

NOTICE TO THE BAR

PROPOSED AMENDMENTS TO RULE 3.17 ("DISQUALIFICATION") OF THE CODE OF JUDICIAL CONDUCT – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on amendments to Rule 3.17 ("Disqualification") of the Code of Judicial Conduct, as originally proposed by the Advisory Committee on Judicial Conduct and as revised by the Court. Rule 3.17 falls under Canon 3 ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"). The proposed amendments are attached.

Please send any comments on the proposed amendments in writing by November 29, 2019 to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Amendments to Code of Judicial
Conduct Rule 3.17 ("Disqualification")
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by email to: Comments.Mailbox@njcourts.gov.

While Code of Conduct Rule 3.17(B)(4) presently provides for a mandatory seven-year disqualification period in matters involving a jurist's former private client or former law firm, the proposed amendments would extend that same disqualification for a minimum of three years to law firms that previously represented the jurist or the jurist's spouse, civil union partner, or domestic partner. Under certain circumstances a disqualification of longer than three years may be required in accordance with specified factors. The proposed amendments are intended to provide clear direction regarding an area not currently addressed by the Code of Judicial Conduct.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by email should include their name and email address. Comments submitted in response to this notice are subject to public disclosure.



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: October 28, 2019

RULE 3.17 Disqualification

(A) Judges shall hear and decide all assigned matters unless disqualification is required by this rule or other law.

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

(1) Personal bias, prejudice or knowledge. Judges shall disqualify themselves if they have a personal bias or prejudice toward a party or a party's lawyer or have personal knowledge of disputed evidentiary facts involved in the proceeding.

(2) Financial interest. Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation. Subject to subparagraphs (i), (ii), (iii), and (iv) hereof, a financial interest means ownership of a legal or equitable interest, however small, or a relationship as director or advisor or other participation in the affairs of a party.

(a) Financial interest does not include:

(i) ownership of an interest in securities held by a mutual fund or common investment fund, or ownership of securities held in managed funds, provided, in respect of managed funds, that no investment discretion has been retained by the judge or the judge's spouse, civil union partner, or domestic partner;

(ii) ownership in securities held by an educational, religious, charitable, fraternal or civic organization in which the judge holds an office;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision;

(iv) ownership of an interest in government securities unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision.

(3) Personal Relationships. Judges shall disqualify themselves if:

(a) the judge or the judge's spouse, civil union partner, or domestic partner, and a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative, or to the judge's knowledge, a second cousin or related relative to either of them, as defined below, or the spouse, civil union partner, or domestic partner of such relative, is a party to the proceeding or is likely to be called as a witness in the proceeding.

(b) the judge or the judge's spouse, civil union partner, or domestic partner, and a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative, is a lawyer for a party.

(c) the judge or the judge's spouse, civil union partner, or domestic partner, or any member of the judge's family residing in the judge's household has an interest in the litigation, including among other things, a financial interest in an enterprise related to the litigation.

(d) the judge has a social relationship with a party or the lawyer for a party of a nature that would give rise to partiality or the appearance of partiality.

(4) Prior Professional Relationships. Judges shall disqualify themselves based on their prior professional relationships as follows:

(a) In proceedings in which the judge served as a lawyer in the matter in controversy or in which the judge has been a witness or may be called as a witness;

(b) In proceedings in which a party was a former private client for whose matter the judge had primary responsibility, for a period of seven years from the conclusion of the representation. However, disqualification for a period of time in excess of seven years from the conclusion of the representation may be required. In making such a determination, a judge should consider, among other relevant factors: (1) the scope of the representation, including but not limited to the cumulative total of matters handled by the judge, whether a continuous fiduciary relationship existed with the client over an extended period of time, and the time that elapsed from the conclusion of the representation; (2) the duration of the representation; (3) the nature of the representation, including but not limited to whether it involved [the] acrimonious negotiations or litigation, or whether [nature of the underlying litigation, and] any information relayed during the representation [acquired about the client as a consequence of the representation that] could cast doubt on the judge's impartiality; (4) any other serious concern arising from the representation that could cast doubt on the judge's impartiality; and (5) [(4)] in respect of a corporate client, whether the principals of the entity are the same as existed during the representation.

For purposes of this rule, an insurance company that had retained the judge to defend its insureds in tort actions shall not be considered a former client of the judge.

(c) In proceedings in which a law firm involved in the matter previously represented the judge, the judge's spouse, civil union partner or domestic partner, for a period of three years from the conclusion of the representation. Disqualification, however, for a period in excess of three years from the conclusion of the representation may be required in certain circumstances. In making this determination, a judge should consider, among other relevant factors: (1) whether the judge, the judge's spouse, civil union partner or domestic partner maintains a professional relationship with the law firm; (2) the scope and duration of the representation; and (3) the nature of the representation, including but not limited to whether it involved acrimonious negotiations or litigation, or whether any

information relayed during the representation could cast doubt on the judge's impartiality; and (4) any other serious concern arising from the representation that could cast doubt on the judge's impartiality.

(d) [(c)] In proceedings in which a party is a governmental entity that previously employed the judge:

(i) for a period of two years following judicial appointment if the judge was employed as a state government attorney, county prosecutor or assistant county prosecutor, provided, however, that prior employment as state government attorneys with broad supervisory authority shall not disqualify judges who had no actual involvement in the matter while in government service;

(ii) for a period of five years following judicial appointment if the judge represented a local government entity;

(e) [(d)] In proceedings in which the judge's former law firm is involved, for a period of at least seven years following termination of the relationship or until all financial obligations from the law firm to the judge are satisfied, whichever is longer;

(f) [(e)] In proceedings in which the judge's former law clerk is appearing or has signed papers, for a period of six months following the termination of the clerkship.

