



Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2023-07 (October 25, 2023)

Attorney Conflict; Disclosure/Disqualification; Rule 2.11; Practice Book §§ 1-22, 3-7 and 4-8, Conn. Gen. Stat. § 51-51/

Facts: A Judicial Official recently received a copy of a complaint filed against the Judicial Official with the Judicial Review Council ("JRC"). The allegations in the complaint stem from comments made by the Judicial Official during in-chambers conversations that were unrelated to the case. The attorney who filed the complaint attended these in-chambers conversations as second chair, but never filed an appearance in the case and never participated in anything on the record. This attorney did sit next to the appearing attorney, but only for part of the day, leaving at or around lunch. The attorney was not present for the next day of trial. According to the Judicial Official, this happens somewhat frequently as a newer attorney comes to the trial to sit next to the appearing attorney, presumably to observe and gain experience but does not participate in the trial in any way. The attorney who filed the complaint has a significant number of cases pending in the court in which the Judicial Official sits, which is very small, and the Judicial Official does not want to impose an additional burden on the other judge(s) by referring all pending cases involving this attorney to the other judge(s).

The Judicial Official understands that they must follow the requirements imposed by Rule 2.11 (e) which states, in relevant part: "When the judge becomes aware pursuant to Practice Book Section 1-22 (b) or 4-8 or otherwise that such a lawsuit or complaint has been filed against him or her, the judge shall, on the record, disclose that fact to the lawyers and parties to the proceeding before such judge, and the judge shall thereafter proceed in accordance with Practice Book Section 1-22 (b)."

Issues: The questions presented by the inquiring Judicial Official are as follows:

- (1) May the Judicial Official, after conducting a hearing on the disqualification issue pursuant to Practice Book Section 1-22 (b), decide not to disqualify themselves from sitting on the proceeding on grounds that the Judicial Official has no personal bias or prejudice concerning the attorney who filed the complaint, and that the referral (and future referrals) would cause the other judge(s) assigned to the same court an undue burden?
- (2) May the Judicial Official rule on any post-judgment motions in the case in which the attorney participated as second chair without having to disclose and conduct a disqualification hearing, since the attorney does not have an appearance in the file and did not participate in anything on the record?

- (3) In the absence of a motion filed by a party, may the Judicial Official “sua sponte” ask another judge to conduct a disqualification hearing and what, if anything, is the Judicial Official permitted to tell the other judge so that they may prepare for the disqualification hearing? Does the Judicial Official have to give specific details concerning the allegations in the complaint?
- (4) If the Judicial Official refers the matter to another judge for a disqualification hearing pursuant to Practice Book Section 1-22 (b) and that judge determines that disqualification is warranted, can that finding be used as a basis to disqualify the Judicial Official from all pending cases involving this attorney? If the judge finds disqualification is *not* warranted, can that be relied on in future cases without the need to repeat a disqualification hearing each time (after making the appropriate disclosure on the record)?

Relevant Code, Practice Book, and Statutory Provisions: Rule 2.11 (Disqualification) of the Code of Judicial Conduct, Practice Book § 1-22 (Disqualification of Judicial Authority), Practice Book § 4-8 (Notice of Complaint or Action Filed Against Judicial Authority), Practice Book § 3-7 (Consequences of Filing Appearance) and Conn. Gen. Stat. § 51-51/ (Investigation of conduct of judge, administrative law judge or family support magistrate)

Rule 2.11 (e) states that a judge “is not automatically disqualified from sitting on a proceeding merely because a lawyer or party to the proceeding has filed a lawsuit against the judge or filed a complaint against the judge with the Judicial Review Council or an administrative agency. When the judge becomes aware pursuant to Practice Book Section 1-22 (b) or 4-8 or otherwise that such a lawsuit or complaint has been filed against him or her, the judge shall, on the record, disclose that fact to the lawyers and parties to the proceeding before such judge, and the judge shall thereafter proceed in accordance with Practice Book Section 1-22 (b).”

Comment (3) to Rule 2.11 states that “[t]he rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

Practice Book § 1-22 (a) states, in relevant part, that “[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct...”

