhaps more commonly reflected with the paraphrase: “To recuse, or not to recuse, that is the question.” The purpose of this article is to provide both definition and application to the concepts of “recusal” and “disqualification” for Magisterial district judges (“MDJs”)

Magisterial district judges represent the foundation of the court system in Pennsylvania. We are the base of the judicial pyramid for good reason. These locally-based community courts are most citizens’ first, and sometimes only, exposure to the judicial system. District courts are typically more accessible than other courts, are less procedurally formal, and litigants often represent themselves.

Judges are elected to six-year terms in much smaller districts comprised of local municipalities. The judge is often known, or well-known, in the community. The judge must live and work within his or her magisterial district.

These factors—local courts, the judge’s familiarity within the community, high case volumes, and the frequency of pro se litigants--all contribute to the likelihood that MDJs are more often asked to consider recusal than judges at other levels of the judiciary.

Recusal and disqualification directly affect the public trust in the fairness of the judiciary. As stated by Justice Papadakos in *Reilly by Reilly v Southeastern Transportation Authority*, 507 Pa. 204, 489 A.2d 1291, (1985):

Questions concerning the fairness, impartiality, or bias of the trial court, always affect the administration of justice and can cloak the whole system of judicature with suspicion and distrust. Because recusal requests call into question our ability to mediate fairly, they raise important issues in which the public is concerned. If our courts are perceived to be unfair and biased, our future ability to adjudicate the public's grievances and wrongs will be threatened, because we all lose the one thing that brings litigants into our halls of justice--their trust. Without the people's trust that our decisions are made without malice, ill-will, bias, personal interest or motive for or against those submitting to our jurisdiction, our whole system of judicature will crumble. Accordingly, when challenges are made concerning the necessity for the recusal of a judge, an important public question is being addressed which we, as responsible representatives of the people, must resolve.

Id. at 225, 489 A.2d at 1301.

An analysis of recusal and/or disqualification involves the judge's relationships and personal knowledge of the parties, or the issues involved. For MDJs, this analysis helps to maintain the public's trust in the fairness and impartiality of the justice system. It also protects the judge against allegations of bias or self-interest. That said, judges may not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues. Pa. R.G.S.C.M.D.J. 2.7 *Responsibility to Decide*, cmt. 2.

Judges may not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues. (Comment 2, Rule 2.7 *Responsibility to Decide*, Pa. R.G.S.C.M.D.J.)

Although recusal and disqualification are two distinct concepts, the exercise of either achieves the same result: the judge will not adjudicate a case otherwise appropriately before them. The terms "recusal" and "disqualification" are not synonymous, and it would be incorrect to use these terms interchangeably.

Simply put, "recusal" is a judge's decision to not hear a case because the judge cannot be fair and objective or because the public perception is such that it appears the judge is incapable of hearing the matter in a fair manner. The decision to recuse is a two-tiered assessment. First, upon self-reflection, does the judge have a personal bias that would prevent impartial review? This is a **personal and unreviewable decision that only the judge can make**. Second, would the judge's

participation create an appearance of impropriety? *Goodheart v. Casey*, 523 Pa. 188, 565 A.2d 757 (1989).

Goodheart is instructive as it articulates the “personal and unreviewable” standard for recusal. By its nature, it forces introspection and a completely subjective analysis on the part of the judge: how it feels to me and how it looks to you. Importantly, as “personal and unreviewable,” the jurist is never obligated to articulate the basis for their decision to recuse.

“Disqualification” represents the opposite side of the same coin. Disqualification, by its nature, requires an objective analysis as to whether the Rules Governing the Standards of Conduct of Magisterial District Judges, (“Rules”) specifically prohibit the judge from hearing the matter. MDJ Rule 2.11 Disqualification, sets forth the specific circumstances necessitating the judge’s decision to decline the case; for example, matters involving family members, or cases in which the judge has an economic interest.

Unique to magisterial district courts is that the decision to recuse or disqualify or hear a case is often made before the parties in the courtroom. As the judge takes the bench, the parties are assembled and ready to proceed. Looking to the assemblage, the judge may see their neighbor, their nephew, their auto mechanic, their largest campaign donor, or others with whom they may be acquainted. This dynamic is the nature of the work of the MDJs. How a judge addresses this concern is what defines them as a “fair and impartial judge,” balancing the competing interests of a fair judiciary and the waste of litigants’ time and judicial resources in rescheduling the matter for another court.

