NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion — 574 — 4/18/86 (30-85)

Modifies N.Y. State 511 (1979)

Topic: Judges, disqualification; prior representation of judge by lawyer.

Digest: Whether a judge must recuse himself where one of the parties is represented by a lawyer who represented the judge depends upon whether the judge's impartiality may reasonably be questioned, which, in turn, depends upon the nature of the original representation, the amount of time that has passed, and whether the parties have waived disqualification. Recusal is not automatically required where the lawyer's partners and associates appear before the judge.

Code: Canon 9; EC 2-18, 7-34, 9-4; DR 5-105(D), 7-110(A), 9-101(G)

Code of Judicial Conduct: Canons 3C(1), 3D

QUESTION

When may a lawyer who has represented a judge in connection with his personal or judicial affairs, or any of the partners or associates of the lawyer, later appear before the judge?

OPINION

In N.Y. State 511 (1979), this Committee grappled with one aspect of this question. The Committee, while recognizing that subsequent appearances by a lawyer before a judge whom he had previously represented would not violate any Disciplinary Rule of the Code of Professional Responsibility (the "CPR") nor any Canon of the Code of Judicial Conduct ("CJC"), held that the broad principles articulated by Canon 9 of the CPR, EC 9-6 thereunder and CJC Canon 3C(1), cast a specter of impropriety upon the proposed appearances that would prevent the lawyer or his partners or associates from appearing before the judge and would disqualify the judge from hearing the matter. The Committee reasoned, first, that there could be no way of avoiding suspicion on the part of the public or other litigants that the judge would feel indebted to his former counsel and that the course of the proceedings would therefore be influenced, and, second, that the judge, for fear of appearing biased, might refuse to take certain actions that would otherwise be appropriate, which would be unfair to his former counsel's client.

N.Y. State 511 went on to suggest that, in almost all instances, the simple solution is for the judge to disqualify himself from sitting on the matter. It suggested that the lawyer should be disqualified only where the judge has previously been involved in the case, where there is only one judge authorized to sit, or where it appears that the lawyer was selected for the purpose of obtaining the judge's disqualification.

The rule adopted in N.Y. State 511 was a *per se* rule. The Committee rejected the analogy to lawyers who have actively supported the campaigns of judicial candidates, and then appear before the judges, where a *per se* rule has not been applied. See N.Y. City 893 (1978). It concluded that representing a judge was qualitatively different. The Committee also stated that the appearance of impropriety in the lawyer's appearance before the judge would not be lessen-

ed if his partners or associates made the appearance. It therefore affirmed the reasoning of N.Y. State 502 (1979), which adopted as a general rule that, where one lawyer in a firm is disqualified from undertaking any representation, all lawyers in the firm are so disqualified.

N.Y. State 511 allowed only one exception to its *per se* rule. It permitted all parties involved to waive judicial disqualification where the representation had been limited (e.g., representation in connection with the purchase of the judge's home) and enough time had passed to assure the public that the judge's withdrawal would serve no purpose.

Another exception to the *per se* rule was adopted subsequently. In a letter opinion to the State Solicitor General, the Committee stated that the *per se* rule was not intended to apply where the representation of the judge by the lawyer had been in the course of the lawyer's official duties, rather than in the course of a private retainer. See N.Y. State 35-79 (1979)(reprinted in N.Y.S.B.J, Aug. 1979, at 436). The Committee reasoned that such representation in the course of official duties is often more akin to a defense of the court than of the judge himself. The Committee therefore held that whether, for example, an Assistant Attorney General should appear before a judge whom he had previously represented was a matter that should be addressed on a case-by-case basis, and that disqualification would generally be required only in rare instances, giving due consideratioan to the kind of personal or professional interests involved in each case. See also ABA Inf. 1331 (1975).

A recent report of this Association's Special Committee on Procedures for Judicial Discipline has concluded that the breadth of N.Y. State 511 makes it dificult for judges, particularly in counties having few judges, to find lawyers willing to represent them, and urges this Committee to consider whether something less than total permanent disqualification would be fair. See *Report of the Special Committee on Procedures for Judicial Discipline* (May 31, 1985). Accordingly, the Committee has reconsidered N.Y. State 511. We have concluded that the rule there laid down is unduly rigid.

