New York State Bar Association
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Memorandum Urging Disapproval

JUDICIAL SECTION

Judicial #1-GOV

August 13, 2020

S. 8831
A. 9542-A

By: Senator Kaminsky
By: M. of A. Wallace
Senate Committee: Rules
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the judiciary law, in relation to requiring judges who recuse themselves to provide the reason for the recusal.

LAW & SECTION REFERRED TO: Section 9 of the Judiciary Law.

THE JUDICIAL SECTION
OPPOSES THIS LEGISLATION AND URGES ITS DISAPPROVAL

The Judicial Section of the New York State Bar Association, which includes the Council of Judicial Associations, comprised of the presidents of all the judicial associations statewide, would like to take this opportunity to comment on S. 8831, legislation which would add a new section 9 to the Judiciary Law requiring a judge who recuses himself or herself from taking part in a proceeding to provide the reason for such recusal in writing or on the record, unless the reason may result in embarrassment or is of a personal nature, affecting the judge or a close relative.

As stated in the Justification Section of the Introducer's (Sen. Todd Kaminsky) Memorandum in Support of this proposed legislation, this bill was based on one incident in Long Island where three judges recused themselves, in a short period of time, from presiding over litigation between the Town of Hempstead and Double Eagle Golf. Senator Kaminsky suggests that this one isolated case raises concerns as to whether the justification for the judges' recusal was legitimate.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]).

22 NYCRR 100.3(E)(1) of the Rules of Judicial Conduct provides that:

Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.

(E) **Disqualification.**

(1) 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:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

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

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(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 or is likely to be a material witness in the proceeding. Where the judge knows the relationship to be within the second degree, (i) the judge must disqualify him/herself without the possibility of remittal if such person personally appears in the courtroom during the proceeding or is likely to do so, but (ii) may permit remittal of disqualification provided such person remains permanently absent from the courtroom.

(f) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the parties or controversy in the proceeding.

(g) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

There is no indication that judicial recusals from cases are exercised other than on a very limited basis or are based on anything other than legitimate concerns on behalf of individual judges to fully comply with the Rules of Judicial Conduct and their ethical obligations. There is no evidence cited to suggest that in making their decisions to recuse from a case, on the rare occasions they are made, judges have in any way abused their authority.

If judges have concerns as to whether they should, or should not, recuse from a particular case, they may submit their inquiries to the Advisory Committee on Judicial Ethics for an appropriate opinion.

We thus perceive no basis for requiring the judges' well-thought out and considered reasons for recusal to be placed in writing or on the record. There is also concern that this requirement could lead to unnecessary litigation as to whether a judge's decision to recuse but not state the reason was, in fact, based on a legitimate concern for embarrassment or was, in fact, of a personal nature affecting the judge or a close relative.

For the foregoing reasons, the State Bar Association's Judicial Section **OPPOSES** this legislation and **URGES ITS DISAPPROVAL** by the Governor.