Although a recusal and/or disqualification analysis may be required following advance notice and opportunity to reflect, often these decisions must be made promptly and immediately in advance of trial. Therefore, it is helpful to have a systematic analysis that may be applied to every case in an impartial manner.

Recusal and disqualification may be viewed as a spectrum. At one end of the spectrum there is no conceivable conflict, and the judge should proceed to hear the matter; at the other end of the spectrum, however, is a factual basis, identified in Rule 2.11, which requires the judge’s disqualification. It is that broad and gray swath that forms the middle ground, the continuum, that most requires our attention.

As a starting point, it is important to note that the courts recognize a presumption of “judicial fairness.” Our Supreme Court has stated that, “[t]his Court presumes judges of this Commonwealth are ‘honorable, fair and competent’ and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice.” *Commonwealth v. Druce*, 577 Pa. 581, 848 A.2d 104 (Pa. 2004) (citing *Commonwealth v. White*, 557 Pa. 408, 734 A.2d 374, 384 (1999)).

The spectrum analysis allows the judge to consider increasing levels of personal knowledge or involvement to reach a recusal decision. “The virtue of disclosure is not that more recusals will result, but that openness helps maintain public confidence that the system is fair.” David Strassburger, *Disclosure, Recusal and Focusing on a Higher Purpose*. Allegheny Bar Association Lawyer’s Journal, June 2, 2023.

At the lowest level is a judge’s knowledge of facts so minor as to allow disclosure to “cure” any perceived conflict. For example, if the judge and the witness attend the same church, the judge should consider whether that fact would motivate either party to request her recusal. A more engaged knowledge of a party may suggest the waiver be in writing. This written waiver is required pursuant to Rule 2.11 Disqualification matters but serves only as a suggestion for recusal consideration.

Rule 2.7 *Responsibility to Decide*, states that an MDJ has a responsibility to decide the cases before them, unless recusal or disqualification apply. The comments to Rule 2.7 stress that unwarranted recusals may bring “public disfavor” to the court as well as to the judge. The comments further state that a desire to avoid unpopular decisions does not constitute a basis for recusal.

Finally, the comments note that the judge has an affirmative obligation to advise the parties of facts that may justify a request for recusal. The initial inquiry for any jurist considering recusal is whether the judge can be impartial. This is the first-tier decision that involves a self-reflection search.

Second, if a judge makes the decision that he or she can be impartial, “the judge must, nonetheless, decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary.” *In Re: Tidd*, 3 J.D. 2016, 175 A.3d 1151 (Pa.Ct.Jud.Disc. 2017), citing *Lomas v. Kravitz*, ___ Pa.Super.___, 130 A.3d 107 (2015). This “appearance” issue constitutes the second and a very important tier of the recusal inquiry.

Once the judge makes the decision to recuse, there are two remaining considerations: the possibility of an exception arising from exigent circumstances and the appropriate procedural steps that a judge must then take when they will not hear a case.

In certain situations where the judge may be the only judge available to hear and decide a matter, typically in exigent circumstances, a principle known as the “rule of necessity” may apply. It is defined in Rule 2.11, comment 3 and states, “The rule of necessity may override the rule of disqualification...” citing the possibility that the MDJ may be the only judge available to issue an immediate order on such issues as probable cause determinations. Therein, the rules require the judge to

disclose the reason for disqualification and make reasonable efforts to transfer the matter as soon as practicable.

While the rules contemplate the application of the rule of necessity to disqualification issues, it is equally applicable to matters in which the judge has made the decision to recuse. Again, situations involving the rule of necessity are more likely to arise with magisterial district judges than trial judges who hear matters with more advance notice that usually involve counseled parties who have analyzed the legal arguments on both sides of a matter.

Procedurally, once a judge has made the decision that they are disqualified, pursuant to Rule 2.11, he or she is obligated to inform the Court Administrator of the decision so the case may be reassigned.¹ The next step is for the Court Administrator to obtain an administrative order of reassignment so as to ensure the disqualifying judge does not, in any way, exercise further jurisdiction over the case. Further the “personal and unreviewable” nature of a recusal decision need only be identified as “recusal” pursuant to Rule 2.7; it is not necessary to identify the underlying factual basis for the decision to recuse.

As we move through the spectrum of recusal and disqualification considerations, we see the rules become more clearly defined, demonstrating a departure from the reliance on self-reflection and case law and become more contingent upon the language of the rules.