Disqualification of the Judge Whose Former Lawyer Represents a Party

Where a judge and a lawyer have had previous connections, the question of whether the judge should be disqualified from sitting or the lawyer should be disqualified from appearing should be governed primarily by the Code of Judicial Conduct. N.Y. State 548 (1983), N.Y. State 384 (1975), ABA Inf. 1331 (1975). N.Y. State 548 extensively reviewed the authorities relating to the respective Codes governing lawyers' and judges' conduct and concluded that, absent statutory prohibition or special circumstances, the lawyer is not required to disqualify himself by reason of a relationship with the judge.[1] Rather, it is the judge's duty to consider disqualification. N.Y. State 548 also concluded that disqualification of a judge is proper only when the situation falls under Canon 3C(1) of the Code of Judicial Conduct.

In essence, the conclusions reached in N.Y. State 548 and N.Y. State 384 generally preclude the use of Canon 9 of the CPR to disqualify either the judge or the lawyer, and indeed, with the exceptions noted, preclude disqualification of the lawyer for such reasons as are dealt with in N.Y. State 511. Disqualification, if it exists, must be grounded on Canon 3C(1) of the CJC, absent special circumstances.

Canon 3C(1) of the CJC provides that:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

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1. Indeed, N.Y. State 548 limits the lawyer's Canon 9 duties to full disclosure to the other party of his prior representatiaon and to declining empleoyment if the lawyer is selected to gain some advantage with the judge or to disqualify the judge. See alsoN.Y. State 384 (1975) (Canon 9 considerations might require the lawyer to decline representatiaon if the lawyer suspects he was selected because of his relationship with the judge, such as to compel disqualification of the judge). cf Illinois Op. 663 (1920), indexed in ABA/BNA Lawyers Manual on Professional Conduct 801:3001 (judge is obligated to instruct his former lawyer to disclose the nature of the relationship to opposing counsel); N. C. Op. 745 (1975), indexed in Maru's Digest 9495 (an attorney representing a judge in domestic relations negotiations may appear before the judge if he discloses his relationship to opposing counsel).

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(d) he or his spouse, or a person within the third[2] degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding[3].

Since the situation here discussed does not fall under any of the specific instances described in paragraphs (a) — (d) of Canon 3C(1), in order for the judge to be disqualified, the situation would have to fall under the general provision, i.e., where, by reason of the lawyer's prior representation of the judge, the judge's "impartiality might reasonably be questioned."

Further, Canon 3D provides that if the disqualification is by reason of paragraphs (c) or (d) of Canon 3C(1), the parties and their lawyers may remit the disqualification by signing an agreement in writing after full disclosure. While this Canon apparently forbids waiver of a disqualification by reason of paragraphs (a) or (b) of Canon 3C(1), it is silent as to whether there may be such a waiver in situations not described in paragraphs (a) — (d), but where, nevertheless, the judge's impartiality might reasonably be questioned. We believe that, in appropriate cases, such waiver should indeed

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2. The Rules of the Office of Court Administration (OCA) require disqualification when the relative is within the sixth degree of consanguinity. See Section 100.3(c)(iv)(22 N.Y.C.R.R.Sec.100.3(c)(iv)). This Committee does not interpret statutes or Rules of the OCA, but limits its opinions to interpretations of the CPR and the CJC.

3. Judiciary Law Sec. 14 contains many of the same prohibitions and Sec. 471 prohibits former partners or law clerks of the judge from appearing in matters which originated before the judge.

be permitted. Such a result is assumed, without discussion, in N.Y. City 893 *supra* ("We believe that disqualification would be necessary [where one of the lawyers in the proceeding had been highly visible as the manager of the judge's election campaign] absent remittal of disqualification pursuant to Judicial Canon 3(D) and 22 NYCRR 33.3(D)...") and in ABA Inf. 1477 (1981). *Cf.* 12 U.S.C. Sec. 455(e) (Waiver permitted "where . . . impartiality might reasonably be questioned", but not in the instances specified in Canon 3C(1)(a), (b), (c) or (d).)

Whether a judge's impartiality might reasonably be questioned in situations not expressly described by Canon 3C(1)(a)-(d) is necessarily a fact question in each case. This, however, does not preclude a conclusion that, in some types of situations, the facts are so clear that, at least *prima facie,* the judge should, or should not, disqualify himself.

The interest to be protected is clear. Actual judicial impartiality is essential to our system of justice; but it is not enough. The reasonable perception of litigants and the interested public that the judge is impartial is also of the highest importance:

> The judiciary must not only be, but appear impartial; as recognized in EC 9-4: " . . . the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits. . . ."

N.Y. City 893 (1978). While we recognize that the court system cannot function if the judge is disqualified by every possible situation that might, to the suspicious, in some manner affect his impartiality, we believe that it is appropriate to isolate some circumstances where the risk is simply too great and other circumstances where voluntary disqualification should be encouraged where practical.

