NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

NYSBA

Opinion #548 - 2/9/83 (38-82)

Topic: Disqualification where one attorney-spouse is employed by a judge and the other attorney-spouse appears before that judge.

Overrules N.Y. State 374

Digest: Neither judge nor attorney appearing before him is disqualified per se where attorney's spouse is confidential law assistant to the judge. Law assistant spouse is disqualified from participating in the case.

Code: Canon 9; EC 9-4, 9-6

Code of Judicial Conduct: Canon 3 (C) and (D)

QUESTION

When an attorney is employed as a confidential law assistant to a judge and the attorney's spouse appears as an attorney before that judge, is the judge disqualified per se from hearing the matter? Is the law assistant disqualified from participating in the matter? Is the practitioner-spouse disqualified from practice before that judge?

OPINION

The Judge

Disqualification of the judge is governed by Canon 3(C) of the Code of Judicial Conduct, which has been adopted for all judges in New York. 22 N.Y.C.R.R. 100.3(c). Canon 3(C)(1) as adopted in New York provides for disqualification (1) when a judge has personal feelings about the parties or personal knowledge of disputed facts, (2) when the judge or a lawyer associated with him was a lawyer or witness in the proceeding before the judge took the bench, (3) when the judge has any financial or substantial other interest in the outcome of the litigation, (4) when the judge or a relative within the sixth degree* is a party

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* The comparable Canon as adopted by the American Bar Association requires disqualification only where the relative is within the third degree of consanguinity. ABA Canon 3(C)(1)(d).

to the litigation or is acting as a lawyer in the proceeding, and finally (5) in any unspecified situation when the judge's "impartiality might reasonably be questioned." Canon 3(D) provides that in cases (3), (4) and (5) the parties and their lawyers may remit the disqualification by an agreement in writing.**

The first four grounds for disqualification in Canon 3(C)(1) do not apply to the instant case. The judge can only be disqualified, therefore, under the fifth provision if in the circumstances his impartiality "might reasonably be questioned." After investigating the boundaries of disqualification law as it has developed in New York and elsewhere, we conclude that a judge's impartiality may not reasonably be questioned in every case simply because the spouse of an attorney appearing before the judge works as a confidential law assistant for the judge. The facts of a particular case, however, may give rise to such reasonable question.

Background

At common law only a direct pecuniary interest in the litigation would disqualify a judge because "favour shall not be presumed in a judge." Brookes v. Rivers, 1 Hardres 503, 145 Eng. Rep. 569 (Ex. 1668) (brother-in-law a party to the case); see In re Dodge & Stevenson Mfg. Co., 77 N.Y. 101, 112 (1879); Frank, Disqualification of Judges, 56 Yale L.J. 605, 609 (1947); 3 W. Blackstone, Commentaries *361. In New York, relationship to one of the parties was added as a ground for disqualification at an early date. See Oakley v. Aspinwall, 3 N.Y. 547, 550-51 (1850). See also 3 Stat. ch. 51 at 643 (1821) (same rule in federal courts). Apart from a broadened definition of personal interest in the litigation, these were the only grounds for disqualification made part of the original Judicial Canons of Ethics in 1924. Former Canons 13, 26, 29.

Disqualification of a judge because his own close relative appears as an attorney before him is a newer concept. It was long held that disqualification in such a case was not a matter of law or ethics, but simply a matter of propriety for the individual judge to determine. People v. Patrick, 183 N.Y. 52, 54, 75 N.E. 963 (1905); see Voltmann v. United Fruit Co., 147 F. 2d 514, 517 (2d Cir. 1945). More recently, however, it has come to be seen as improper per se for a judge to hear a case in which his close relative represents one of the parties. N.Y. City 456 (1938); N.Y. County 346 (1938); see ABA 200 (1940) (Judicial Canons of Ethics do not require disqualification but

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** There is also a partially overlapping statute that requires a nonwaivable disqualification if the judge is a party to the action, or has been an attorney in the action, or has an interest in the action, either pecuniary or for example as a witness, or is related to any party within the sixth degree. N.Y. Judic. Law § 14 (McKinney 1968).

