NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #511 - 4/23/79 (74-78)

Modified by N.Y.State 574 (1986)

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

Digest: Lawyer who represented judge, as well as lawyer's partners and associates, may not appear before that judge

Code*: Canon 9;
EC 7-34, 9-6;
DR 7-110(A), 9-101(C)

Code of Judicial Conduct: Canon 3(C)(1), (D); 7; 2(B)

QUESTION

A lawyer defended a local judge against charges of ticket fixing instituted by the Commission on Judicial Conduct. Proceedings concluded with the judge being censured. All fees owed to the lawyer were paid and the lawyer no longer represented the judge in any matter. Thereafter, the lawyer formed a new firm.

Under the circumstances stated, may the lawyer or any of his present partners and associates now appear before the judge?

OPINION

The question posed is an extremely difficult one. We are not here dealing with a situation where a lawyer suggests that because of his prior representation of the judge he can obtain a more favorable result or one where the judge by his conduct conveys the impression that he is seeking to assist the lawyer who had personally represented the judge on a prior occasion. Such conduct by either the lawyer or the judge would be clearly improper. See, DR 9-101(C) of the Code of Professional Responsibility ("CPR") and Canon 2(B) of the Code of Judicial Conduct ("CJC"). The question posed assumes that no such improprieties have occurred; that the matter in which the lawyer represented the judge is now closed; and, that the lawyer did not render his services gratuitously. Cf., EC 7-34 and DR 7-110(A)(prohibiting the giving of a "thing of value" to a judge).

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* Unless otherwise noted, all references are to the Code of Professional Responsibility.

In 1974, the Code of Judicial Conduct was renumbered and incorporated in 22 NYCRR as Part 33 of the Rules of the Administrative Board of the Judicial Conference, Sections 33.1, et seq. Effective April 1, 1979, Part 33 was subsumed in the Rules of the Chief Administrator of the Courts and the balance of the Rules of the Administrative Board of the Judicial Conference became the Rules of the Chief Judge.

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Under such circumstances, it would appear that the subsequent representation of other clients before the judge would not violate any Disciplinary Rule of the Code of Professional Responsibility nor any Canon of the Code of Judicial Conduct. When read both narrowly and literally, we must conclude that no mandatory provision of either Code is addressed to the question posed.

Nevertheless, while no Disciplinary Rule is involved, the broad principles articulated by CPR Canon 9, and especially EC 9-6, serve to cast a specter of impropriety upon the proposed conduct and thus, we believe, should serve to disqualify the lawyer and his present associates from pleading a case before a judge whom the lawyer had previously represented. Those provisions of the Code of Judicial Conduct which are directed against the appearance of impropriety would, we believe, similarly serve to enjoin the judge from hearing a matter under the circumstances stated. See, CJC Canon 3(C)(1).

Where others are or become aware of the prior representation, there can be no way of avoiding a suspicion on their part that the judge will feel indebted to his former counsel and that this will influence the course of the proceedings. Any step the judge may take favorable to his former counsel will immediately become suspect. A judge, sensitive to such suspicions, may refuse to take certain actions which would otherwise be viewed as perfectly appropriate for fear of appearing biased. This would be unfair to his former counsel's present client.

It may be argued that a broad per se rule of disqualification will result in unfairness to a lawyer who has met his professional obligation to provide representation to members of the judiciary who may not be able to afford counsel. Also, a judge faced with charges of misconduct may be unable to obtain competent representation. We think that neither unfortunate result is inevitable under the proposed rule.

First, we cannot accept the proposition that, in a state as large as New York, a judge of limited financial resources cannot find a competent lawyer who will meet his professional obligation to provide representation to a judge requiring legal assistance and before whom that lawyer or his firm will not thereafter appear.

Second, a per se rule need not be overly burdensome to either the judge or the lawyer. A simple solution to the problem in almost all instances would be for the judge to disqualify himself from sitting on the matter, rather than to oblige the lawyer to refuse or withdraw from the case. See, N.Y. State 384(1975) and N.Y. City 893 (1978). In this way the lawyer need not suffer the loss of a client. We recognize that this solution may not be possible where, for example, the judge has previously been involved in the case or a related matter and to require the judge's -- rather than the lawyer's -- withdrawal would be a waste of judicial resources. A similar result would be necessary where there is only one judge authorized

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to sit in the particular court having jurisdiction. And, of course, where it appears that the lawyer was selected for the very purpose of obtaining the judge's disqualification, the lawyer has a duty to decline the matter. But these will be the rare cases, and if the rule established here strengthens the public's confidence in the administration of justice, then requiring a lawyer to withdraw in these instances is a small price to pay.

While CJC Canon 7, when dealing with the analogous problem of lawyers actively supporting judicial candidates, does not adopt a per se rule prohibiting lawyers who are known to have actively supported a judge from subsequently appearing before that judge, the problem of judicial candidates, although raising similar concerns, is qualitatively different from that now before our Committee. In the case of judicial candidates, it would be impossible for any lawyer or judge to conduct a meaningful candidacy without the assistance of the Bar and a per se rule would eliminate the possibility of support from any lawyer who might expect to appear before that judge. The application of a broad prophylactic rule to the question presented here, however, does not pose these difficulties inasmuch as a situation where a judge need be represented by more than one or two lawyers or firms would be extraordinary.

In our view the appearance of impropriety of a lawyer appearing before a judge whom the lawyer has previously represented is not appreciably lessened by the circumstance that the lawyer's partners or associates actually appear before the judge. The approach taken in N.Y. State 502(1979), where it was held that a former assistant district attorney's firm may in certain circumstances undertake a representation from which the former assistant might himself be disqualified, cannot be applied here. The countervailing considerations discussed in N.Y. State 502 are not present.

There may, of course, be occasions where after full disclosure, all the parties wish to waive the requirement of judicial disqualification. See, CJC Canon 3(D). However, such a waiver should be permitted only where both the limited nature of the representation and the passage of time will leave the parties and the public with the unequivocal assurance that judicial withdrawal would serve no purpose. An example of an occasion for an ethically meaningful and effective waiver might be one where the lawyer represented the judge in the purchase of the judge's home a number of years prior to the matter in suit and since that time has had no other lawyer-client relationship with the judge. But here the very nature of the representation -- to wit, defending a judge against charges of improper conduct in office -- would make any such waiver both inappropriate and wholly ineffective.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the negative.
