



**STATE OF VERMONT**  
**JUDICIAL ETHICS COMMITTEE**

Opinion No.: 31  
Date: October 7, 2024  
To: [name redacted in posted version pursuant to A.O. 35, ¶ 6]

The Committee has considered the matter you presented to it. The following is the opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

**Question Presented**

Must a judge who served as a deputy state’s attorney in the past research the criminal record of each defendant now appearing before the judge to determine whether the judge previously prosecuted that defendant?

**Short Answer**

The Committee believes that it is unlikely that the Code requires a judge to conduct research to determine if the judge previously prosecuted a defendant, as mere knowledge of a prior matter or contact with an individual does not generally require a judge’s recusal.

**Relevant Provisions of Code of Judicial Conduct**

The relevant provisions of the Vermont Code of Judicial Conduct 2019 (“the Code” or “V.C.J.C.”) include the following rules and guidance:

- Canon 1, Rule 1.2: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- Canon 2, Rule 2.2: A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.
- Canon 2, Rule 2.3: (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

- Canon 2, Rule 2.11(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: . . . (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; (c) was a material witness concerning the matter; or (d) previously presided as a judge over the matter in another court. . . . (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 advise 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. (D) A judge shall disclose to the parties on an ongoing basis . . . (3) any other fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Rule 2.11(A). Unless a party promptly moves to disqualify on the basis of a disclosure under (1) or (2), the judge may continue to participate in the proceeding

### **Analysis**

The Vermont Code of Judicial Conduct requires that a judge shall “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” V.C.J.C. 1.2. A judge must perform their duties “fairly and impartially” and “without bias or prejudice.” V.C.J.C. 2.2, 2.3. Consistent with those general rules, the Code provides that a judge “shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.” V.C.J.C. 2.11(A).

To ensure public confidence, a judge is required to disclose to the parties “any other fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Rule 2.11(A).” V.C.J.C. 2.11(D)(3). “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.” V.C.J.C. 2.11, cmt. 5. Among the non-exhaustive list of reasons a judge's impartiality might be questioned, resulting in disqualification, is that the judge “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.” V.C.J.C. 2.11(A)(6)(a).

The Code does not specifically address the situation in which a judge formerly served as a lawyer in a different matter involving the same party as the current matter.

Generally, a judge's prior knowledge concerning a defendant does not, by itself, disqualify the judge. See *In re Barrows*, 2007 VT 9, ¶ 15, 181 Vt. 283 (“Indeed, if such were the standard for disqualification, few trial judges in this state would be able to preside over cases involving some of our district court’s more frequent defendants.”). A judge’s integrity and honesty are presumed, absent an affirmative showing of bias or prejudice. *State v. Davis*, 165 Vt. 240, 249 (1996).

Other jurisdictions have generally concluded that a judge’s prior prosecution of a defendant in an unrelated matter, by itself, is not a reason to disqualify the judge. See *Appearance of Impropriety: Deciding When A Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 Geo. J. Legal Ethics 55, 81 (2000); *State v. Truskowski*, 22-CR-12252, slip op. at 2–3 (Vt. Super. Ct., Jan. 19, 2023) (Zonay, C.J.) (collecting cases) (citing *Brown v. State*, 424 S.W.3d 288, 292 (Ark. 2012) (“Under our case law, the trial judge’s previous prosecution of Appellant itself does not require recusal, and Appellant has not demonstrated actual bias or prejudice.”); *People v. Flockhart*, 304 P.3d 227, 238 (Colo. 2013) (“[W]e are unwilling to adopt a per se rule requiring disqualification in every instance in which a presiding judge, as a former prosecutor, brought unrelated criminal charges against the defendant in the past. Absent facts demonstrating some material relationship between the two proceedings, or facts showing that the past prosecution is relevant to the current case, disqualification is not invariably required.”); *Jenkins v. Bordenkircher*, 611 F.2d 162, 167 (6th Cir.1979) (rejecting any per se rule requiring disqualification where the trial judge “has had previous contact with the defendant as a prosecutor in totally unrelated criminal charges”); *Gray v. State*, 37 So.3d 104, 105–06 (Miss. Ct. App. 2010) (holding disqualification not required where judge prosecuted defendant in unrelated matter); *Beard v. State*, No. 11–03–00184–CR, 2004 WL 1103680, at \*1 (Tex. Ct. App. May 13, 2004) (“[T]he rule regarding disqualification of judges is limited to cases in which the judge has served as counsel at some prior time in the same case now before the trial court, and it does not apply to situations where the judge served as counsel in a different case now used for enhancement purposes in the trial court.”); *Turner v. State*, 926 S.W.2d 843 (Ark. 1996) (“[A] trial judge need not recuse simply because that judge had previously prosecuted the defendant for a separate crime which was to be used for sentence enhancement purposes.”).

Ethics committees in other states have reached conclusions consistent with the above-cited cases and provide some additional relevant considerations. “A judge is not required to monitor his or her docket in real-time for any Prior Criminal Matter that might create a potential issue of disqualification” because such independent research would be “unduly burdensome, impractical, and a poor use of judicial resources.” JEAC 2014-1, 2014 WL 6785121, at \*4 (DE Jud. Eth. Adv. Comm. Aug. 7, 2014). “A judge should raise independently whether disqualification is required, without the filing of a motion to disqualify, if the judge readily recalls the litigant and harbors actual personal bias or prejudice towards that individual, if the Prior Criminal Matter is one in which the public’s perception of the former prosecutor and the litigant have become inextricably linked, or if the judge learns as a result of the submission of documents into evidence that the judge served as a prosecutor in a Prior Criminal Matter involving the litigant.” *Id.* (footnotes omitted). “[A]s long as the charges against the defendant (both past and current) are

unrelated to those in the present case, and there is no material relationship between the past and present case, per se disqualification is not required.” C.J.E.A.B. Adv. Op. 2019-04, 2019 WL 7340809, at \*6 (CO Jud. Eth. Adv. Brd. Dec. 20, 2019).

Absent specific circumstances that would reasonably lead to questions about the judge’s impartiality, such as a showing of bias or prejudice, judges generally do not have to recuse themselves from cases involving a defendant they may have prosecuted in the past. If recusal is not necessary, then there is no obligation for a judge to disclose the past matter. Because neither disclosure nor recusal is required, it is unlikely that the judge would be required to research the criminal record of each defendant appearing before them to rule out the possibility that the judge was involved in the prosecution of a prior, unrelated matter against the same defendant. However, if the judge recalls a prior matter and has formed opinions about the defendant or is aware of any circumstances that could create an appearance of impartiality, the judge should disclose the prior prosecution, but spending limited judicial resources to conduct criminal history research proactively does not seem to be warranted.

**Conclusion**

It is the opinion of this Committee that the Code does not require a judge to research the criminal record of each defendant appearing before the judge to determine whether the judge previously prosecuted that defendant unless the judge is aware of circumstances that could create an appearance of impartiality.

*Eileen M. Blackwood*

Eileen M. Blackwood, Esq., Chair

Signed by:

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Honorable Thomas A. Zonay

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