NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 703 - 5/7/98 (10-98)	Topic:	Remittal of judge's disqualification owing to family relationship with lawyer for party.
Modifies N.Y. State 548 (1988), 673 (1995)	Digest:	Judge in multi-judge court may accept remittal from disqualification caused by appearance in judge's court of lawyer related to the judge, or of another lawyer affiliated with the judge's relative. Whether recusal is required, prior to consideration of remittal, by appearance of associate of judge's relative depends upon whether the judge's impartiality might reasonably be questioned under the particular facts and circumstances.
	Code of Judicial Conduct:	Canon 3(E)(1); Canon 3(F)

QUESTIONS

1. Where the stepdaughter of the uncle of a judge of a multi-judge state court acts as a lawyer in a proceeding before the judge, may the judge accept remittal of the judge's disqualification?

2. Where the stepdaughter does not personally act as a lawyer in the proceeding, is the judge disqualified where an associate or partner of the stepdaughter's law firm appears?

3. If so, may the judge accept remittal?

OPINION

The inquirer is a judge who sits in a multi-judge term in New York Supreme Court. In a matter before him, his uncle's step-daughter acts as a lawyer. The judge inquires whether he must recuse himself, and if he does so and announces the basis for his disqualification, whether he may accept remittal if offered by the parties without his participation. In a second matter, associates and partners of the step-daughter's law firm, but not the stepdaughter, act as lawyers in the proceeding. The inquirer asks whether he must recuse himself in this second matter, and if so, whether he could accept remittal.

Canon 3(E)(1) of the Code of Judicial Conduct (22 NYCRR §100.3[E][1]) provides:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
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> (e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

The child of a judge's uncle is a cousin and is therefore a relative within the fourth degree.[1] In this case, the relation of affinity is created by marriage. The lawyer is the child of the uncle's wife, *i.e.* a stepdaughter. Nevertheless, she is a relative within the fourth degree. *See In re Orellana v. Escalante*, 228 A.D.2d 63, 65 (4th Dep't 1997); *In re Petition of United States,* 418 F.2d 264, 271 (1st Cir. 1969). Therefore, where the stepdaughter of the judge's uncle is acting as a lawyer in the proceeding before the judge, the judge is disqualified.

Canon 3(F) (22 NYCRR §100.3[F]), however, permits remittal. Provided the judge has disclosed on the record the basis of the judge's disqualification, and the parties "without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding."

In N.Y. 548 (1983), a minority of the Committee opined 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 … should disqualify himself as a matter of course in

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[1] NYCRR § 100.0(C) provides that the degree of relationship where the judge and the party are in different lines of descent is calculated by ascending or descending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. It specifically provides that a cousin is a relative within the fourth degree.

order to avoid an unnecessary apprehension of partiality." The majority, however, opined that the parties could remit the disqualification.

In a subsequent opinion, the Committee considered the appearance of a lawyer before a judge the lawyer had previously represented. N.Y. 574 (1986). Such a relationship is not among the specifically enumerated items in Canon 3(C)(1), which are not exclusive. The Committee opined that the judge must therefore determine whether an objective disinterested observer could reasonably question the judge's impartiality. We noted,

> Where there is a multi-judge court of sufficient size that 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 as a matter of course, at least for a reasonable number of years after the representation.

The Committee, however, specifically noted that even where recusal was mandatory, the parties could remit disqualification under Canon 3(F).

In N.Y. 673 (1995), the Committee considered the disqualification of a judge where a lawyer appearing before the judge previously represented a relative of the judge. Once again, because representation of a judge's relative is not among the enumerated causes for disqualification, the Committee noted that the judge must consider whether his or her impartiality could reasonably be questioned. In making that determination, the Committee noted that there is also a practical component a judge must consider and used language almost identical to that in N.Y. State 574 in referring to multi-judge courts. Because the Committee found that recusal was not required on those facts, it did not discuss remittal.