Practice Book § 1-22 (b) states that a judicial authority “is not automatically disqualified from sitting on a proceeding merely because an attorney or party to the proceeding has filed a lawsuit against the judicial authority or filed a complaint against the judicial authority with the Judicial Review Council or an administrative agency. When such an attorney or party appears before the judicial authority, he or she shall so advise the judicial authority and other attorneys and parties to the proceeding on the record, and, thereafter, the judicial authority shall either

disqualify himself or herself from sitting on the proceeding, conduct a hearing on the disqualification issue before deciding whether to disqualify himself or herself or refer the disqualification issue to another judicial authority for a hearing and decision.”

Practice Book § 4-8 states, in relevant part that “[an] attorney or party who has filed a complaint with the Judicial Review Council...against any judicial authority..., shall give notice of the filing of such complaint... to the judicial authority and to all other attorneys and parties of record in any matter pending before the judicial authority or, if the attorney or party has no matter pending before the judicial authority, shall mail such notice by certified mail, return receipt requested or with electronic delivery confirmation, to the judicial authority at the location at which such judicial authority is assigned.”

Practice Book § 3.7 states:

- (a) Except by leave of the judicial authority, no attorney shall be permitted to appear in court or to be heard on behalf of a party until the attorney’s appearance has been entered. No attorney shall be entitled to confer with the prosecuting authority as counsel for the defendant in a criminal case until the attorney’s appearance has been so entered.
- (b) After the filing of an appearance, the attorney or self-represented party shall receive copies of all notices required to be given to parties by statute or by these rules.
- (c) The filing of an appearance by itself shall not waive the right to attack defects in jurisdiction or any claimed violation of constitutional rights.

Conn. Gen. Stat. § 51-51i states, in relevant part:

- (a) Except as provided in subsection (d) of this section, the Judicial Review Council shall investigate every written complaint brought before it alleging conduct under section 51-51i, and may initiate an investigation of any judge, administrative law judge or family support magistrate if (1) the council has reason to believe conduct under section 51-51i has occurred or (2) previous complaints indicate a pattern of behavior which would lead to a reasonable belief that conduct under section 51-51i has occurred. The council shall, not later than five days after such initiation of an investigation or receipt of such complaint, notify by registered or certified mail any judge, administrative law judge or family support magistrate under investigation or against whom such complaint is filed. A copy of any such complaint shall accompany such notice.... Any investigation to determine whether or not there is probable cause that conduct under section 51-51i has occurred shall be confidential and any individual called by the council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council on whether probable cause exists, unless the respondent requests that such investigation and disclosure be open, provided information known or obtained independently of any such investigation shall not be confidential....

Discussion: Pursuant to Practice Book § 1-22, a judge should disqualify themselves from acting in a matter if it is required by Rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that “[a] judge shall disqualify himself or herself ... in any proceeding in which the judge’s impartiality might reasonably be questioned ...” It includes a circumstance in which “[t]he judge has a personal bias or prejudice concerning a party ...” or “[t]he judge has made a public statement other than in a court proceeding, judicial decision, or opinion that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” Code of Judicial Conduct 2.11 (a) (1) and (4). Moreover, Rule 2.11 (e) specifically provides that “[a] judge is not automatically disqualified from sitting on a proceeding merely because a lawyer or party to the proceeding has filed a lawsuit against the judge or filed a complaint against the judge with the judicial review council.” Code of Judicial Conduct 2.11 (e). Rather, when a judge becomes aware that a lawsuit or complaint has been filed against him or her, “... the judicial authority shall either disqualify himself or herself from sitting on the proceeding, conduct a hearing on the disqualification issue before deciding whether to disqualify himself or herself or refer the disqualification issue to another judicial authority for a hearing or decision.” See *Tierini v. Noonan*, No. TTDCV185010679S, 2019 WL 3219510 (Conn. Super. Ct. June 18, 2019)

In applying Rule 2.11, “[t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge’s impartiality on the basis of all the circumstances. ... Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. ... Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially ... the burden rests with the party urging disqualification to show that it is warranted.” (Internal quotation marks omitted.) *State v. Milner*, 325 Conn. 1 at 12, 155 A.3d 730 (2017).