The appearance before a judge of the judge's former lawyer may present all shades of the spectrum, both in the nature of the prior representation and in the time elapsed since that representation. Clearly, the risk that litigants or the interested public will reasonably harbor doubts as to the judge's impartiality are greater where the prior representation involved defending the

judge against formal charges of judicial misconduct (as was the case in N.Y. State 511) or in a bitterly contested matrimonial matter, than where it involved the purchase of a home, the drawing of a will or even representation provided and paid for by a liability insurer with respect to an insured claim. Further, the greater the time elapsed since the representation, the less the risk that litigants and the interested public will question the judge's impartiality. *Cf.* N.Y. City 893 (1978).

Of course, if the judge believes he cannot be impartial, recusal is required. Where the judge determines his impartiality is not affected, we believe the following general principles are appropriate:

First, if the prior representation of the judge was of a character where the judge's personal integrity was at issue or involved a highly emotional situation, such as a bitterly contested matrimonial matter, we believe that the judge should in all cases disqualify himself, *irrespective of consent*, for several years. Thereafter, the judge should disqualify himself unless the parties remit the disqualification under Canon 3D.

Second, if the representation was (a) of a routine and economic character, such as buying or selling a home or drawing a routine will, (b) in the course of official duties (and in the nature of a defense of the court rather than of the judge) or (c) provided by an insurer with respect to a fully insured claim, we believe that it is not necessary either for the judge to disqualify himself or for remittal under Canon 3D to be obtained, provided no special circumstances are present. The prior representation should, however, be disclosed.

Third, in cases falling between these two situations, where there are no other special circumstances, and in cases otherwise falling into paragraph (2) above where the representation was in repeated instances, then, for a period of several years, the judge should disqualify himself unless the parties remit the disqualification under Canon 3D. Thereafter, the principles enunciated in paragraph (2) above would apply, and the prior representation must be disclosed.

It is impossible to fix a specific number of years to the period of disqualification. The length of the period will depend upon whether an objective, disinterested observer would question the judge's impartiality. That, in

turn, will depend upon the circumstances surrounding the original representation, the frequency of the lawyer's representation of the judge, and the relationship of the judge and the lawyer since the time of the representation.

Where there is a multi-judge court of sufficient size that recusal would not result in significant delay or disrupt orderly court administration, we believe that, even in situations under paragraphs (2) and (3) above, it would be better practice for the judge to recuse himself as a matter of course, at least for a reasonable number of years following the representation. This practice is desirable to avoid any unnecessary apprehension of partiality.

Additionally, if the matter in which the judge needs representation is of a character described in paragraph (1) above, and arises after the judge has become a judge, the judge should, when it can reasonably be done without prejudice to the cause, employ a lawyer from outside the community where he sits or who is otherwise unlikely to appear before the judge.

As respects the partners or associates of the lawyer who has represented the judge, N.Y. State 511 applied to them the same disqualifications it applied to the lawyer. N.Y. State 511, however, was here based on Canon 9 of the CPR, and, as discussed above, we believe that, on the basis of the conclusions reached in N.Y. State 548 and N.Y. State 384, disqualification, if any, should not be of the lawyer under the CPR, but of the judge under the CJC. Accordingly, the test as to partners or associates is the same as for the former lawyer, *i.e.*, whether the judge's impartiality might reasonably be questioned. In this regard, the Commentary to Canon 3C(1) is instructive:

> 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 appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

Because this test focusses on the judge rather than on the judge's former lawyer, there is no occasion for application of DR 5-105(D), as interpreted by N.Y. State 502 (1979).

All of the foregoing assumes that, if the judge was a sitting judge at the time of such representation, the judge was charged an appropriate fee unless the lawyer represented the judge in the judge's official capacity. *Cf.* EC 7-34 and DR 7-110(A), prohibiting the giving of a "thing of value" to a judge, and Canon 5C(4) of the CJC prohibiting a judge from receiving a gift or favor except as there permitted. Where the lawyer provided legal services to the judge at a reduced fee or without fee before he became a judge, EC 2-18, we believe disclosure of such reduced-fee representation is required.

CONCLUSION

For the reasons stated above, we believe that the situation posed is governed by the Code of Judicial Conduct rather than the Code of Professional Responsibility. Under the CJC, whether the judge should recuse himself depends upon whether his impartiality may reasonably be questioned, which, in turn, depends upon the circumstances of the prior representation and the amount of time that has passed. It further depends, in those circumstances where recusal would otherwise be indicated, upon whether the parties may, after disclosure of the reasons for the recusal, agree in writing that the judge's former relationship is immaterial. The same principles apply, but to a less stringent degree, to the partners or associates of the judge's former counsel.