Despite the imperative language used in N.Y. State 574 and 673, the Committee did not intend that where a judge in a multi-judge court chose recusal, the judge could not accept remittal if offered by the parties. We note that even in the enumerated cases where the CJC mandates recusal, it permits the judge to accept remittal provided the judge believes that he or she will be impartial. There is no reason why this option should be unavailable in the non-enumerated cases. The fact that the judge sits on a multi-judge court is one factor that the judge should take into account in deciding whether disqualification is required under Canon 3(E)(1) and in deciding whether to accept remittal under Canon 3(F). That factor alone is not determinative. *See* N.Y. Advisory Committee on Judicial Ethics Opinions 90-44 (1990) and 89-13 (1989); Ohio Op. 89-10 (1989) *indexed in* BNA Manual at 901:6861 (permitting judge to accept remittal with no consideration of whether judge sat in a multi-judge court).

Thus, where the judge is required to recuse himself or herself because a relative within the fourth degree is acting as a lawyer in the proceeding, the judge may accept remittal if offered by the parties and the judge believes he or she will be impartial. In deciding whether to accept remittal, the judge may take into account the fact that he or she sits in a multi-judge court and that recusal would not result in significant delay, but

that fact alone does not preclude acceptance of the remittal.

In the second inquiry, associates and/or partners of the judge's uncle's stepdaughter appear before the judge. Canon 3(E)(1)(e) mandates disqualification only where the judge's relative "is acting as a lawyer in the proceeding." For purposes of this second inquiry, we assume that the stepdaughter had no participation whatsoever in the matter currently before the judge. *See* N.Y. Advisory Committee on Judicial Ethics #90-44 (1990) (recusal required if the relative "participated in any way" regardless of whether she actually appeared in judge's court). The judge, however, must also determine whether the appearance of associates or partners of the stepdaughter's firm gives rise to a situation where the judge's impartiality "might reasonably be questioned," in which case recusal would be called for under the general rubric of Canon 3(E)(1).

The Commentary to a prior version of the Code of Judicial Conduct included the following:

> 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) [prior version of 3(E)(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) [currently 3(E)(1)(d)(iii)] may require his disqualification.

In N.Y. State 673 we noted in passing that in such a situation, the judge's disqualification would be required "when the judge is in a position to confer a benefit on the relative . . . (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. *Id.* at 5 n.4; *see also* N.Y. State 574 at 8 (referring to the Commentary and indicating that partners and associates would be disqualified only if the judge's impartiality might reasonably be questioned); Ohio Op. 91-8 (1991), indexed in BNA Manual at 1001:6852 (no automatic recusal where associates or partners of judge's spouse's firm appear).

The Advisory Committee on Judicial Ethics has required disqualification in cases in which a lawyer affiliated with a relative's firm appears, *see* Opinion 87-3 (1987) (judge should "as a matter of course" be disqualified when any member of a four-person firm in which brother is a partner appears, noting small size of firm and community), but not where the relative is a lawyer for a government agency. *See* Joint Opinions 88-101 and 102 (1988) (permitting judge to accept remittal where judge's spouse is assistant corporation counsel and where judge's spouse is assistant district attorney), 89-112 (remittal permitted where judge's cousin is assistant district attorney), 87-127 (remittal permitted where judge's son is assistant district attorney); *see also* S.C. Opinion 90-45 (1991) (recusal not required where members of public defender's office employing judge's son appear). *But see* Ala. Op. 89-45 (1989) (disqualification not extended to other members of judge's son's law firm).

In our view, although the nature of the attorney (public vs. private attorney), the nature of the fee (contingent vs. hourly fee), the size of the law firm and the size of the community are all factors that the judge should take into account in deciding whether his or her impartiality may reasonably be questioned, no one factor is determinative. For example, it is unlikely that the judge's impartiality would be called into question if an associate of a 1,000 lawyer firm appears before the judge in a contingency fee matter and the judge's cousin is an associate in a west coast office of the firm. Conversely, where the partner of the judge's brother in a two-partner firm in a small town appears before the judge, regardless of how the firm's fee is to be paid, the judge's impartiality is likely to be called into question.

As in the first inquiry, however, if the judge discloses on the record the basis for the disqualification, and the parties and their lawyers agree, without the judge's participation, that the judge should not be disqualified, the judge may continue to sit in the proceeding.

CONCLUSION

For the foregoing reasons we answer the first and third questions in the affirmative, and conclude that the answer to the second question depends upon the particular facts and circumstances.
