

Nebraska Judicial Ethics Opinion 07-2

Question Presented--

May a newly appointed judge sever his financial and business interests in the law firm of which he is presently a shareholder and continue to temporarily maintain a general partnership with his prior partners who own the law firm's building and a separate L.L.C. whose sole asset is a piece of real estate taken as fees for past legal work done by the law firm?

Conclusion

As a result of his appointment to serve in the judiciary, and in order to preserve the independence and integrity of that position, the judge will need to divest himself of all financial interests he presently maintains with his former law firm, including a general partnership which owns their building, and the L.L.C. which owns other property.

Statement of Facts

An attorney who has recently been appointed to the bench seeks an opinion regarding the winding up of the interests he presently holds as shareholder in a professional corporation which operates the law firm, a general partnership owned by the same shareholders which owns the building the professional corporation leases to operate its law practice and a limited liability company which owns real estate obtained by the law firm as fees for legal work. The professional corporation has a buy-sell agreement in which the remaining shareholders will purchase the new judge's interest. It is likely that this purchase will be funded by a loan taken by the remaining shareholders using funds generated by a mortgage on the building currently owned by all of them. In association with the law practice, the appointee is also presently a comaker on a note covering certain firm expenses, which note is expected to be paid off by the end of 2007. In association with the L.L.C., its owners intend to hold the real estate until some time in the future, when they receive a reasonable offer for its purchase. There is apparently a possibility that the professional corporation's shareholders may be acquiring another piece of real estate, which would be placed into this or another L.L.C. Lastly, there is a malpractice case pending against the professional corporation which is not expected to be resolved in the near future. Once he assumes the bench, the judge has agreed to recuse himself from all cases involving his former law partners for a period of 5 years.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 1, 4D(1)(b), 4D(3), 4D(4), and "Application of the Code of Judicial Conduct"

References in Addition to Nebraska Code of Judicial Conduct

Candice Goldstein, Becoming a Judge: Problems with Leaving a Law Practice, 6 No. 3 Judicial Conduct Reporter 1 (Fall 1984).

Arizona Judicial Ethics Advisory Opinion 00-07

Kansas Judicial Ethics Opinion JE-95

Nebraska Judicial Ethics Opinions 89-1, 97-2, and 99-2

Discussion

"The practice of law by sitting full-time judges is restricted in all jurisdictions in the United States. Accordingly, the practicing attorney newly elected or appointed to the bench is

confronted with the task of winding up his or her law practice. There is little guidance for this task other than the Code of Judicial Conduct or state statutes, all of which tend to be quite general.” Candice Goldstein, *Becoming a Judge: Problems with Leaving a Law Practice*, 6 No. 3 Judicial Conduct Reporter 1 (Fall 1984). Through this opinion, the Committee seeks to provide guidance for the newly appointed member of the judiciary in extricating himself from his business and financial entanglements under the broad umbrella of Canon 1 of the Nebraska Code of Judicial Conduct, which provides in part, “A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.”

The appointee takes his oath of office on September 14, 2007. Preliminarily, there is no question but that the appointee must depart from his law firm and terminate his interest as shareholder in the professional corporation. Canon 4D(3) of the Nebraska Code of Judicial Conduct is clear in its mandate that, with few exceptions, “A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity” Apparently, there is already a buy-sell agreement contemplated between the appointee and the remaining shareholders whereby they will purchase his interest in the P.C., to include existing accounts receivable up to September 30, 2007, and with the expected date of completion of the buyout being November 1, 2007. The Committee finds the proposed plan is reasonable and creates no ethical problem, with one caveat. Regarding the anticipated note representing the firm’s ongoing overhead expenses, on which the appointee is presently a comaker, it is recommended the appointee hold the funds from his buyout in a blind trust until such time as the note is expected to be paid off, by the end of 2007. We suggested such a blind trust in Nebraska Judicial Ethics Opinion 97-2, where we said if professional associations could not be completed, the newly appointed judge should “place any share holdings of the professional corporation in a blind trust ... to which the judge-appointee will have absolutely no participation or input into the affairs of the professional corporation.”

The new judge further holds an interest as a general partner in a partnership which owns the building in which the law firm practices and leases the building to the firm. Likewise to the professional corporation, there is also a buyout plan in place whereby the remaining four partners will purchase the appointee’s interest in the partnership building, employing the same timeframe referenced above. The Committee finds no ethical problem with the proposed plans for the buyout, save that there can be no agreement to repay that share based on the financial loss that may or may not be suffered as a result of pending litigation against the law firm. Along with the expeditious termination of the appointee’s ties to the firm and the partnership owning the building, he thereby removes himself from the future earnings, but also risks. This is in keeping with the spirit of Canon 4D(1)(b) of the Nebraska Code of Judicial Conduct, which states that “A judge shall not engage in financial and business dealings that ... involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.” To the degree the partners acknowledge certain risks inherent in the litigation proceeding against the law firm it is their prerogative to factor such risks into the settlement of the appointee’s timely buyout which may also include utilizing the blind trust as a means of ensuring an equitable settlement and avoiding any appearance of impropriety.

Likewise to the severing of business and financial ties to the professional corporation and the general partnership which owns the firm’s building, it is incumbent upon the appointee, as soon as is reasonably possible, to divest himself of any interest in the real estate held by the shareholders in the limited partnership. Canon 4D(4) reads as follows: “A judge shall manage the judge’s investments and other financial interests to minimize the number of cases in which the judge is disqualified. *As soon as the judge can do so without serious financial detriment, the*

judge shall dispose of investments and other financial interests that might require frequent disqualification.” (Emphasis supplied.) We also warned in Nebraska Judicial Ethics Opinion 99-2 that if any additional co-ownership in an entity continues, “so will the appearance of impropriety.” It is no less an ethical concern to maintain an interest in the L.L.C. and its sole asset, the property originally received by the shareholders as payment of legal fees, than to continue in business relationships with other members of the firm.

As to the time required for the new judge to completely wind up all three arenas of business and financial dealings, this Committee makes no specific recommendation beyond what is outlined in the section entitled “Application of the Code of Judicial Conduct, C. Time for Compliance,” in which the drafters clarified, “A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except sections 4D(2), 4D(3), and 4E and shall comply with these sections as soon as reasonably possible and shall do so in any event within the period of 1 year after assuming office.”

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON SEPTEMBER 6, 2007

Judge Stephen R. Illingworth

Judge John F. Steinheider

Judge Carlton E. Clark

Judge John A. Colborn

Judge Robert B. Ensz

Judge Lawrence D. Gendler

Judge William B. Cassel