The question whether a judge must be disqualified from sitting on a proceeding merely because a lawyer to the proceeding has filed a complaint against the judge with the JRC is governed by subsection (e) of Rule 2.11. Section (e) of Rule 2.11 states that “[a] judge is *not automatically disqualified* from sitting on a proceeding merely because a lawyer or a party to the proceeding has filed a lawsuit against the judge or filed a complaint against the judge with the Judicial Review Council.” (Emphasis added.) The court in *Tierini*, supra, determined that the party’s contention of bias due to prior complaints filed against the judge with the JRC, were “mere speculation and conjecture divorced from any factual predicate or partiality.” See also *Tracey v. Tracey*, 97 Conn. App. 278, 286, 903 A.2d 679 (2006),

This Committee has previously considered whether a Judicial Official should recuse themselves following the disposition of a complaint filed with the JRC against the judge. In [JE 2009-03](#), the Committee stated that:

Following the disposition of the complaint, the Judicial Official should be guided by Canon 3(c)(3) [now Rule 2.11], which provides that a judge is not automatically disqualified from sitting on a proceeding merely because a lawyer to the proceeding

has filed a lawsuit against the judge or filed a complaint with the judicial review council. In such instances, the judge is required to disclose on the record that fact to the lawyers and parties to the proceeding before the judge. In addition, the Judicial Official should be guided by the principle enunciated in *Consiglio v. Consiglio*, 48 Conn. App. 654 (1998) that “[t]he matter of a judge’s recusal is in the reasonable discretion of that judge.... The decision to recuse oneself is an intrinsic part of the independence of a judge.” *Id.* at 561-562.

Recommendations:

Question (1): *May the Judicial Official, after conducting a hearing on the disqualification issue pursuant to Practice Book Section 1-22 (b), decide not to disqualify themselves from sitting on the proceeding on grounds that the Judicial Official has no personal bias or prejudice concerning the attorney who filed the complaint and that the referral (and future referrals) would cause the other judge(s) assigned to the same court an undue burden?*

After the Judicial Official conducts a disqualification hearing, reviews the disqualification requirements set forth in Rule 2.11, determines that there is no evidence of bias or prejudice, and concludes that they can be fair and impartial, the Judicial Official may decide *not* to disqualify. Unless the rule of necessity¹ applies, the fact that a disqualification may cause an undue burden on other judges should not be a factor in the Judicial Official’s consideration. (See Comment (3) to Rule 2.11).

The language of subsection (e) of Rule 2.11, stating that disqualification is not automatic, indicates that there is no presumption that judges have an inherent bias or prejudice against lawyers or litigants who file lawsuits or complaints against a judge. Therefore, the Judicial Official’s determination that recusal is unwarranted is within the reasonable discretion of that judge and an intrinsic part of the independence of a judge.

Question (2): *May the Judicial Official rule on any post-judgment motions in the case in which the attorney participated as second chair without having to disclose and conduct a disqualification hearing, since the attorney does not have an appearance in the file and did not participate in anything on the record?*

A review of the plain language of subsection (e) of Rule 2.11 indicates that judges are not automatically disqualified from sitting on a proceeding merely because a lawyer or party “to the proceeding” has filed a lawsuit or complaint against the judge. The question we must now address is whether a non-appearing attorney, who participated as second chair, qualifies as a lawyer “to the proceeding” under this rule.

In *Jones v. Ippoliti*, 52 Conn. App. 199 (1999), the Appellate Court considered whether a law firm functioned as an attorney in the underlying case. At the outset, the Appellate Court noted that the law firm did not enter an appearance on behalf of the plaintiffs in this matter. The court wrote that “[e]xcept by leave of the judicial authority, no attorney shall be permitted to

¹ A legal principle known as “the rule of necessity” may require the judge to hear a case and render a decision. Under the rule of necessity, it is more important for a judge to decide a case—even when burdened with a conflict of interest—than to leave litigating parties in limbo by failing to render a decision. Judges in that situation must set aside all personal interest and rule with complete neutrality.

appear in court or to be heard on behalf of a party until the attorney's appearance has been entered....' Practice Book § 3-7(a)." *Jones v. Ippoliti*, supra at 211-12. Because [the law firm] did not enter an appearance on behalf of the plaintiffs, even though the law firm assisted trial counsel, the Appellate Court held that the firm did not represent the plaintiffs in this action.

