New York State Bar Association
Committee on Professional Ethics

Opinion 673 - 3/16/95 (62-94)

Topic:	Judges, disqualification; representation of relative of judge by lawyer.
Digest:	1) A lawyer may appear before a town justice when the lawyer represents a relative of another town justice in an unrelated action in another court unless there is some other reason that the town justice's impartiality may reasonably be questioned. 2) A lawyer may appear before a town justice after having represented the town justice's adult child in an unrelated matter in which the town justice had no involvement.
Code:	Canon 9, Canon 7; DR 7-101; EC 9-6
Code of Judicial Conduct:	Canons 3C(1), 3D

QUESTIONS

1) May a lawyer appear before a town justice when the lawyer represents a relative of the other town justice in an unrelated matter in another court?

2) May a lawyer appear before a town justice after the lawyer has completed representing that town justice's relative in an unrelated action where the town justice had no involvement?

OPINION

Where a judge and a lawyer have a relationship that might prevent the lawyer from appearing before the judge, absent statutory prohibition or special circumstances,[1] the lawyer is not required to disqualify himself or herself by reason of that relationship. Rather, it is the judge's duty to consider disqualification and, therefore, the Code of Judicial Conduct (the "CJC") governs the question. N.Y. State 574 (1986); N.Y. State 548 (1983). The standard for disqualification of a judge is stated in Canon 3C(1) of the CJC, which has been made applicable to all judges in the State of New York. 22 N.Y.C.R.R. 100.3(c).

Canon 3C(1) provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. …" Canon 3C(1) then provides a nonexclusive list of specific instances, none of which apply to these inquiries, where a judge should disqualify himself.[2] Whether a judge's impartiality might reasonably be questioned is necessarily a question of fact in each case. Even if the judge believes that he or she can be impartial, the judge should recuse himself or herself if an objective, disinterested observer could reasonably question the judge's impartiality. N.Y. State 574 (1986).

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[1] N.Y. State 511 (1979) noted three possible special circumstances: 1) where the judge has been previously involved in the case and to require the judge's withdrawal, rather than the lawyer's, would be a waste of judicial resources, 2) where there is no other judge available to hear the case, and 3) where it appears that the attorney was hired for the very purpose of obtaining the judge's disqualification.

[2] (1) A judge should disqualify himself … where:

> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (b) he served as 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;
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> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
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> (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;
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> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
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> (ii) is acting as a lawyer in the proceeding;
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> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
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> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Although the CJC governs the question of disqualification, under Canon 9 of the Code of Professional Responsibility (the "Code") a lawyer has a duty to make full disclosure to the judge and other parties of the lawyer's relationship to the judge at the earliest opportunity to allow timely consideration of disqualification. EC 9-6; N.Y. State 548 (1983); N.Y. State 384 (1975).

Question 1

Assuming that the town justice who is related to the lawyer's client would be disqualified under Canon 3C(1), the first question is whether a disqualifying relationship between the lawyer and the town justice also should disqualify the other town justice under Canon 3C(1). The opinion of the Committee is that it does not.

Unlike lawyers who are associated in the same law firm, conflicts or other facts disqualifying one judge are not imputed to the other judges of the same court. Judges have no economic or personal interest in each other's cases as would members of a private law firm. It would not be reasonable for a party to question the impartiality of one judge solely on the basis of the disqualification of another judge of the same court. To make such inferences would severely encumber the administration of justice, requiring cases to be moved to other districts if any conflict arose with any judge.

As noted above, each case must be determined on its own particular facts and a judge should consider whether he or she has some other business or personal relationship with the disqualified judge or the judge's relative that could call into question the judge's impartiality. Assuming no such relationship, Canon 3C(1) would not call for the disqualification of the other town justice.

Question 2

As with the first question, none of the specific disqualifications listed in Canon 3C(1) covers the case where the lawyer appearing before the judge has previously represented an adult child of the judge. Therefore, the basic standard that applies is whether a disinterested observer could reasonably question the judge's impartiality.

This question is analogous to the situation where the attorney previously has represented the judge, rather than a relative. In N.Y. State 574, the Committee rejected a per se rule against a lawyer appearing before a judge he or she previously represented and instead developed guidelines based on the nature of the prior representation and the elapsed time since that representation:

> *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.
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> *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, however, should be disclosed.

Third, in cases falling between these two situations, where there are not 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 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 representation.

