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A. C. J. C.

Supreme Court of New Jersey
Jersey Advisory Committee
On Judicial Conduct
Docket No. ACJC 2009-116

In the Matter Of
Gerald J. Council, Judge
Of the Superior Court

Answer

Alan Dexter Bowman, Esq., attorney for respondent, the Honorable Gerald J. Council, J.S.C., doth hereby answer and say:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted. It is significant to note that the **Code of Judicial Conduct** requires that a judge recuse himself/herself only where the "relative" is within the third degree of relationship. **Code of Judicial Conduct §C. (1)(d).** The **Code** references **R.1:12-1 (a),** which requires recusal where a party "is by blood or marriage the second cousin or more closely related" to the court. The party at issue herein was not immediately recognized by respondent as either a second cousin or more closely related. Respondent at that time believed that the relationship was more attenuated. Nevertheless, the **Code** states that for its purposes the degree of the relationship is calculated according to the common law. **Code of Judicial Conduct §C. (3)(a).** The commentary to this provision states that the common law relationship test extends beyond **R.1:12-**

1(a) and unequivocally includes all parents, grandparents, cousins, nephews and nieces. **Commentary §C. (3)(a).**

As a technical matter, the party/relative at issue was subsequently determined as clearly fitting into a prohibited category. In this context, a conflict of interest did exist in regard to her and there was a potential for an appearance of impropriety. Indeed, after the filing of this complaint respondent inquired and was informed that the party is a second cousin. Even prior to dispelling his misconception of attenuation, respondent recognized the possibility on the record and expressed a concomitant intention to recuse himself. Subsequent comments of the prosecutor concerning a predetermined resolution of the matter caused an unfortunate rethinking of the required recusal decision.

5. Admitted.
6. Admitted. As was noted above, the **Code** and court rules establish that a conflict of interest existed. Recusal was consistent with promoting public confidence in the integrity and impartiality of the judiciary. Respondent had acknowledged on the record that some degree of familial relationship existed prior to learning that the degree of relatedness was within the purview of the rules. The public may in this circumstance perceive the potential for impropriety even where the court did not know that the level of relatedness absolutely required recusal within the tenets of the **Code** and court rules.
7. Admitted. It is pertinent that respondent's initial and clearly correct decision respecting the necessity of a recusal was impacted by the prosecutor's

recommendation that the person be released immediately. The prosecutor's recommendation was formulated on the basis of the downgrading of the offense prior to the appearance of the party before respondent. Had no decision been made by respondent as to the person's status because of the familial relationship, she would have certainly served an additional period of time incarcerated. Stated somewhat differently, the person would have been penalized because of the familial relationship. In this context, we note that there is no indication that she benefited from it. It is a fair assumption that the same result would have been achieved with another judge. The clear and admitted concern is the appearance of impropriety. And, it should be emphasized that there is no present dispute that recusal was the required decision.

8. Admitted. Respondent agrees that the subsequently determined degree of relationship establishes that a clear conflict of interest is demonstrated. Respondent acknowledges the potential for an appearance of impropriety because of the familial relationship. And, this fact implicates the issue of the integrity and impartiality of the judiciary. So too, respondent admits that post-decision events clearly establish that the prescribed course would have been to steadfastly maintain the judgment to recuse himself despite any other circumstance, compelling or otherwise. However, in this discreet circumstance it is urged that a distinction exists between an ethical failing and a mistake induced by aberrant and extraordinary circumstances. Respondent

did not intend to transgress the **Code**. However, lack of intention mitigates but does not excuse.

9. Denied in part and Admitted in part. Respondent's review of the **Code** and court rules indicates that the clear nature of the conflict of interest is not legally debatable. ***A fortiori***, the decision not to recuse is problematic and unacceptable. Nonetheless, although the decision was wrong, respondent's mistake or lapse in judgment should not in our view be categorized as bringing the judicial office into disrepute. The circumstances were confounding and arose in a very brief proceeding which did not facilitate substantial pre-decision reflection. The competing value of avoiding potentially unfair detriment to the party induced the lapse. Respondent still does not dispute that he should not have taken any action in this matter and opted in favor of recusal.

Wherefore, respondent concedes an error in judgment induced by circumstances unlikely to recur. He respectfully submits that the conduct was an error as opposed to ethical failing. Any legitimate question as to the integrity and independence of the judiciary implicated herein would arise in almost any context where a mistake is made. Lugubriously, the mistaken decision to proceed is not consistent with promotion of public confidence. Even so, it is difficult to perceive a more slight transgression of the line between allowable and prohibited conduct. The filing of the complaint herein is both chastening and pedagogical.

Alan Dexter Bowman, Esq
Attorney for Respondent

Dated: 9-28-09

Certification of Service

I hereby certify that copies of the Answer on behalf of Gerald J Council (**ACJC 2009-116**) were sent via first class mail on September 28, 2009:

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