"wise" not to sit "where feasible"); Law of June 25, 1948, ch. 646, 62 Stat. 908 (amending statute governing disqualification of federal judges to add relationship to a party's attorney as a ground on which a federal judge might disqualify himself); N.Y. State 79 (1968) ("extraordinary circumstances justify sitting").

A survey done in 1947 disclosed no jurisdiction in the United States which mandated disqualification in additional areas, such as appearances by a judge's friend, or law firm, or ex-law clerk, and many that did not uniformly require disqualification even in the basic areas of relationship of the judge to the lawsuit, the parties, or their lawyers. Frank, Disqualification of Judges, supra, 56 Yale L.J. at 621. The situation does not appear to have materially changed between that time and the passage of the current Code of Judicial Conduct. See ABA Inf. 594 (1961) (disqualification of judge not required by presence of judge's former law firm); ABA Inf. 1191 (1971) (no ethical problem perceived in practice before judge of lawyer whose father is clerk of the court); N.Y. City 515 (1939) (proper to hear case in which former law clerk appears).

Present Code of Judicial Conduct

In March 1973 the Code of Judicial Conduct, containing Canon 3(C)(1) as it exists today, replaced the old Judicial Canons of Ethics. In January 1974 it was adopted in the form of Judicial Conference Rules for judges in New York State. 22 N.Y. C.R.R. 100.3(c) (formerly Rule 33.3(c)). The principal change from prior formulations of the disqualification rule lay in the addition of an omnibus clause providing for disqualification whenever circumstances would cause a reasonable man to question the judge's impartiality. Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973). No new categories of disqualification were added, however, and indeed the Code retreated from suggestions in some prior ethics opinions (e.g., N.Y. State 79 (1968); N.Y. City 456 (1938); N.Y. County 346 (1938)) in its specific denial of per se disqualification when the law firm of a judge's close relative appears before him (see Thode, supra, at 67) and in its provision for remittal of the disqualification in some circumstances on written consent of the parties (Canon 3(D)).

Canon 3(C)(1) has been most widely interpreted in the federal courts. In 1974, the principal statute governing disqualification of federal judges was amended to conform to the new Code of Judicial Conduct. Law of December 5, 1974, Pub. L. 93-512 § 1, 88 Stat. 1609, codified at 28 U.S.C. § 455 (1976); see H. Rep. No. 93-1453, reprinted in [1974] U. S. Code Cong. & Ad. News 6351. The interpretations of when a judge's impartiality might reasonably be questioned under this section accord with prior ethics opinions in holding that a judge is not disqualified per se if his friend is a party to an action (e.g., Baker v. City

of Detroit, 458 F. Supp. 374, 376-77 (E.D. Mich. 1978) or if his former law partner is an attorney in an action (Bumpus v. Uniroyal Tire Co., 385 F. Supp. 711, 714 (E.D. Pa. 1974)) or if a close relative's law firm, but not the relative himself, represents one of the parties to an action (United States ex rel. Weinberger v. Equifax, Inc. 557 F. 2d 456, 463-64 (5th Cir. 1977), cert. denied, 434, U. S. 1035 (1978); accord ABA Inf. 1372 (1976)). These cases discuss the possibility, of course, that facts in an individual case might lead a judge to disqualify himself.

