NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 602 - 10/26/89 (38-88)

Topic: Appearing before judge about whom member of firm has been called to testify; Commission on Judicial Conduct; recusal; withdrawal; disclosure of information concerning testimony before Commission on Judicial Conduct.

Digest: Lawyer may not appear before judge when member of lawyer's firm is witness in Commission on Judicial Conduct proceeding brought against that judge, absent disclosure and remittal; irrelevant whether testimony will be favorable to judge; judge has primary obligation of recusal; failing recusal or remittal, lawyer must seek to withdraw; to extent permitted by law, opposing counsel and clients having matters before judge must be informed.

Code: EC 1-5, 5-1, 5-11, 5-21, 7-8, 7-20, 7-39, 9-2; DR 1-102(A)(5), 1-103(B), 2-110(A), 7-110(B).

Code of Judicial Conduct: Canons 2, 3C(1), 3C(1)(c), 3C(1)(d)(iii), 3D

QUESTIONS

A lawyer has been subpoenaed to testify before the Commission on Judicial Conduct (the "Commission") in a proceeding brought against a judge within the New York State unified court system. Although the lawyer does not expect to appear before the judge, several of his firm's partners and associates do.

Under the circumstances: (1) Must the firm's lawyers request that the judge recuse himself from matters in which they appear as counsel? (2) Must opposing counsel be informed? (3) Must the firm's clients in such matters be told about the subpoena or the fact that one of the firm's partners has been required to give testimony concerning the judge?

OPINION

Proceedings before the Commission are confidential. Judiciary Law § 45. Even the existence of the proceeding will remain confidential unless and until the respondent judge waives confidentiality or the proceeding is concluded with some form of public sanction, such as an admonition, censure or a recommendation to the Court of Appeals for removal from office. *Id.* § 44(4), (7). If the judge is absolved or merely issued a letter of caution, the law requires that confidentiality be maintained. *See, e.g., Nicholson v. State Commission on Judicial Conduct,* 67 A.D.2d 649, 412 N.Y.S.2d 602 (1st Dep't 1979), *modified on other grounds,* 50 N.Y.2d 597, 431, N.Y.S.2d 340 (1980).

Consistent with the Commission's procedures, irrespective of whether the testimony favors the judge, the judge will come to know the identity of any witness who has been subpoenaed to testify after formal proceedings are instituted. *See* Judiciary Law § 44(4). It is reasonable to assume that the judge will also either know, or shortly come to know, the witness' firm affiliation.

Although issues of law are beyond our jurisdiction to resolve, we assume absent controlling precedent to the contrary that the witness may fully inform other members of his firm. Since knowledge is irrebutably imputed among partners, such an assumption does little more than recognize explicitly what analogous principles of law imply. *See, e.g., Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F2d 1384 (2d Cir. 1976). Whether the law will permit

the witness lawyer to inform others outside his firm is problematic. There are no clearly analogous authorities, let alone controlling precedents.

Thus, the three questions now posed to our Committee relate to a period in the proceedings when only the respondent judge and the witness lawyer (and, perhaps, the members of the lawyer's firm) may be aware of what is happening and of the relationship between the two individuals.

It is in the context of this shared secret that we turn to consider whether there is any obligation of recusal. The operative standard of judicial ethics is set forth in Canon 3C(1) of the Code of Judicial Conduct: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ...."

Our analysis of the judge's obligation of recusal must begin by asking whether an appearance by the lawyer witness — as distinguished from one of his partners or associates — should require the judge to recuse himself. As long as proceedings before the Commission continue, the lawyer witness may have significant power over the judge's reputation and career. Regardless of whether the witness' testimony will support the judge's position in those proceedings, the witness will be perceived to have some power to influence its outcome. We believe that this power can reasonably raise a question concerning the judge's impartiality. Accordingly, the judge "should disqualify himself" from matters in which the witness is appearing as counsel. *Id.*; *see* ABA Inf. 1477 (1981).

In so finding, we recognize that there is considerable authority for the proposition that the personal antipathy of a judge for a party's counsel does not ordinarily mandate recusal. *E.g.*, *see also, United States v. International Business Machines*, 475 F.Supp. 1372 (S.D.N.Y. 1979); *Matter of Rotwein*, 291 N.Y. 116, 51 N.E.2d 669 (1943); *Fitzgerald v. Wells*, 9 A.D.2d 812, 192 N.Y.S.2d 719 (3d Dep't 1959); *People v. Wallace*, 84 Misc. 2d 619, 378 N.Y.S.2d 290 (Sup. Ct. Suffolk Co. 1975); 23 A.L.R.3d 1416. We are also aware of authorities that do not require recusal where the judge has reason to feel personal gratitude toward a litigant's attorney. *See, e.g.*, N.Y. City 81-51 (1982); N.Y. City 893 (1978); *contra* Ariz. Op. 215 (1967), 6 Ariz. B.J. 34 (1970), indexed in Maru's Digest at 5969. In our view, however, the potential for leverage makes this situation more akin to one in which the judge has an impermissible "interest" than to one in which the judge has merely expressed a dislike for counsel or has reason to be grateful. *See, e. g.*, *Melnick v. Melnick*, 118 A.D.2d 902, 499 N.Y.S 2d 470 (3rd Dep't 1986) *Johnson v. Hornblass*, 93 A.D.2d 732, 461 N.Y.S.2d 277 (1st Dep't 1983);

cf., *Rosen v. Sugarman*, 357 F2d 794 (2d Cir. 1966). The judge's interest is personal albeit not necessarily pecuniary. The interest is in the outcome of the litigation, or in the manner of its disposition, in the sense that the judge understandably may wish to avoid offending the lawyer witness and could reasonably be perceived as wanting to produce a favorable result for him. *Cf.* Code of Judicial Conduct, Canons 2, 3C(1)(c) and (d)(iii).

