Judicial Ethics Committee
State of Vermont

Opinion Number: 2728-16

Date: April 29, 2015

To: (Name Redacted)

The matter that you presented to the Judicial Ethics Committee has been researched and reviewed. The following is the Opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Questions Presented

Is a judge who is the first cousin, once removed of a state's attorney required to recuse himself from cases in which the state's attorney or one of his deputies appears before him? If recusal is not required, what is required in terms of disclosure to the parties regarding the judge's relationship to the state's attorney?

Short Answer

Recusal is not automatically required under the Code. Although the appearance of a judge's first cousin, once removed as an attorney in a proceeding before the judge could, under certain circumstances, potentially create a situation in which a judge's impartiality may reasonably be questioned, disqualification is not generally required absent a close personal relationship between the judge and the first cousin, once removed. The judge should disclose the relationship to allow the parties the opportunity to consider whether to request disqualification.

Facts

A judge is the first cousin, once removed of the state's attorney of the county in which the judge currently sits. That is, the state's attorney is the child of the judge's first cousin. The judge represents that he occasionally interacts with state's attorney at family gatherings. The judge currently hears cases in which the state's attorney's deputies appear on behalf of the State of Vermont although the state's attorney has not personally appeared before the judge.

Relevant Canons of the Vermont Code of Judicial Conduct

CANON 3(E)(1), (E)(1)(d)(ii), (G), Reporter's Notes

Analysis

The Code sets forth both specific circumstances requiring per se disqualification as well as a more general "catchall" provision requiring disqualification in circumstances where a "judge's

impartiality might reasonably be questioned." Canon 3(E)(1). Specifically, a judge is required to disqualify himself or herself in a proceeding where "the judge or the judge's spouse or a person 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 . . . ." Canon 3(E)(1)(d)(ii).

Here, the state's attorney's deputies appear in proceedings before the judge. The Committee concludes that the appearance of these deputies should be treated as analogous to the personal appearance of the state's attorney. See U.S. Comm. on Codes of Conduct Op. No. 38 (2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf (concluding that under the analogous federal rule where a specified relative serves as a United States Attorney recusal is required in all cases in which the relative's office appears). The state's attorney necessarily serves as the supervisor of the deputies and is ultimately the one responsible for the litigation. Treating the deputies' appearance as tantamount to the appearance of the state's attorney is consistent with the Code's purpose in seeking to promote public confidence in the judiciary.

The Code defines "fourth degree of relationship" as including the following individuals: "great-great grandparent, great-grandparent, grandparent, parent, great uncle, great aunt, uncle, aunt, brother, sister, first cousin, child, grandchild, great grandchild, great-great grandchild, nephew, niece, great nephew, or great niece." The definition does not include a first cousin, once removed, which is generally understood to constitute a fifth degree of relationship. See *People v. Molaro*, 953 N.Y.S.2d 530 (App. Div. 2012) (holding that automatic disqualification under rule requiring disqualification where attorney was within the fourth degree of relationship to a judge was not required where prosecutor was judge's first cousin, once removed because a first cousin, once removed constitutes a fifth degree of relationship). Accordingly, the judge is not per se disqualified from hearing cases in which the judge's first cousin, once removed acts as the state's attorney.

The Code generally requires recusal where a "judge's impartiality might reasonably be questioned." Canon 3(E)(1). Family relationships of a degree that is not sufficiently close to require per se disqualification can nonetheless create circumstances favoring recusal under the general impartiality standard. Ethics committees which have considered the issue generally have concluded that where per se disqualification is not mandated, disqualification is only required if the judge has a particularly close relationship with the relative. See, e.g., Fla. Sup. Ct. Comm. on Standard of Conduct Governing Judges Op. No. 97-13, available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet7/97-13.html (disqualification is the "safe course of conduct" where judge has "close familial tie" to cousin); Ethics Comm. of Ky. Judiciary Op. No. JE-48 (1984), available at http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_048.pdf (disqualification required where judge and cousin have a "near-sibling relationship." In the scenario presented here, the judge and the state's attorney have only occasional interactions at family events. The relationship, therefore, does not appear to be sufficiently close to mandate disqualification under the general "impartiality might reasonably be questioned" standard of Canon 3(E)(1).

The Committee believes that the judge in this scenario should follow the provisions of Canon 3(G) and allow litigants the opportunity to file a motion to disqualify. Canon 3(G) states: "A

judge shall disclose to the parties any fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Section 3E(1). Unless a party promptly moves to disqualify, the judge may continue to participate in the proceeding." As the Reporter's Notes indicate, this provision is unique to the Vermont Code. The Reporter's Notes emphasize that the standard for disclosure is lower than the standard required for disqualification. Disclosure is consistent with a judge's independent duty to ensure that all parties are aware of any potential conflict of interest between the judge and the attorneys in a case. See *Velardo v. Ovitt*, 2007 VT 69, ¶ 14, 182 Vt. 180.

As provided by Canon 3(G), disclosure should be made in advance in each case involving the state's attorney's office. The judge should disclose his familial relationship with the state's attorney and why he believes it does not rise to the level requiring disqualification. The onus would then be on the litigants to move for disqualification if they disagree with the judge's assessment.

Summary

Based on the facts presented, automatic disqualification of the judge is not required under Canon 3(E)(1)(d)(ii). Disqualification is also not generally required under the broader impartiality provision of Canon 3(E)(1) because of the nature of the relationship as described by the judge. Pursuant to Canon 3(G), the judge should disclose such familial relationship in all cases involving the state's attorney's office. Disclosure should be made in advance in each case to allow litigants an opportunity to move for disqualification.

Members of the Judicial Ethics Committee

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