

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Louis D. Brandeis

RULE 2.11

Disqualification

(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:

(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.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.

(4) The judge knows or learns that a party, a party's lawyer, or the law firm of a party's lawyer has made a direct or indirect contribution(s) to the judge's campaign in an amount that would raise a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the party, the party's lawyer, or the law firm of the party's lawyer. In doing so, the judge should consider the public perception regarding such contributions and their effect on the judge's ability to be fair and impartial. There shall be a rebuttable presumption that recusal or disqualification is not warranted when a contribution or reimbursement for transportation, lodging, hospitality or other expenses is equal to or less than the amount required to be reported as a gift on a judge's Statement of Financial Interest.

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; or

(c) was a material witness concerning the matter.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic

interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT:

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] 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.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] 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.

GEORGE BARNES

Appellant

v.

WARREN G. KELLER

v.

WESTFIELD GROUP a/k/a, d/b/a, t/a
WESTFIELD INSURANCE COMPANY

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2459 EDA 2011

Appeal from the Order Entered August 1, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 03918 May Term, 2010

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

CONCURRING OPINION BY LAZARUS, J.

I fully join in the majority's decision to reverse the trial court's order granting Appellee summary judgment and to remand this case on the basis that a reasonable person could conclude that Appellant was vehicle-oriented when he was struck and injured by an unidentified driver. I write separately, however, to express my disapproval of the trial judge's failure to disclose his wife's employment with the defense law firm prior to the decision on the motion for summary judgment. Not only did the trial judge err on the law as applied to the facts of this case, but he failed in his

* Retired Senior Judge assigned to the Superior Court.

professional responsibility as set forth in the Code of Judicial Conduct and, as a result, prejudiced the litigants.

Here, Judge Tereshko failed to disclose in open court to the parties that his wife had been an attorney at the law firm, Post & Schell, which represents the defendant insurance company and was so employed when this motion was filed. In his Memorandum of Law in Support of his Motion to Reconsider, Reverse and Recuse, Plaintiff states:

After receipt of this court's order filed August 1, 2011 (order granting summary judgment), Plaintiff's counsel, in the course of determining to file a Notice of Appeal, learned that Judge Tereshko's spouse is an attorney for the law firm representing Defendant.

Canon 3A(1) of the Code of Judicial Conduct provides in part:

Judges should be faithful to the law and maintain professional competence in it. They should be unswayed by partisan interests, public clamor, or fear of criticism.

Code of Judicial Conduct, Canon 3A(1). Moreover, Canon 3C of the Code provides in part: "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." Code of Judicial Conduct, Canon 3C(1)(d)(iii).

Canon 3C, like the whole of the Code of Judicial Conduct, does not have the force of substantive law, but imposes standards of conduct upon

the judiciary to be referred to by a judge in his self-assessment of whether he should volunteer to recuse from a matter pending before him. **Reilly v. SEPTA**, 489 A.2d 1291 (Pa. 1985), *overruled on other grounds as stated in, Gallagher v. Harleysville Mut. Ins. Co*, 617 A.2d 790 (Pa. Super. 1992).

Judge Tereshko states that in addition to the recusal issue having no merit, it is also waived because plaintiff did not raise it until after summary judgment was granted. However, as the plaintiff correctly states, he did not become aware of the judge's wife's connection to defendant's law firm *until after judgment was entered* and then only by happenstance. Had the judge at the outset of the matter properly disclosed the potential conflict, the parties would have been aware of it before entry of summary judgment and could have raised it in a timely fashion. Where the court has a duty to disclose, the failure of the party to raise the issue cannot constitute waiver.

Although 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 of itself* disqualify the judge under Canon 3C, **see Note** to Canon 3C(1) (emphasis added), it was Judge Tereshko's affirmative duty to disclose the fact that his wife works as an attorney for the defense firm so that the parties could then investigate the matter and decide whether further action (i.e., a motion for recusal) was warranted. **See Reilly, supra** (when circumstances during trial raise questions of trial judge's bias or impartiality, it is duty of party to allege by petition the bias, prejudice or unfairness necessitating recusal).

Although recusal may not be *mandated* in cases such as this one, the objective standard is whether a reasonable *minority* of litigants appearing before the tribunal would believe that the judge could be fair and impartial. In fact, Canon 3C sets forth an objective standard regarding recusal: no matter how the judge himself feels, if his impartiality might reasonably be questioned, recusal is required. The question, therefore, is not how the judge appraises the situation but how a detached observer, the common law's "reasonable man," would appraise it.¹ The party claiming that the judge should have recused himself is therefore under no obligation to show any actual prejudice -- that is, that subjectively, or in fact, the judge was not impartial; it is enough to show that a reasonable observer might have questioned the judge's impartiality.

¹ In the recent decision, ***Perry v. Brown***, No. 10-99016, 2012 U.S. App. LEXIS 20344 (9th Cir. Sept. 28, 2012), the United States Court of Appeals for the Ninth Circuit reiterated the proper recusal standard for determining whether a judge's "impartiality might be *reasonably* questioned" as follows:

[We] ask whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. . . . The "reasonable person" is not someone who is hypersensitive or unduly suspicious, but rather is a well-informed, thoughtful observer. The standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.

Id. at *4-5 (citing ***United States v. Holland***, 519 F.3d 909, 913 (9th Cir. 2008)).

Here, Judge Tereshko's conclusion, based on his personal knowledge that his wife had no financial interest in the matter, is nothing short of *post hoc* reasoning and highlights the difficulty which results from a tribunal's lack of disclosure. As a result of his actions, I believe that the following two significant ethical issues are raised: (1) doubt regarding the trial court's transparency; and (2) the lack of recourse for the aggrieved party to test the conclusion of no partiality or bias by discovery, should he so desire.

Where a court has specific knowledge of a private matter or situation in which his or her impartiality may reasonably be questioned, it is his duty to disclose that information to the parties. Because Judge Tereshko's actions prejudiced the parties, I would not only join the majority in noting my disapproval, but vacate the trial court's entry of summary judgment and remand the matter to allow the plaintiff to create a record for a full hearing on his recusal motion.²

² Although I would be inclined to recommend assignment of a new trial judge to the case upon remand, I am well aware of our Supreme Court's prohibition of such a procedure. ***See Commonwealth v. Whitmore***, 912 A.2d 827 (Pa. 2006); ***see also Reilly, supra*** at 1298 (Superior Court erred when it *sua sponte* directed that different trial judge take over a case for alleged impartiality in violation of Canon 3C; Supreme Court declared procedure "inappropriate and preclude[d] its use.>").