

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION 2019-2**

ISSUES

Is recusal necessary when a judge, who periodically presides in actions in which Company A is appointed as guardian, acquires personal knowledge of facts that may be in dispute in a matter.

FACTS

A judge presided over the initial stages of a civil suit in which Company A was a defendant. In the course of this work, the judge learned that some people associated with Company A had been convicted of fraud in federal court. The judge was familiar with Company A because the judge had presided over guardianship actions in which appointment of Company A was sought. The judge had also reviewed guardianship cases in which Company A had filed affidavits that did not disclose information about prior criminal activity by a person still associated with Company A, even though referencing that person in the affidavit. The judge made inquiries outside of the scope of the pleadings in the civil case, including research of the law, policies, rules, forms, standards pertaining to guardianships and requirements for guardianship certification. After making these inquiries, the judge recused from the civil suit. The judge then sought more information about Company A and what disclosures it had made in the guardianship cases in which it had been involved. The judge discussed her concerns about Company A with others serving in the court system, including a Guardianship Standards Workgroup member. Given that additional guardianship actions continue to be brought where appointment or retention of Company A is sought, the judge requests an opinion on whether the judge's recusal from these continuing actions is necessary.

ANALYSIS

Canon 2, Rule 2.11(A)(1) states:

A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned including the following circumstances:

- (1) The judge has 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.

Personal knowledge is not defined. In State v. Dorsey, 701 N.W.2d 238 (Minn. 2005), the Minnesota Supreme Court determined that it is a narrow prohibition.

[T]he word "personal" should be interpreted according to its common usage. "Personal" is primarily defined as "of, relating to, or affecting a person," and is regarded as synonymous with "private." Webster's Ninth New Collegiate

Dictionary 877 (1987). “Private,” in turn, is defined as “restricted to the individual or arising independently of others.” *Id.* at 936. For the purposes of Canon 3D(1)(a), “personal knowledge” pertains to knowledge that arises out of a judge’s private, individual connection to particular facts. We conclude that it does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen.

A judge is presumed to be unbiased and not prejudiced. State v. Jacobson, 2008 ND 73, ¶ 13, 747 N.W.2d 481. “A judge’s disqualification decision is directed by the North Dakota Code of Judicial Conduct.” *Id.* at ¶ 7 (citing Sargent County Bank v. Wentworth, 500 N.W.2d 862, 877 (N.D. 1993)). When a judge’s impartiality could be reasonably questioned, a judge must disqualify himself or herself. *Id.* (citing N.D. Code Jud. Conduct Canon 3(E)(1) (Rule 2.11 in the current Code of Judicial Conduct is largely a restatement of prior Canon 3(E))). The North Dakota Supreme Court has stated the test as follows:

An objective standard is used to determine whether a judge must recuse himself. Brakke, 512 N.W.2d at 721. “[T]he judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge’s impartiality.” *Id.* “Even without intentional bias, disqualification can be essential to satisfy the appearance of justice.” Wentworth, 500 N.W.2d at 877-78.

Jacobson, 2008 ND at ¶ 7. The list in Rule 2.11(A) is not exhaustive and disqualification is required if a judge’s impartiality “might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.” Rule 2.11, cmt. 1.

In this matter, the judge learned information about Company A beyond that existing in the case record. Because the judge thus obtained personal knowledge of facts that may be in dispute in guardianship proceedings involving Company A, the judge’s impartiality in those proceedings may reasonably be questioned.

CONCLUSION

The Committee is of the opinion that the judge must recuse from guardianship matters involving Company A because the judge’s impartiality regarding Company A may reasonably be questioned.