NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #384 - 4/17/75 (18-75)

Topic: Practicing in court where lawyer's brother is judge.

Digest: Lawyer not required to forego practice in court where brother is a judge absent statutory prohibition or special circumstances, although judge may be disqualified in matter.

Code: Canon 9
EC 1-5, 9-4, 9-6
DR 7-102(A)(8)
Judicial Code: Canon 3C(1)(d)(ii), 3D

QUESTION

May a lawyer properly handle matters in a court in which his brother is a judge?

OPINION

Statutes such as Sections 471 and 472 of the New York Judiciary Law prohibit certain lawyers from practicing in a court of which a judge is a member by reason of specified practice or personal relationships with the judge. The scope of such statutory prohibitions involve issues of law on which this Committee express no opinion. Obviously any court appearance forbidden by law would be violative of the Code. EC 1-5; DR 7-102(A)(8).

Even where no statute prohibits a lawyer from practicing in a particular court, it would not be at all conducive to public confiddence in the impartiality of the judicial system to have a judge rule on matters where a brother or other close relative is either a party or serves as counsel. While the former Canons of Judicial Ethics did not specifically preclude a judge from sitting in a case in which a close relative is counsel, it was generally recognized that "[t]he responsibility [was] on the judge not to sit in [such] a case unless he is both free from bias and from the appearance thereof". ABA 200 (1940). The Code of Judicial Conduct which replaced the former Judicial Canons in March 1973, and the Judicial Conference Rules which became effective in New York in January 1974, have made such disqualification mandatory whenever a close relative serves as counsel, absent remittal of disqualification pursuant to Judicial Canon 3D and 22 NYCRR 33.3 (d). See Judicial Canon 3C(1)(d)(ii) and 22 NYCRR 33.3(c)(iv)(b).

It does not follow, however, that the lawyer relative must forego all practice in the court of which his close relative is a member, absent a specific legal prohibition such as that found in Section 472 of the Judiciary Law. In making it the judge's responsibility not to sit on a case involving either actual or apparent bias, ABA 200 (1940) further held that it was not incumbent on a lawyer to refuse employment in a case merely because it might come before a judge who was his

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father or other relative. See also ABA Inf. 449 (1961) and ABA Inf. 1260 (undated), decided under the new Code. Both recognize in accord with ABA 200 that it is the judge and not the lawyer relative who is the one who is normally to be disqualified.

Special circumstances may, of course, exist where it might be violative of Canon 9 and EC 9-4 and EC 9-6 for a lawyer to accept a retainer in connection with a matter either pending or to be brought in a court of which a close relative is a member. This would be the case if the lawyer had grounds for suspecting that his client had selected him in order to gain some hoped for advantage because of his relationship with a judge of that court, such as to compel the judge to disqualify himself.