Rule 2.11 Disqualification states that an MDJ shall disqualify himself or herself, in any case in which the judge’s impartiality might reasonably be questioned. The rule cites specific examples of when disqualification is required, generally:

1. The judge’s personal bias;
2. The judge, or a spouse, domestic partner or family member within the third degree of relationship is:
 - a. a party
 - b. a lawyer
 - c. a person with more than a *de minimus* interest in the outcome
 - d. likely to be a material witness
3. The judge, spouse, domestic partner, household member or third degree relative has an individual or

¹ Merely transferring the matter to another magisterial district court extends the judge’s authority over a matter in which they are not authorized to rule. So too, once the decision to recuse is made, the judge should likewise refer the matter to Court Administration for reassignment, as opposed to making the unilateral decision to transfer to another judge. (See *In Re Arnold*, 2 J.D. 12, 51 A.3d 931 (2012)). (An MDJ’s direct transfer of a case may violate local rules, requiring the Order of a President Judge to transfer a case, as well as a violation of Article V, § 17 (b) and § 18 (d)(1) of the Pa. Const.).

- fiduciary economic interest in the subject matter of the proceeding;
4. A party or counsel for a party has made a contribution to the judge's campaign in an amount that would raise a reasonable concern about the judge's ability to be impartial;
 5. The judge, while serving as a judge or candidate for judicial office, has made a public statement that would appear to commit the judge to reach a particular decision; and
 6. The judge had previously served as a lawyer in the matter in controversy or had previously participated in the controversy either as a government employee or as a public official or was a material witness to the circumstances of the controversy.

Rule 2.11 also states that judges have an affirmative obligation to "keep informed" of the judge's personal and economic interests and to endeavor to remain informed of the economic interests of household members and family.

Of particular note, Rule 2.11 (C) permits a judge, under certain circumstances, to attempt to "cure" the conflict. Therein, if the reason for disqualification is not bias or prejudice, the judge may disclose (on the record) the basis for disqualification and allow the parties an opportunity to consider whether to waive the disqualification. Such waiver discussions are to be conducted outside the presence of the judge. The rule further requires a written acknowledgement of the parties' agreement to waive the conflict and proceed with trial.

The comments direct that disqualification may be in response to a motion, or *sua sponte*, citing the obligation to disqualify. Further, the comments allow the rule of necessity to override the obligation to disqualify, however the judge "must make reasonable efforts to transfer the matter as soon as practicable." *Id.*, cmt. 3

The circumstances requiring disqualification, pursuant to Rule 2.11 although clearly defined, are not exhaustive. As the language of the rule states, the obligation to disqualify applies in any circumstance where the judge's "impartiality might reasonably be questioned."

In conclusion, a judge's decision to recuse or disqualify is a process that begins with the requirements of Rule 2.7 *Responsibility to Decide*, emphasizing the fundamental function of judges that is to decide the matters brought before them. In the course of making the personal decision to recuse, a judge may explore other

measures such as disclosure and waiver to minimize the impact of recusal. In the absence of these options, the judge must weigh recusal and make a decision that respects the public's expectation of fairness and impartiality.

If the judge believes that he or she can be fair and impartial and their decision to hear the matter does not create a public appearance of bias or partiality, the analysis progresses to the issue of disqualification.

The "disqualification" analysis follows the continuum if the judge is barred from exercising jurisdiction over the matter due to the specific prohibitions contained in Rule 2.11 as it relates to family and economic interests.²

If the judge's disqualification is due to bias or prejudice, the disqualification cannot be "cured." However, if the disqualification is due to other, enumerated factors such as relationships and economic interests, the parties may waive the conflict, following the protocol set forth in Rule 2.11, Comment (C), and proceed with trial.

Finally, upon making the decision to recuse or disqualify, the judge is, in effect, stating that his or her impartiality might reasonably be questioned. Therefore, the judge should refrain from making any subsequent decisions affecting the matter. Accordingly, the case should be transferred to the office of the County Court Administrator for the President Judge to reassign the matter.

An independent, fair, honorable and impartial judiciary is indispensable to our system of justice. Indeed, these qualities are the cornerstones of judicial integrity, the foundation upon which the public places its trust. To deserve and to maintain this confidence the concepts of disqualification and recusal must always be forefront in the mind of the jurist. Hence, be mindful always "to recuse or not to recuse?" Yes, that is the question! For the Bard also sayeth, "This above all: to thine own self be true, And it must follow, as the night the day. Thou canst not then be false to any man." Hamlet, Act 1, Scene 3.

² Mindful that if the judge's impartiality might "reasonably be questioned pursuant to Rule 2.11 (A), the judge is disqualified.