

Opinion 23-54

May 4, 2023

Digest: (1) A judge’s impartiality cannot reasonably be questioned based on (a) de minimis political contributions made more than two years ago or (b) the business and/or political activities of the judge’s first-degree relative, where the relative has no direct or indirect involvement in the proceeding and no interests that could be substantially affected by the proceeding. (2) As a result, the judge is not ethically required to disclose such facts or circumstances *sua sponte* in the proceeding, regardless of any surrounding publicity or lack thereof. The judge may continue to preside in the matter provided the judge believes he/she can be fair and impartial.

Rules: Judiciary Law § 14; 22 NYCRR 100.2; 100.2(A); 100.2(B); 100.3(B)(1); 100.3(E)(1); 100.3(E)(1)(a)-(f); 100.3(E)(1)(d)(iii); 100.3(E)(1)(e); Opinions 22-183; 22-172; 22-138; 17-126; 15-212; 15-62; 98-22; *People v Moreno*, 70 NY2d 403 (1987).

Opinion:

The inquiring judge is presiding in a criminal case involving a defendant who is a former public official. Although the judge has searched his/her conscience and is confident in his/her own ability to be fair and impartial, the judge nonetheless asks if disclosure and/or disqualification is ethically mandated on one of several grounds.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary’s integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must not allow “family, social, political or other relationships to influence the judge’s judicial conduct or judgment” (22 NYCRR 100.2[B]) and must “not be swayed by partisan interests, public clamor or fear of criticism” (22 NYCRR 100.3[B][1]). A judge must disqualify where required by rule or statute (*see* 22 NYCRR 100.3[E][1][a]-[f]; Judiciary Law § 14) and in any other proceeding where the judge’s impartiality “might reasonably be questioned” (22 NYCRR 100.3[E][1]). For example, a judge must disqualify when a relative within the fourth degree of relationship “is likely to be a material witness in the proceeding” (22 NYCRR 100.3[E][1][e]) or “has an interest that could be substantially affected by the proceeding” (22 NYCRR 100.3[E][1][d][iii]). However, where disqualification is not mandatory, a trial judge is the sole arbiter of recusal (*see People v Moreno*, 70 NY2d 403 [1987]).

First, the judge asks if he/she should confirm or deny, as the case may be, matters that have been reported in the media. Whether or not something has been

reported in the media is immaterial to the ethical analysis. The judge remains free, of course, to make any disclosures the judge deems appropriate but he/she is not by virtue of such reporting mandated to do so.

The judge also asks if it is mandatory to disclose certain prior political contributions that were made more than two years ago. The total amount contributed, in the aggregate, was less than \$50. One contribution was made to the person who opposed the defendant in an election; none was made to the defendant or the prosecutor or anyone else involved in the case before the judge.

We seldom require disqualification or disclosure for more than two years (*see e.g.* Opinion 22-138 [“A set period will be simpler for judges to remember and apply, and two years is a standard we have used regularly since the Committee’s inception.”]). Indeed, we recently adopted a bright-line two-year rule in an area where we had previously required disclosure indefinitely (*see* Opinion 22-183 [judge’s former counsel]).

On the facts before us, it is sufficient to say that these modest political contributions made more than two years ago cannot reasonably create an impression of bias or favoritism in the case before the judge. Accordingly, we conclude the judge’s impartiality cannot “reasonably be questioned” on this basis and the judge is not ethically required to disclose them.

The inquiring judge further asks us whether he/she must disclose that his/her relative’s agency recently declined to work for the prosecutor now appearing before the judge. A first-degree relative of the judge ^[1] is a high-ranking officer in a business that works exclusively with one political party’s candidates, and that party is different from that of the former elected official now appearing as a defendant in the judge’s court. The judge’s relative was asked to work for the prosecutor in a political matter but the relative declined the work.

We previously considered a circumstance where a judge’s first-degree relative was “employed by a non-party real estate company that does business with one party in the litigation” (Opinion 22-172). We concluded that fact “does not require disqualification, where neither the judge’s relative nor the relative’s employer has any interests that could be substantially affected by the proceeding” (*id.*).

Here, too, the matter currently before the judge does not involve either the judge’s relative or the relative’s business, whether directly or indirectly. They are not parties or likely witnesses in the matter, and none of the parties or counsel before the judge are clients of the business. We see nothing in the inquiry to suggest that the outcome of the case could have any effect on the judge’s relative, the relative’s business, or any of their interests.

We also note that, notwithstanding the strict limits on a judge's own political activities, a judge's relatives remain free to engage in their own bona fide independent political activities (*see e.g.* Opinions 15-62; 98-22). A relative's independent political activities do not provide a *reasonable* basis to question the judge's impartiality (*see e.g.* Opinions 17-126 [judge may continue to preside in a declaratory judgment action, even after learning that the spouse's employer made political contributions to a named respondent, provided the judge believes he/she can be fair and impartial]; 15-212 [judge need not disqualify from cases involving lawyers who sought to contribute to the judge's spouse's recent political campaign, provided the judge believes he/she can be fair and impartial]).

On the facts before us, we conclude the judge's impartiality cannot reasonably be questioned based on the judge's relative's business and/or political activities, and the judge is not ethically required to disclose them.

[1]

A judge's first-degree relatives include a parent or child of the judge or the judge's spouse, or the spouse of such person. Here, the judge's relative lives and works in another state, but apparently does business with campaigns nationwide.