Our determination of the need for recusal is expressed solely as a matter of judicial ethics and not as a matter of substantive law. The difference between these two standards was well stated by the First Department several years ago in *Johnson v. Hornblass, supra*, deciding whether a writ of prohibition should properly lie against a judge who had refused to disqualify himself:

> In the absence of a violation of express statutory provisions (such as Judiciary Law § 14), bias or prejudice or unworthy motive on the part of a judge, unconnected with an interest in the controversy, will not be a cause for disqualification, unless shown to affect the result. * * * We have heretofore recognized the limitation in several cases (citation omitted). Although Justice Hornblass may not be disqualified pursuant to Judiciary Law § 14, Canon 2 of the Code of Judicial Conduct requires that a judge "avoid impropriety and the appearance of impropriety". Canon 3C(1) calls on the judge to disqualify himself when his "impartiality might reasonably be questioned". * * * Indeed it is upon this and other sections of the Canons that the People primarily rely. And while sufficient (sic) has not been shown to establish such an abuse of discretion on the part of the respondent in denying recusal to warrant our intervention, we suggest that the "appearance of justice" might be better served by his recusal. We are confident that he recognizes, as do we, that judicial proceedings should never be conducted save in a manner and under circumstances that reflect complete impartiality. Not only must there be no partiality in fact, even the appearance of partiality is to be avoided.

93 A.D.2d at 733, 461 N.Y.S.2d at 279. The substance of this principle of judicial ethics was reiterated in N.Y. State 574 (1986):

> Actual judicial impartiality is essential to our system of justice, but it is not enough. The reasonable perception of litigants and the interested public that the judge is impartial is also of the highest importance.

Because we believe that the judge should not preside over cases in which the witness appears and it is reasonable to assume that other lawyers in the witness' firm share the witness' knowledge, we find that the judge should also recuse himself from presiding over cases in which the witness' partners and associates appear. The need for recusal flows from a recognition of the special knowledge of the judge's situation and the "reasonable perception" of partiality similar to that which would obtain if the witness himself were to appear before the judge. N.Y. State 574 (1986).

In both instances, consistent with our prior interpretation of Canon 3D of the Code of Judicial Conduct, we believe that remittal of the judge's disqualification should be possible. *See, e.g.*, N.Y. State 574, *supra*; N.Y. City 893 (1978). Since an effective remittal would require that all counsel and their respective clients be advised of the relationship between the judge and the witness' firm, however, the judge should feel himself under no constraint to remain in the case by seeking remittal. As a matter of judicial ethics, the judge has a choice. He may disqualify himself and say nothing; or he may make full disclosure, and leave it to the litigants and their counsel to decide whether to remit his disqualification.

If the judge fails to recuse himself or to make disclosure, lawyers in the witness' firm cannot simply permit the case to proceed. Although 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. *See, e.g.*, EC 7-39, EC 9-2; *cf.* DR 1-103(B), EC 7-20. Ordinarily, application of this principle in practice would require nothing more on the part of the lawyer having knowledge than to disclose the problem for the record and to await appropriate action by the court or opposing counsel. *Cf.* DR 7-110(B). In this instance, however, the legal requirement of maintaining confidentiality may prevent full disclosure by lawyers in the witness' firm. They may have only one practical course of action: to request that the judge recuse himself or herself and, failing that, to attempt to withdraw from the case pursuant to DR 2-110(A). In seeking to withdraw, absent a controlling interpretation of Judiciary Law § 45 to the contrary, they must continue to maintain confidentiality. *See* EC 1-5; *cf.* DR 1-102(A)(5). Of course, if the judge requires them to state their reasons for withdrawal or otherwise waives the judge's right to confidentiality, the proceedings before the Commission may be disclosed. Even without such waiver and notwithstanding the apparent need to preserve confidentiality, the firm's lawyers can and should make known to op-

posing counsel the fact that one of their partners has been subpoenaed to testify in a pending matter of great importance to the judge. Although such a limited disclosure may be insufficient to permit a meaningful and legally effective remittal of the judge's disqualification, it would, in our view, suffice to discharge the lawyers' ethical obligation; it could also be delayed in its communication to opposing counsel until the judge has been accorded a reasonable opportunity to act.

Ethically, clients of the witness' firm having cases before the judge stand on different ground from that on which opposing counsel stand. They are entitled to such information as will enable them to decide whether their interests would be better served by another firm, and they are entitled to this information within a reasonable period of time after their lawyers become aware of the problem. *See, e.g.*, EC 5-1, EC 5-11, EC 5-21, EC 7-8. In the absence of authority to the contrary, on the assumption that the requirement of maintaining the confidentiality of Commission proceedings would still apply to attorney/client communications, we believe that such clients must nonetheless be advised of the problem — albeit that such advice remain within the bounds of the law. *Cf. Spector v. Mermelstein*, 485 F.2d 474 (2d Cir. 1973); ABA Inf. 1243 (1972). Thus, the client should be told that one of the partners in the firm has been subpoenaed to testify in a matter of great importance to the judge. Lest the client come to perceive some particular personal advantage, counsel should also make clear to the client the fact that the judge may be compelled to recuse himself or herself or that the firm may be obliged to withdraw, as well as the potential for increased delay or expense incident to such additional proceedings as may become necessary.

For the reasons stated and subject to the qualifications hereinabove set forth, each of the three questions posed is answered in the affirmative.