(5) Post-Retirement Employment. Judges shall disqualify themselves if the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney or law firm;

(6) Irrespective of the time periods specified in this rule, judges shall disqualify themselves whenever the nature of the relationship to a party or a lawyer, because of a continuing social relationship or otherwise, would give rise to partiality or the appearance of partiality.

(C) A disqualification required by this rule is not subject to the parties' waiver. The judge shall, however, disclose to the parties any circumstance not deemed by the judge to require disqualification but which might be regarded by the parties as affecting the judge's impartiality.

(D) A judge shall address disqualification or issues of recusal and disqualification promptly upon recognition of grounds which would give rise to partiality or the appearance of partiality.

(E) A judge shall not be automatically disqualified upon learning that a complaint has been filed against the judge with the Advisory Committee on Judicial Conduct, litigation naming the judge as a party, or any other complaint about the judge by a party. If, however, after consideration by the judge whether there is a reasonable basis to question the court's impartiality, the judge may recuse himself or herself. A judge shall promptly disclose to the parties to the pending litigation that a complaint has been filed or made.

OFFICIAL COMMENTS [COMMENT]:

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity and impartiality of the judiciary, unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial or unpopular issues.

[2] In determining whether disqualification is necessary, the applicable standard is as follows: Would a reasonable, fully informed person have doubts about the judge's impartiality. DeNike v. Cupo, 196 N.J. 502.

[3] For purposes of this rule, as with New Jersey Court Rule 1:12-1, a "first cousin or more closely related relative" includes first cousin, aunt or uncle, niece or nephew, grandparent, grandchild, child, parent, or sibling.

A "second cousin or related relative" includes a second cousin, great aunt or uncle, first cousin once removed (e.g., a first cousin's child or a great aunt or uncle's child), great grandparent, or grandniece or grandnephew, or great grandchild.

Judges shall keep informed about their personal and fiduciary interests and make reasonable efforts to keep informed about the personal financial interests of their spouse, civil union partner, or domestic partner, and family members residing in the judge's household.

"Knowledge" means actual knowledge of the fact in question. However, knowledge may be inferred from the circumstances.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (B), or the lawyer-relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (B)(3)(c), the judge's disqualification is required.

In making such a determination, a judge should consider, among other relevant factors: (1) the degree of relationship between the judge and the relative affiliated with the firm (e.g., sister, nephew, nephew's spouse); (2) the closeness of the relationship between the judge and the relative; (3) whether the relative's affiliation with the firm was known to the judge without counsel making the court aware of such affiliation; (4) the size of the law firm the relative is affiliated with; (5) the relative's role in the law firm (e.g., owner or equity interest holder, associate, intern); (6) the relative's relationship, if any, to the lawyer in the proceeding; (7) whether the law firm represents a named party to the action, as opposed to an entity proceeding (or seeking to proceed) as *amicus curiae*; (8) the timing of the law firm's commencement of

participation in the proceeding; (9) whether the law firm is providing its services *pro bono*, if such arrangement is known by the judge; and (10) the nature of the proceedings.

Note that this comment addresses only whether a lawyer-relative renders the judge disqualified from hearing all matters involving the law firm with which the relative is affiliated. Nothing in this comment should be read to permit a judge to hear proceedings in which a lawyer in the case is related (as first cousin or closer) to the judge or the judge's spouse, civil union partner or domestic partner.

[5] In evaluating whether a judge should be disqualified from proceedings in which a party was a former private client of the judge for a period of time in excess of seven years from the conclusion of the representation, judges should be guided by DeNike v. Cupo, 196 N.J. 502.

[6] A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this rule; judges formerly employed by governmental agencies, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of the association.

[7] With regard to Rule 3.17(B)(4)(c)(ii), a municipal court judge who was a former municipal prosecutor in the same municipality may preside over local ordinance violations.

[8] A judge may not initiate contact about or discuss or negotiate his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially. A matter pending before the judge includes any matter or aspect of a matter which has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order. If the subject is raised in any fashion, the judge must put a halt to the discussion or negotiation at once, rebuff any offer, and disclose what occurred on the record in the presence of all parties and counsel. The judge, all parties and attorneys on the record should then evaluate objectively whether any further relief is needed.

A judge who engages in post-retirement employment negotiations or discussions while still on the bench with any party, attorney or law firm that does not have a matter pending before the judge, must do so in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts. A judge should delay starting any such negotiations or discussions until shortly before his or her planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers. A judge should also inform the Appellate Division Presiding Judge for Administration or Deputy Presiding Judge for Administration, his or her Assignment Judge, or the Tax Court Presiding Judge about the post-retirement employment negotiations or discussions to the extent that such negotiations or discussions will interfere with the judge's regular assignments.

A judge should not initiate contact about or discuss or negotiate his or her post-retirement employment with a party, attorney or law firm that has in the past appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the

case cannot reasonably be questioned. What is reasonable depends on the circumstances. For instance, it may be that an uncontested matter resolved swiftly by entry of a default judgment would not call for a lengthy interval of time. Prolonged or particularly acrimonious litigation may caution in favor of a longer delay. Actions likely to result in continuing post-judgment matters would also warrant a lengthier intervening period of time.

[9] The 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, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. 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.

[10] The provision in Rule 3.17(C) is designed to avoid the possibility that a party or lawyer will feel coerced into consent.

Note: Adopted as part of the revised Code of Judicial Conduct August 2, 2016 to be effective September 1, 2016; subparagraph (B)(4)(b) amended, subparagraph (B)(4)(c) redesignated as subparagraph (B)(4)(d), new subparagraph (B)(4)(c) adopted, and subparagraphs (B)(4)(d) and (B)(4)(e) redesignated as subparagraphs (B)(4)(e) and (B)(4)(f) _____, 2019 to be effective immediately.