

NEW YORK STATE BAR ASSOCIATION

**Committee on Professional Ethics**

Opinion 725 – 12/8/99

Topic Assistant District Attorney appearing before sibling who is a Town Justice

Digest: An Assistant District Attorney may not appear before a Town Justice who is a sibling, but must take steps to secure the Town Justice's recusal. Other attorneys in the District Attorney's office may appear before the Town Justice.

Code: DR 1-103(B), 9-101(C); EC 7-13, 7-39, 9-2

CJC: Canon 3(E)(1)(e), 3(F)

**QUESTION**

May an attorney in the District Attorney's office appear before a Town Justice who is a sibling, and, if not, may other attorneys in the District Attorney's office do so?

**OPINION**

A Town Justice may not preside over a case in which a sibling who is an Assistant District Attorney appears on behalf of the prosecution. Canon 3 of the Code of Judicial Conduct ("CJC"), codified at 22 N.Y.C.R.R. §100.3, provides that a judge shall disqualify himself or herself from a proceeding where the judge's impartiality might reasonably be questioned, including if the judge knows that a person within a fourth degree of relationship is acting as a lawyer in the proceeding. CJC § 3(E)(1)(e).

If the Town Justice does not take the initiative to disqualify himself or herself, the Assistant District Attorney who is his or her sibling may not proceed on behalf of the prosecution. As we have previously stated, "[a]lthough recusal is primarily the responsibility of the judge under applicable law and the Code of Judicial Conduct," N.Y. State 548 (1983), "lawyers have an obligation to the system

of justice that requires that they take steps to prevent a judge from presiding over a case which they know the judge should not retain." N.Y. State 602 (1988); see also EC 7-39, EC 9-2; cf. DR 1-103(B). As a government prosecutor charged with the responsibility of seeking justice, the attorney's obligation to the justice system is even greater than that of other lawyers in the same situation. The attorney is obliged to alert the Town Justice to the obligation to recuse himself or herself, and if the Town Justice refuses to do so, take other steps to avert the problem, such as by securing a substitute attorney or by formally seeking the Town Justice's recusal.

Although Canon 3 contains a procedure for remittal of a judge's disqualification upon full disclosure and consent by the parties in the matter, we do not believe that an Assistant District Attorney may properly invoke this procedure. Section 3(F) provides that after disclosure of the basis for disqualification, the parties, "without participation by the judge," may agree on the record that the judge should not be disqualified, and the judge may then choose to preside over the proceeding if the judge believes that he or she will be impartial. CJC § 3(F).<sup>1</sup> Although neither the rule nor the commentary specifically addresses the question, we believe that where the judge's sibling is prosecuting a criminal action, the remittal procedure is unavailable because of the heightened public interest in the fairness, and apparent fairness, of the proceedings. Even though the defendant might agree to permit the judge to preside, the public may suspect that the prosecutor's office used its superior power to secure the defendant's consent or that, notwithstanding the defendant's consent, the judge might favor the prosecution because of the family relationship. Such suspicions might be discounted in a civil action, but as we have previously observed, "[a] scintilla of partiality, which might be waivable by private parties in other contexts, is intolerably suspect and prejudicial to the public's regard for the criminal justice system." N.Y. State 660 (1993); see also N.Y. State 588 (1987); N.Y. State 450 (1976).

Other members of the District Attorney's office properly may appear before the Town Justice, however. The Commentary to CJC Canon 3(E)(1)(e) provides that "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." CJC Commentary § 3.25. Disqualification in such instance may be required only if the judge's impartiality might "reasonably be questioned," or the relative is known by the judge to have an interest in the relative's law firm that could be "substantially affected" by the outcome of the proceeding. *Id.* An Assistant Dis-

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<sup>1</sup> The commentary to section 3(F) adds that a judge must not solicit, seek or hear comment on the possibility of a remittal, and advises that a judge may wish to have the parties sign a remittal agreement. CJC Commentary § 3.27. In deciding whether to accept remittal, the judge may consider whether or not he or she sits on a multi-judge court such that recusal may not result in significant delay, but that fact alone is not dispositive. N.Y. State 703 (1998) and 574 (1986); N.Y. Advisory Committee on Judicial Ethics Opinions 90-44 (1990) and 89-13 (1989). The lawyer who is related to the judge may not state or imply that he or she is able to influence the court or the judge. DR 9-101(C).

trict Attorney ordinarily has no interest that would be affected by a prosecution brought by another prosecutor in the office. Therefore, unless the judge's impartiality may reasonably be questioned, the Town Justice may preside over a case prosecuted by a lawyer who serves in the District Attorney's office with the Town Justice's sibling.

### **CONCLUSION**

An Assistant District Attorney may not appear before a Town Justice who is a sibling, but must take steps to secure the Town Justice's recusal. However, other attorneys in the District Attorney's office may appear before the Town Justice.