Based on the foregoing, including that the attorney's participation in the case was limited to attending an in-chambers discussion and a half day in court and did not involve anything on the record, it is the Committee's opinion that the Judicial Official may rule on any post-judgment motions in the case in which the attorney participated as second chair without having to disclose and conduct a disqualification hearing because the attorney never filed an appearance in the case. The Committee cautions that in situations where a non-appearing attorney's involvement in a case is substantial, the Judicial Official should consider whether a reasonable person would question the judge's impartiality on the basis of all the circumstances.

Question (3): *In the absence of a motion filed by a party, may the Judicial Official "sua sponte" ask another judge to conduct a disqualification hearing and what, if anything, is the Judicial Official permitted to tell the other judge so that they may prepare for the disqualification hearing? Does the Judicial Official have to give specific details concerning the allegations in the complaint?*

The procedures for disqualifications under Rule 2.11 (e) are set forth in Practice Book § 1-22 (b). Under the rule, when a judicial authority becomes aware that a complaint has been filed against them, the judicial authority, after providing notice to all attorneys and parties to the proceeding *on the record*, has three options. The judicial authority shall either: (1) disqualify himself or herself from sitting on the proceeding, (2) conduct a hearing on the disqualification issue before deciding whether to disqualify himself or herself or (3) refer the disqualification issue to another judicial authority for a hearing and decision. Additionally, Practice Book § 1-22 (a) allows judges to *disqualify* themselves upon their own motion (i.e., "sua sponte"). However, subsection (a) of this rule does not seem to permit "sua sponte" referrals on the disqualification issue without first giving all attorneys and parties adequate prior notice. The Committee finds, based on the language of the Practice Book rule, that judges may "sua sponte" disqualify themselves, but may not "sua sponte" refer the disqualification matter to another judge without first providing the required on-the-record notice to lawyers and parties.

As to the question concerning how much information the Judicial Official should share about the allegations in the complaint, it is important to note that complaints and proceedings of the Judicial Review Council are confidential until the council makes a finding of probable cause. Thereafter, proceedings and findings are made public. The statutory confidentiality requirements are set forth in Conn. Gen. Stat. §51-51/ (a) which states, in relevant part:

Any investigation to determine whether or not there is probable cause that conduct under section 51-51i has occurred shall be confidential and any individual called by the council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council on whether probable cause exists, unless the respondent requests that such investigation and disclosure be open, provided information known or obtained independently of any such investigation shall not be confidential.

Before the JRC enters a finding of probable cause, the allegations in the complaint are confidential by statute, unless waived by the respondent. The Committee concludes that the Judicial Official is *not required* under the Code or the rules of practice to share specific details concerning the allegations in the complaint. The burden rests with the party urging disqualification to show that it is warranted. As such, the Judicial Official should not share any information with the judge conducting the hearing. In fact, disclosing any information to the judge may be viewed as an ex parte communication.

Question (4): *If the Judicial Official refers the matter to another judge for a disqualification hearing pursuant to Practice Book Section 1-22 (b) and that judge determines that disqualification is warranted, can that finding be used as a basis to disqualify the Judicial Official from all pending cases involving this attorney? If the judge finds disqualification is not warranted, can that be relied on in future cases without the need to repeat a disqualification hearing each time (after making the appropriate disclosure on the record)?*

The answers to Question (4) should be guided by the procedures set forth in Practice Book § 1-22 (b). If the matter is referred to another judge for a disqualification hearing and that judge determines that disqualification *is warranted* because it directly involved bias or prejudice *against the attorney*, the Committee finds that, under Practice Book § 1-22 (b), the judge's finding may be used as a basis to disqualify the Judicial Official from all pending cases involving this attorney provided the Judicial Official makes the appropriate disclosure on the record. In contrast, if the disqualification was based on some other reason under Rule 2.11, such as the Judicial Official was found to have a personal bias or prejudice concerning a party, the Judicial Official should not rely on the finding as a basis to disqualify in future cases.

If the other judge concludes that disqualification is *not warranted*, it is the Committee's opinion that the judge's finding cannot be relied on in future cases involving the attorney who reported the Judicial Official to the JRC because additional attorneys and parties involved in future cases would be precluded from participating in the disqualification proceeding available to them under Practice Book 1-22 (b).