The widespread use of recent law graduates in the federal courts as law clerks has also resulted in opinions relating to that relationship as an asserted ground for disqualification. It is established, for example, that an appearance by a judge's former law clerk as an attorney for a party does not require per se disqualification of the judge. Wolfson v. Palmieri, 396 F. 2d 121, 123 (2d Cir. 1968); United States v. Trigg, 394 F. 2d 860, 862 (7th Cir.), cert. denied, 391 U.S. 961 (1968); Smith v. Pepsico, Inc., 434 F. Supp. 524, 525-26 (S.D. Fla. 1977); see Fredonia Broadcasting Corp. v. RCA Corp., 569 F. 2d 251, 255-57 (5th Cir.), cert. denied, 439 U.S. 859 (1978) (disqualification of judge required only because former clerk had actually worked on prior trial of same matter while a clerk). It has also been held that disqualification of a judge is not required if one of his law clerks has already accepted future employment at a law firm appearing in a case before him (Reddy v. Jones, 419 F. Supp. 1391 (W.D.N.C. 1976)) or even if one of the judge's law clerks is simultaneously working part time at a law firm appearing in a case before him (Simonson v. General Motors Corp. 425 F. Supp. 574, 478-79 (E.D. Pa. 1976)). In these latter cases it was held that any possible impropriety was removed by careful screening of the law clerk from all contact with cases involving his law firm. See also, Dobson v. Camden, 502 F. Supp. 679 (S.D. Tex. 1980) (judge not disqualified by statute from deciding case brought by his present law clerk, as long as law clerk screened from contact with case, though judge would disqualify himself in exercise of discretion).

These federal cases, interpreting a statute that has the same relevant language as Canon 3(C)(1), 22 N.Y.C.R.R. 100.3 (c)(1), lead to two conclusions. First, insofar as the question of disqualification in the instant case rests on the possibility of judicial favoritism toward the spouse of a judicial employee, it has been uniformly held that the possibility of such favoritism without more is not sufficient to give rise to a reasonable question regarding a judge's impartiality, even when the judge's relationship to the lawyer before him is far closer than it would be in the case under consideration. Second, to the extent that the question of disqualification relates to the possibility that confidential information will be relayed from the judicial employee

to his or her attorney-spouse, or that the judicial employee may in some way affect the judge's decision, the appropriate way to avoid any suggestion of impropriety while conserving judicial resources is to screen the judicial employee from any contact with the case. Accord, Miller Industries v. Caterpillar Tractor Co., 516 F. Supp. 84, 88-90 (S.D. Ala. 1980) (disqualifying judge because he had failed to screen his law clerk from case involving firm with which the clerk had accepted an offer of future employment); Simonson v. General Motors Corp., supra (law clerk working for law firm and judge, screened from case in both capacities); Reddy v. Jones, supra (law clerk who accepted employment with firm screened from all activities in cases involving firm). This same kind of "Chinese Wall" has been held sufficient to guard against the possibility that a former government attorney will reveal confidences to his new private firm employer. ABA 342 (1975); N.Y. State 502 (1979); N.Y. City 889 (1978); N.Y. City 81-108 (1981).

An analytically similar situation arises when a law firm of which a judge's spouse is a partner represents a party before that judge. Both the risk of favoritism and the risk that confidential information might be transferred appear greater in that situation. Yet, the Commentary to Canon 3(C)(1)(d)(2) specifically states that "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." See ABA Inf. 1372 (1976) (law firm of judge's father). In accordance with this Commentary, and with the weight of prior authority, it has been held by the New York State Office of Court Administration that a judge is not disqualified per se when his spouse's law office represents a party before him. Opinions 113, 116 (1978), published in Opinions on Judicial Ethics from the Office of Court Administration (NYSBA 1979) (interpreting Rule 33.3(c)(1), current version at 22 N.Y.C.R.R. 100.3(c)(1)). We agree, and believe that this result a fortiori governs the situation in which the law firm before a judge is not that of his spouse, but that of the spouse of one of his employees.

We conclude therefore that on the stated facts there is no need for a per se rule requiring that a judge disqualify himself, as long as his confidential law assistant is screened from contact with a case in which her practitioner-spouse or his law firm appears.

