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Can We Still Be Friends? Judicial Disclosure and Recusal in Lawyer Friendship Cases

by Keith A. Call

I wonder if any Utah judges can relate to these sentiments:

> "Before becoming a judge, I had no idea or warning, of how isolating it would be."
>
> "Except with very close, old friends, you cannot relax socially."
>
> "Judging is the most isolating and lonely of callings."
>
> "The isolation is gradual. Most of your friends are lawyers, and you can't carry on with them as before."

Isaiah M. Zimmerman, *Isolation in the Judicial Career*, 36 Ct. Rev. 4, 4 (2000).

Based on my experience practicing in other jurisdictions, Utah has an extremely collegial bar. We frequently see this collegiality extend to lawyer-judge relations at bar functions, in the community, and even in the courtroom.

When do lawyer-judge friendships have to be disclosed to the parties, when do they require recusal, and when can they be waived? Rule 2.11 of the Utah Code of Judicial Conduct and a recent ABA ethics opinion touch upon these issues.

Rule 2.11

The rule applicable to lawyer-judge friendships is Utah Code of Judicial Conduct Rule 2.11. It provides:

> 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: 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. . . .

Utah Code Jud. Conduct R. 2.11(A)(1). This rule, which models the ABA model rule, is general and vague. It gives little guidance. It relies on a judge's individual (and private) sense of "personal bias or prejudice."

ABA Formal Opinion 488

The ABA recently issued a formal ethics opinion that sheds some limited additional light on the subject. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488 (Sept. 5, 2019) (Opinion 488). Opinion 488 attempts to provide guidance to judges on when they must disclose a personal relationship and when they must recuse.

Opinion 488 starts by emphasizing that judges should not only avoid bias and partiality but also even the appearance of impropriety. "If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself form the proceeding." *Id*. at 2. This is measured objectively and depends on the facts of the case. Disqualification should be the exception rather than the rule, and judges should avoid disqualifying themselves too quickly, lest litigants be encouraged to use disqualification motions as a means to judge-shop. *See id*.

Opinion 488 also recognizes that a variety of changing factors can affect interpersonal relationships. For example, "in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and

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parties that are unavoidable." *Id*. The opinion acknowledges that relationships vary widely, can change over time, and are unique to the people involved. *See id*.

Opinion 488 categorizes a judge's personal relationships into three categories: (1) acquaintances, (2) friendships, and (3) close personal relationships; and evaluates each category separately.

An "acquaintance" exists when the judge's and lawyer's "interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship." *Id*. at 4. This includes attendance at bar association or other professional meetings, past representation of co-parties in litigation, meeting each other at school events involving children or spouses, neighborhood or homeowner's association events and meetings, and attendance at the same religious services. *See id*. In an "acquaintance," neither the judge nor the lawyer generally seeks contact, but they greet each other amicably when their lives intersect. *See id*. Standing alone, a judge's acquaintance with a lawyer is not a reasonable basis to question impartiality, and a judge has no obligation to disclose it. *See id*.

A "friendship" implies some degree of affinity greater than an acquaintance, but the opinion's attempted definition remains nebulous. "Some friends are closer than others," the opinion astutely acknowledges. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488, at 4 (Sept. 5, 2019). The opinion discusses a judge and lawyer who may have practiced law together, may periodically meet for a meal, and may have been classmates and stay in touch through occasional calls or correspondence. *See id*. In closer friendships, the judge and lawyer may exchange gifts on holidays, regularly socialize together, coordinate activities with their families, or share a mentor-protégé relationship. *See id*. at 5–6. A judge should disclose information about friendships "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." *Id*. at 6. If a party then objects, the judge has discretion to continue to preside over the matter or to disqualify himself or herself. *See id*.

Finally, a "close personal relationship" goes beyond common concepts of friendship. For example, a judge may be romantically involved with a lawyer, may be divorced but remain amicable or share custody of children, or may be the godparent of the lawyer's or party's child or vice versa. *See id*. A judge must recuse himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding or desires to pursue such a relationship. *See id*. A judge should disclose other intimate or close personal relationships even if the judge thinks he or she can be impartial. *See id*. If a party objects, the judge has discretion to either continue to preside over the proceeding or to disqualify himself or herself. *See id*.

Even when a judge might be subject to disqualification, waiver is still possible. Utah Code of Judicial Conduct Rule 2.11 explains how trial court and appellate court judges can make proper disclosures on the record and ask the parties to consider waiver *outside the presence of the judge and court personnel*. *See* Utah Code Jud. Conduct R. 2.11(C)–(D). Any waiver must be incorporated into the record of the proceeding. *See id*. Judges should read these rules to remind themselves of the particulars before inviting any waiver.

Conclusion

Quoting a Seventh Circuit case, Opinion 488 states:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend – even a close friend – appears as a lawyer.

ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 19-488, at 5 (Sept. 5, 2019) (quoting *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985)).

Opinion 488, while not binding on the Utah judiciary, will hopefully provide useful guidance to judges and lawyers in understanding when it is appropriate or necessary to disclose personal relationships or even recuse oneself from a case.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.