

JOINT OPINION 08-76, 08-84, 08-88 and 08-89

April 24, 2008

Digest: As long as a State-paid judge believes he/she can be fair and impartial, in view of the lawsuit filed by the Chief Judge seeking a judicial salary increase, a judge need not recuse him/herself, when, in an unrelated action: 1) a State Legislator appears before him/her as a party or as counsel; 2) a member of the legislator's law firm appears as counsel; or 3) a member of a law firm representing one of the parties within the Chief Judge's litigation appears before the judge. Furthermore, a judge need not disclose the lawsuit when a State Legislator or a member of his/her law firm represents a party before the judge. If the judge voluntarily discloses the lawsuit to the parties, recusal remains within the judge's sound discretion, but is required when the judge doubts his/her ability to remain impartial.

Rules: N.Y. CONST. art. VI, §1(a); Judiciary Law § 469; CPLR art. 9; 22 NYCRR 100.2(A), 100.3 (E)(1)(a)(i), 100.3(F); Opinions 07-190, 07-176, Joint Opinion 07-84/07-140, 07-25, 01-24 (Vol. XIX), 94-23 (Vol. XII), 89-93 (Vol. IV); People v Moreno, 70 NY2d 403 (1987); People v Kabir, 13 Misc 3d 920 (Sup Ct 2006); Eisenhauer v Sarrabia, 178 Misc 2d 95, 97 (Nassau Dist Ct 1998); Black's Law Dictionary 1154 (8th ed 2004).

Opinion:

Four State-paid judges ask whether they must exercise recusal while the Chief Judge's lawsuit concerning judicial salary increases is pending. Specifically, the judges ask whether they must recuse themselves when 1) a member of the State Legislature appears before him /her as counsel or as a party; 2) another lawyer from the legislator's law firm appears before the judge as counsel; or 3) a member of a law firm representing one of the parties actually named in the Chief Judge's litigation appears before the judge. In addition, one judge asks whether disclosure of the Chief Judge's lawsuit is either mandatory or appropriate when a State Legislator, or a law firm with which the legislator is affiliated, represents a party before the judge.

A judge must disqualify him/herself in any proceeding in which the judge's impartiality might reasonably be questioned (22 NYCRR 100.3[E][1]). The Chief Judge and the New York State Unified Court System commenced the lawsuit giving rise to the inquirers' concerns. Although the complaint is brought "on behalf of ... the Judiciary" and "State-paid courts and judges" (see Kaye Complaint at 8-9, ¶¶ 16 & 19), the complaint is not styled as a class action. cf. CPLR art. 9. Thus, although the inquiring judges have interests implicated by the proceeding, they are not parties to the pending judicial pay raise lawsuit. A party is one "by or against whom a suit is brought . . . and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties" (Eisenhauer v Sarrabia, 178 Misc 2d 95, 97 [Nassau Dist Ct 1998] [citations and internal quotation marks omitted]; see also People v Kabir, 13 Misc 3d 920, 924-925 [Sup Ct 2006]; Black's Law Dictionary 1154 [8th ed 2004]).

The allegation that the plaintiff Unified Court System "includes all New York State trial and appellate courts, as well as the judges and justices who sit on those courts" (see Kaye Complaint at 9, ¶ 20 [citing N.Y. CONST. art. VI, §1(a)]) does not change the analysis. Significantly, in these circumstances, the inquiring judges are not named parties, nor do they have direct or personal involvement in the lawsuit. As one example, they were not consulted about bringing the lawsuit or about the allegations to be included in the complaint, nor have they demonstrated that they are likely to be consulted on any potential settlement of the case.

Although directly relevant, however, the judges' non-party status may not be sufficient to answer the issue of whether a "judge's impartiality might reasonably be questioned" (22 NYCRR 100.3[E][1]) in light of the Chief Judge's pending lawsuit. More fundamentally, we have previously found that the relationship between a State-paid judge and State Legislator is too remote to mandate recusal on the basis of the Legislature's control over judicial pay (Joint Opinion 07-84 and 07-140; Opinion 89-93 [Vol. IV]), even when the "long-standing issue of judicial salary increases" is before the Legislature (Opinion 07-25). Indeed, although the Legislature controls the budget for State-funded courts and the judge's salaries, the Judiciary Law expressly contemplates that legislators will practice law before the courts of this State (see, e.g., Judiciary Law § 469).

The Committee believes the ethical considerations raised by the Chief Judge's lawsuit seeking to "fix[] the salaries for the judges of each State-paid court" (Kaye Complaint at 29, ¶ 4) are indistinguishable from the underlying circumstances in Joint

Opinion 07-84 and 07-140. There, we concluded that commencement of an action by individual judges seeking immediate disbursement of all retroactive sums and forthwith payment of the budgeted raises to the judges and justices of New York did not require recusal of judges who were not named parties in the action "when a member of the New York State Legislature (or a member of his or her law firm) appears before the judge" (Joint Opinion 07-84 and 07-140; see Opinion 07-176; 94-23 [Vol. XII]).

Similarly, the Committee now concludes that, even following commencement of a judicial compensation lawsuit by the Chief Judge and the Unified Court System, the relationship between a judge, who is not a named party to that lawsuit, and a legislator remains too remote as a factor, in and of itself, to reasonably call into question a judge's impartiality when a legislator or a member of his/her law firm appears before a judge in an unrelated action (see Joint Opinion 07-84 and 07-140; Opinion 07-176; 94-23 [Vol. XII]). In our view, a judge who is not a named party to the Chief Judge's lawsuit has the same financial interest in the outcome of the lawsuit as he/she would have in the outcome of ordinary legislative debates about judicial pay. Thus, the nature of this particular financial interest is not, standing alone, a sufficient factor to alter the very distant relationship between individual State legislators and individual State-paid judges. Accordingly, the mere existence of this recent lawsuit is not alone a proper basis upon which a judge should exercise recusal in other, unrelated matters in which the judge believes he/she can be impartial.

Regarding the appearance before a judge by a member of a law firm representing one of the parties in the Chief Judge's litigation itself, we note again that the inquiring judges are not named parties in that lawsuit. Consequently, the law firms involved in that action neither represent those judges nor parties adverse to those judges. Accordingly, the Committee concludes that recusal is not required when a member of a law firm representing one of the parties appears (see Opinions 07-176; 01-24[Vol. XIX]).

It follows that, because a judge's impartiality may not reasonably be questioned merely because of the Chief Judge's recent lawsuit, disclosure of that lawsuit is not mandatory. Any decision as to voluntary disclosure of the lawsuit remains within an individual judge's discretion, should that judge deem it appropriate under any particular circumstances. Thus, once a judge has concluded that he or she can be fair and impartial, he/she may voluntarily disclose the fact of the Chief Judge's lawsuit and entertain argument from the parties.

After reflection, however, the ultimate decision on recusal remains within the judge's discretion. Conversely, if following such reflection, "the judge believes he or she can be fair and impartial notwithstanding the salary issue, then 'opting for disqualification on the ground stated would . . . erode public confidence in the integrity, impartiality and independence of the judiciary'" (Opinion 07-190, quoting Opinion 07-25; see also 22 NYCRR 100.2[A]).

Finally, if an individual judge, after searching his/her personal conscience, concludes that the controversy surrounding judicial pay and/or the Chief Judge's pending lawsuit raises genuine doubts in his/her mind regarding his/her ability to be fair and impartial, then recusal is mandatory, and not subject to remittal (22 NYCRR 100.3[E][1][a][i]; 100.3[F]; Opinions 07-190; 01-24 [Vol. XIX]; see generally People v Moreno, 70 NY2d 403 [1987]).