**ADVISORY COMMITTEE ON JUDICIAL CONDUCT**
**OF THE DISTRICT OF COLUMBIA COURTS**

# ADVISORY OPINION NO. 12
**(February 2, 2012)**

## RECUSAL OF A JUDGE BECAUSE OF A RELATIONSHIP WITH A FINANCIAL INSTITUTION

Several judges have requested advice about whether they should recuse themselves in cases in which a bank is a party and the judge either (1) has a savings or checking account at the bank or (2) owes the bank money because of a mortgage or other sizable loan with the bank. For the reasons that follow, we advise that disqualification is ordinarily not required. Disqualification is required only in unusual circumstances when the proceeding before the judge could substantially affect the judge's relationship with the financial institution.

The Advisory Committee notes that similar issues arise when a judge has a relationship with other types of companies. For example, judges regularly maintain accounts with utility, insurance, and credit card companies. These relationships generally are standard, arm's-length customer relationships on the same terms that the companies offer in the regular course of business to thousands or millions of other customers. The same kind of recusal analysis that applies to relationships with banks and other financial institutions generally applies to customer and debtor relationships with other kinds of companies.

Effective January 1, 2012, the D.C. Courts adopted a revised Code of Judicial Conduct that replaced the 1995 Code. The 1995 Code contained provisions that are

substantively equivalent to the provisions of the current Code concerning recusal based on relationships with financial institutions, so the recent adoption of the current Code has not changed the applicable principles.

**General standards**

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" specified in subparagraphs (1-6).

Rule 2.11(A)(3) requires disqualification where "the judge knows that he or she … has an economic interest … in a party to the proceeding ...." The Terminology section of the Code defines the term "economic interest" as "ownership of a more than de minimis legal or equitable interest." Paragraph (3) of this definition of "economic interest" excludes "a deposit in a financial institution, the proprietary interest … of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, … unless a proceeding pending or impending before the judge could substantially affect the value of the interest …."

Rule 2.11(A) expressly states that its list of circumstances in which disqualification is required is not exhaustive. A judge is disqualified whenever the judge's impartiality might reasonably be questioned, even if none of the specific rules in Rule 2.11(A) applies.

The standard for disqualification under Rule 2.11(A) is whether the circumstances create "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge's impartiality." *See Coulter v. Gerald Family Care,*

*P.C.*, 964 A.2d 170, 179 (D.C. 2009).[1] "The standard for determining whether recusal is required … is an objective one, whether an observer could reasonably doubt the judge's ability to act impartially." *In re M.C.*, 8 A.3d 1215, 1222 (D.C. 2010). "Recusal is required if an objective, disinterested observer *fully informed of the facts* underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Id.* (internal quotations and citations omitted); *see In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("Importantly, the test is whether the facts would create a reasonable doubt about the judge's partiality in the mind of a person *with knowledge of all the relevant circumstances*.") (footnote and citations omitted). An "edifice of conjecture" or "speculation" does not satisfy the requirements for disqualification. *Coulter*, 964 A.2d at 179 (quotations and citations omitted).[2]

**Savings and checking accounts**

As set forth above, the Code of Judicial Conduct explicitly provides that a judge's savings or checking account with a bank does not constitute an economic interest in the bank that requires disqualification, unless a proceeding pending or impending before the judge could substantially affect the value of the interest. Accordingly, the fact that a judge has a savings or checking account with a bank generally does not require the judge to disqualify himself or herself. In the exceptional circumstance that a decision in a

[1] Such an appearance of bias or prejudice would also result in a violation of Rule 1.2, which requires judges to avoid both impropriety and "the appearance of impropriety." *See* Comment [5] to Rule 1.2 ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's … impartiality …."). In addition, Rule 2.4(B) forbids a judge from permitting any relationship to influence the judge's judicial conduct or judgment.

[2] The cases cited in the text interpret Canon 3(E)(1), the disqualification provision of the prior version of the Code. That Canon is substantively equivalent to Rule 2.11(A), so decisions interpreting Canon 3(E)(1) guide interpretation of Rule 2.11(A).

proceeding before the judge could substantially affect the value of the account, the judge should recuse himself or herself.

**Bank loans**

Unless unusual circumstances exist, a judge need not disqualify himself or herself because the judge accepted a loan from a financial institution that later became a litigant before the judge. In our view, a fully informed, objective person could not reasonably question a judge's impartiality merely because the judge previously borrowed money from the institution.[3]

That conclusion follows not only from Rule 2.11(A) but also from Rule 3.13(B)(4). Rule 3.13(B)(4) allows a judge to accept "commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges."[4] Accepting a loan consistent with Rule 3.13(B)(4) is fully consistent with a judge's obligation under Rule 2.1 to conduct personal activities to minimize the risk of conflicts that would result in frequent disqualifications. *See* Comment [1] to Rule 2.1. A judge's loan on standard terms available to similarly situated non-judges would not normally create a conflict that requires disqualification if the lender later happens to become a litigant before the judge.

