JUDICIAL ETHICS COMMITTEE

ADVISORY OPINION NO. 04-01
February 17, 2004

The Committee has been asked to render an opinion as to the necessity of recusal by a trial judge when a law firm with which the judge's child is affiliated makes an appearance in the judge's court:

1. Must a trial judge recuse himself/herself from all cases in which one of the parties is represented by a firm in which his/her child is a salaried partner?

2. Must a trial judge recuse himself/herself from all cases in which one of the parties is represented by a firm in which his/her child is an equity partner?

The Committee concludes that the fact a litigant is represented by a firm in which the judge's child is a partner, whether salaried or equity, does not require recusal of the judge from the litigation, but other factors may make recusal necessary.

DISCUSSION

These inquiries are governed by Tennessee Supreme Court Rule 10, Canon 3E(1) which provides in pertinent part:

> 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:
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> . . . .
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
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> . . . .
>
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding[.]

The intent of this section is further explained by its Commentary:

> The 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. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under

> Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge[']s disqualification. Judges are cautioned that Tenn. Code Ann. § 17-2-101 requires disqualification, unless all parties consent, when the judge is related to a party within the sixth degree of relationship.

In Opinion No. 95-4, this Committee had been asked to determine a somewhat broader question, whether the fact that a judge's child was employed by a law firm, either as an attorney or a summer law clerk, required that the judge recuse himself/herself from cases in which that firm represented one of the parties. The Canon then in effect provided that recusal was required when the child was "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . ." Tenn. Sup. Ct. R. 10, Canon 3C(1)(d)(iii). Applying the standard, this Committee determined that recusal was not automatically required:

> 1. A judge is not *per se* disqualified from hearing cases presented by members of the same law firm in which the judge's child practices. Recusal would, however, be required where the judge's impartiality might reasonably be questioned or where the judge's child has an interest in the law firm that could be "substantially affected by the outcome of the proceeding." Examples requiring recusal might include:
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> (A) the judge's child is a partner in the firm and his/her compensation could be "substantially affected" by the case's outcome;
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> (B) the judge's child contributed toward the preparation of the case even though the child makes no formal appearance.
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> 2. A judge does not commit any ethical impropriety by recusing himself/herself in all cases which involve a law firm in which the judge's relative practices as a partner or associate.

Judicial Ethics Committee, Op. 95-4 (Aug. 31, 1995).

Utilizing the current standard, that the judge is aware the child has "a more than de minimis interest that could be substantially affected by the proceeding," the New York State Bar Association Committee on Professional Ethics considered, *inter alia*, in Opinion No. 703 (1998) whether a member of a multi-judge state court is disqualified from hearing a matter in which one of the parties is represented by a law firm which has, among its members, the stepdaughter of the uncle of the judge. Applying Canon 3E(1), the committee explained considerations which could guide a trial

judge in ascertaining whether his/her impartiality reasonably could be questioned by continuing to preside in a matter where a relative's law firm represented a litigant:

> In our view, although the nature of the attorney (public vs. private attorney), the nature of the fee (contingent vs. hourly fee), the size of the law firm and the size of the community are all factors that the judge should take into account in deciding whether his or her impartiality may reasonably be questioned, no one factor is determinative. For example, it is unlikely that the judge's impartiality would be called into question if an associate of a 1,000 lawyer firm appears before the judge in a contingency fee matter and the judge's cousin is an associate in a west coast office of the firm. Conversely, where the partner of the judge's brother in a two-partner firm in a small town appears before the judge, regardless of how the firm's fee is to be paid, the judge's impartiality is likely to be called into question.
>
> As in the first inquiry, however, if the judge discloses on the record the basis for the disqualification, and the parties and their lawyers agree, without the judge's participation, that the judge should not be disqualified, the judge may continue to sit in the proceeding.

New York State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 703, 1998 WL 957915, at *4 (May 7, 1998). These considerations are similar to those recognized by this Committee in Advisory Opinion No. 95-4:

> Recusal may well present a more difficult problem for rural judges than for urban judges. It may be relatively easy for urban judges to adopt an equitable assignment system so that a particular judge is not assigned cases involving a particular law firm, or such cases can be transferred to another division upon the appearance of a particular law firm. Rural judges may not be able to easily accomplish such a transfer. Nevertheless, ethical mandates apply to urban and rural judges alike.

CONCLUSION

We conclude, as we did in Opinion No. 95-4, that a trial judge is not *per se* disqualified from a matter simply because his/her child is a salaried or equity partner with a law firm representing a litigant in a matter in the judge's court. Considerations as to whether the judge's child has "a more than de minimis interest that could be substantially affected by the proceeding" include the size of the law firm in question and the number and geographic spread of its offices, with the individual interests of firm members being diluted, under normal circumstances, the greater the size of the firm.

Additionally, the judge should consider the nature of the matter, the potential impact on the child's firm of its client being awarded a large sum or substantial relief, or having such an award against it, as well as the child's involvement, if any, in the matter.

If the trial judge concludes that he/she must be disqualified because the judge's impartiality might reasonably be questioned or because the judge's child has more than a de minimis interest in the matter which could be substantially affected by the proceeding, the trial judge may, in accord with Rule 10, Canon 3F "disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." The Comment to this section explains efforts which the judge must make to insure that he/she does not influence the parties' determinations as to the judge's disqualification:

> A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

As our final comment on this matter, we repeat the conclusion of this Committee in Advisory Opinion No. 95-4 that there is no ethical impropriety in a trial judge's disqualifying himself/herself in all cases where a party is represented by the law firm with which the judge's child is affiliated in some fashion:

> It may be that a judge would prefer to adopt a policy disqualifying himself/herself in all cases involving a relative's law firm. We find such a policy to be acceptable. Although we have previously opined that a judge should hear all cases except those in which disqualification is required (Formal Opinion 91-5), disqualification from all cases involving a relative's law firm creates no ethical impropriety.

This comment is repeated only to make clear that a blanket disqualification ethically is acceptable. However, such a policy is not required.

FOR THE COMMITTEE:

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ALAN E. GLENN, JUDGE

CONCUR:

FEBRUARY 17, 2004

CHANCELLOR THOMAS R. FRIERSON, II
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