We stress that our conclusion relates only to per se disqualification of a judge on the stated facts. Disqualification may nonetheless be required or appropriate on the facts or circumstances of a particular case. The judge should place all relevant facts and circumstances on the record in each case in which the practitioner-spouse's law firm appears, and should examine those

facts and circumstances for considerations other than those discussed herein that might lead to a reasonable question regarding the judge's impartiality in the individual case. Any doubt in the judge's mind should be resolved in favor of disqualification. ABA Standards Relating to the Function of a Trial Judge, Section 1.7; cf. Corradino v. Corradino, 48 N.Y. 2d 894, 895, 424 N.Y.S. 2d 886, 400 N.E. 2d 1338 (1979). Judges retain discretion to disqualify themselves when they would not be disqualified under Canon 3(C)(1), and it would generally be appropriate for a judge to disqualify himself if good faith questions could be raised regarding his impartiality.

Finally, it should be noted that whenever a judge determines to disqualify himself by reason of any relationship to an attorney appearing before him, the parties may remit the disqualification by written agreement. Canon 3(D); 22 N.Y.C.R.R. 100.3(d).

A minority of the committee believes that, where recusal would not result in significant delay or disrupt orderly court administration, such as where there is a multi-judge court, the judge, in circumstances such as those presented here, should disqualify himself as a matter of course in order to avoid an unnecessary apprehension of partiality. This does not turn on the question of the judge's impartiality but on appearances to the litigants and the public. Cf. ABA Inf. 1477 (1981); EC 9-1; 9-1; E.C. 9-2.

The Law Assistant Spouse

The judge's confidential law assistant has an independent duty under Canon 9, EC 9-4 and EC 9-6 of the Code of Professional Responsibility, whenever her spouse's law firm becomes involved in a matter before her employer, to inform the judge of that fact and to remove herself from all involvement in and knowledge of the case. This duty arises from the need to avoid any appearance that the law assistant spouse might try to influence her employer's decisions in the matter or even inadvertently give confidential information regarding the matter to her spouse.

The Practitioner-Spouse

The practitioner-spouse is not under an obligation to disqualify himself on the stated facts. When the relative of a judge appears before him in a case, it has been uniformly held that it is the judge's duty, not the attorney's, to consider disqualification. ABA 200 (1940); ABA Inf. C-449 (1961), 1260 (1973) and 1306 (1974); N.Y. State 384 (1975). See also N.Y. State 541 (1982). The duty to consider disqualification is placed on the judge by Canon 3(C)(1), and no concomitant duty on the attorney exists. S. J. Groves & Sons v. Teamsters Union,

581 F. 2d 1241, 1248-49 (7th Cir. 1978). The same conclusion is appropriate here because, like the situation of the judicial relative, the nature of the potential impropriety has nothing to do with the practitioner-spouse's actions. This potential impropriety would consist either of favoritism that might be shown toward the practitioner-spouse by the judge or the employee-spouse, or of confidential information that might be given the practitioner by his spouse. These would be improprieties by the judge or his employee and hence they are appropriately given the burden of guarding against them. Indeed, in light of the due-process dimension of the right to counsel of one's choice, putting such a burden on the practitioner-spouse in the absence of any possible impropriety by him might be constitutionally impermissible. Fredonia Broadcasting Corp. v. RCA Corp., supra, 569 F. 2d at 257. In N.Y. State 374 we reached a contrary result that we here overrule.

We do believe that Canon 9 of the Code of Professional Responsibility does require two things of the practitioner-spouse in the instant case. First, full disclosure of the lawyer's relationship to the judge's employee must be made to the judge and other parties at the earliest opportunity to allow timely consideration of disqualification. Second, care should be taken not to accept employment on behalf of a client who selects the practitioner in order to gain some hoped-for advantage because of the lawyer's relationship with an employee of the judge, such as confidential information or to compel the judge to disqualify himself. EC 9-4; EC 9-6; N.Y. State 384 (1975).

For the reasons stated, the first and third questions stated are answered in the negative, and the second is answered in the affirmative.