[3] None of the subparagraphs of Rule 2.11(A) describing circumstances that require disqualification applies to standard loan arrangements with financial institutions.
[4] A judge may not use his or her position to obtain more favorable loan terms than a lender would otherwise offer. Rule 1.3 prohibits a judge from abusing the prestige of judicial office, and Comment [1] states, "It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment."

An example based on the typical situation illustrates the point:  no reasonable and fully informed person might question a judge's impartiality where the judge took out a mortgage from a bank on standard terms available to judges and non-judges alike, the judge took out the mortgage before the case involving the bank came before the judge, the judge had been and reasonably and in good faith expects to remain current on principal and interest payments, the judge does not expect to refinance or renegotiate the mortgage with the bank, and the case before the judge involves an aspect of the bank's business unrelated to mortgages.

Only in unusual circumstances might a fully informed, objective person reasonably question a judge's impartiality if a bank that has an outstanding loan to the judge becomes a party in a case before that judge.  If resolution of the issues in the case reasonably could be expected to affect the terms of the loan or otherwise affect the judge's relationship with the bank, the judge should recuse himself.  For example, if injunctive relief in the case could affect the terms of all of the banks' outstanding mortgages including the judge's mortgage, recusal would be required.  In addition, if a judge is or expects to become delinquent, or if a judge intends or expects to refinance or renegotiate the terms of the mortgage with the mortgage holder, a fully informed person might reasonably question whether the judge would issue a ruling favorable to the mortgage holder in an attempt to curry favor with it, even if the issues in the case before the judge are unrelated to delinquencies, refinancings, or renegotiations of mortgages.  In assessing whether the circumstances could create an appearance of partiality, the judge should consider all relevant factors, which may include the size of the outstanding loan

balance (in absolute terms and in relationship to the judge's income, assets, and net worth), whether the loan is secured, and whether it is a recourse or a non-recourse loan.

Our conclusion is consistent with the views of other committees and commissions:

- In Opinion 89-367 on May 1, 1989, the Judicial Inquiry Commission of Alabama concluded that disqualification is not required unless the judge's bank account or customer relationship could be substantially affected by the outcome of the proceeding.
- In Opinion No. 40 on June 10, 1980, the Georgia Judicial Qualifications Commission concluded that "the mere making of a loan by a judge from a lending institution is not a matter of disqualification in cases in which the institution involved is a party," but disqualification may be required where, for example, the particular circumstances of a loan from a private party may cause a judge's impartiality reasonably to be questioned, or peculiar circumstances may have caused the judge to develop a personal bias or prejudice for or against the institution.
- In Advisory Opinion #3-93, the Indiana Commission of Judicial Qualifications opined that a judge need not disqualify himself or herself when the bank has filed collections cases and the judge has a mortgage or commercial loan from the bank that is ordinary in every respect and the merits of the particular case do not implicate the judge's business with the bank in any significant way.
- In Opinion 04-50 issued on April 22, 2004, the New York Advisory Committee on Judicial Ethics advised that a judge need not disqualify himself or herself

where a bank holds a mortgage on the judge's personal residence, granted the judge an auto loan, or issued a credit card and the bank appears as a party in the judge's court; the ubiquity and routine nature of such transactions and the fact that they are rarely predicated on a special or personal relationship between the borrower and the institutional lender mean that neither recusal nor disclosure is necessarily warranted where the bank appears before the judge as a party.

- In Formal Opinion 96-1 issued on September 1, 1996, the Judicial Council of Utah advised that judges could not participate in a program negotiated for judges only with a specific bank, but the Council indicated that recusal is not required where a judge obtains a loan from a financial institution on the same terms generally available to the public, including favorable terms available to people who are not judges.

**Waiver of disqualification**

Rule 2.11(C) provides for waiver of disqualification unless personal bias or prejudice concerning a party or lawyer is the basis for disqualification. Rule 2.11(C) specifies the procedures a judge must follow, starting with disclosure on the record of the basis of the judge's disqualification. These procedures apply to disqualifications based on a judge's relationship with a financial institution.

Even if the judge believes that his or her relationship with a financial institution does not require disqualification, the judge may decide that it is appropriate to disclose that relationship to the parties. Comment [5] to Rule 2.11 states, "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." *See In re M.C.*, 8 A.3d at 1226 (quoting the comment to Canon 3(E)(1) and citing Comment [5] to Model Rule 2.11); *Coulter*, 964 A.2d at 180. If a party files a motion for disqualification after a judge discloses the relationship, it is up to the judge to decide whether the motion justifies reevaluation of the judge's initial assessment that disqualification is not required.