The judge should also consider the type of action for which the lawyer is now appearing in deciding whether to recuse himself or herself. If differences in either the course or outcome of the present action could not significantly affect an economic or other interest of the lawyer, and thus there exists little opportunity for the judge to confer any benefit on the lawyer, recusal is less likely to be warranted. The opposite is, of course, true. Recusal would be required if a large contingency fee or the goodwill of an important client was at stake.

Finally, there is also a practical component a judge must consider. As noted in N.Y. State 574, if the court where the judge sits has many judges and recusal would not result in significant delay or disrupt orderly court administration, even where the circumstances do not mandate recusal, it would be better practice for the judge to recuse himself or herself as a matter of course, at least for a reasonable number of years after the representation.

In the present inquiry, the lawyer represents a relative of the judge rather than the judge[3]. This distinction is significant. There can be no presumption of any personal relationship between the judge and the lawyer. The lawyer has had no duty to

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[3] This opinion addresses the case where the relative is someone other than a spouse or a minor child residing in the judge's household and other than a relative beyond the sixth degree of relationship to the judge. Canon 3C(1), as enacted in 22 N.Y.C.R.R. 100.3, makes both of these distinctions for specific instances of disqualification in subsections (c) and (d), respectively. Absent special circumstances, prior representation of a spouse or minor child should be treated no differently than representation of the judge for purposes of these guidelines while representation of a relative beyond the sixth degree should be considered the same as having no family relation at all.

vigorously represent the judge's interests (*see* Canon 7; DR 7-101). While some personal interest in the relative's welfare can be presumed, the judge's interest is likely to be significantly attenuated as compared to that of the relative. Further, since the prior representation is now over, the judge is in no position to confer any benefit upon the relative through favorable treatment of the lawyer.[4] Even owing a debt of gratitude is not enough, alone, to disqualify the judge. *See* N.Y. City 893 (1978).

The standard of Canon 3C(1), however, is an objective one, based on the perceptions of a reasonable disinterested observer. The existence of a family connection anywhere in the case could reasonably affect an observer's calculation of the judge's impartiality. Therefore, the Committee recommends that a judge assess the prior representation of a relative on the same basis as if the judge himself had been represented by the lawyer, and apply the guidelines set forth in N.Y. State 574. These general principles should be tempered to recognize that the judge's relative, rather than the judge, was the client. This fact, in most instances, would justify a response by the judge that is less than what would be required under N.Y. State 574 if the judge were the represented party. There will be situations, however, that the judge should treat the same as if he or she were represented by the attorney, such as when the judge is directly involved in the matter.

In the present inquiry, the representation of the adult child involves a matrimonial matter which the inquirer expects to result in an uncontested motion for a divorce and where the town justice is not expected to testify or otherwise take part. Thus, if the town justice had been the represented party, this situation would fall under paragraph *three* of N.Y. State 574, where disqualification is required but remittal by the parties is possible. However, because the prior representation is only of the adult child of the town justice and nothing in the inquiry indicates a direct involvement by the justice or other special circumstances, the Committee believes that the less restrictive rule set forth in paragraph *two* of N.Y. State 574 should apply. Therefore, while disclosure should be made for some period of time, disqualification would not appear necessary.

CONCLUSION

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[4] This opinion does not address the question of whether a judge must recuse himself or herself from a case where one of the parties is represented by a lawyer who *currently* represents a relative of the judge on an unrelated matter in another court. One court has addressed this issue and found no cause for disqualification. *Celafu v. Globe Newspaper Co.,* 391 N.E.2d 935, 939 (Mass. App. 1979). Further, the Commentary to subsection (d)(iii) of Canon 3C(1) states that a lawyer's association with a law firm with which a relative of the judge is associated is not enough, alone, to call for the judge's disqualification. Usually, such an association will require only the judge's disqualification when the judge is in a position to confer a benefit on the relative in violation of Canon 3C(1)(d)(iii) (such as where a contingency fee may be awarded or the firm's reputation enhanced) or there is some other reason to cast doubt on the judge's impartiality. *See, e.g., Jenkins v. Forrest City Gen. Hosp.,* 425 So. 2d 1180, 1181 (judge disqualified in a medical malpractice case where judge's brother was partner in the firm and where judge was supported by the medical community in the last election). The fact that the judge's relative is the lawyer's client rather than associate does not seem likely, in most cases, to give the judge any more reason to favor or appear to favor a lawyer.

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