

Nebraska Ethics Advisory Opinion 01-2

Question Presented--

May a member of the judiciary who previously served as supervising deputy county attorney over the child support enforcement division of a county attorney's office preside in child support cases which were filed or being handled by the county attorney's office during the period of time the judge served as chief deputy county attorney? Specifically, should the judge consider recusal in either of the following situations: (1) If a bench warrant was issued while the judge was serving in the county attorney's office, does a conflict exist requiring recusal, when the child support obligor is picked up on that bench warrant, (2) In cases which were filed or opened by the county attorney's office while the judge served as the supervising attorney and in which a request is now being made for the issuance of a bench warrant or other action required in the case based on facts or events that occurred after the judge left the county attorney's office?

Conclusion

With respect to question (1), it is the committee's opinion that the judge should recuse himself or herself from the handling of the case in that it involves facts directly related to the period of time that the judge was the supervising attorney in the county attorney's office. With respect to question (2), it is the committee's opinion that a recusal would not be necessary provided that the operative facts of the subsequent action were different and separate from the action as originally handled by the county attorney's office when the judge was the supervising attorney.

Statement of Facts

A newly appointed member of the judiciary has requested an opinion regarding the propriety of presiding in child support collection cases. This member of the judiciary served as a deputy county attorney and chief deputy county attorney for approximately 12 years. For several years, the judge served as the supervisor of all deputy county attorneys in that county, including the deputy county attorneys assigned to the child support enforcement division. In the capacity of supervising deputy county attorney, the judge had little interaction with the child support enforcement county attorneys and had actual knowledge of only a few of the many support cases handled by that division.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 3

References in Addition to Nebraska Code of Judicial Conduct

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.16 (3d ed. 2000)

Discussion

The following Canons of the Nebraska Code of Judicial Conduct apply to the above described situation:

Canon 3E(1)(b) provides:

1. A judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where:

....

b. The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it[.]

Canon 3F provides:

REMITTAL OF DISQUALIFICATION. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement must be in writing and filed in the court file of the proceeding.

It is the committee's opinion that any matters that were filed and/or pending during the period of time that the judge was in the county attorney's office acting as a supervising attorney might reasonably draw into question his or her impartiality. The committee believes that the judge should disqualify himself or herself from handling of any such cases. In the treatise, Jeffrey M. Shaman et al., *Judicial Conduct and Ethics*, § 4.16 at 142 (3d ed. 2000), it is suggested, that "if a judge-previously-prosecutor supervised or even recorded his or her name on documents of record in a case now before the court, the judge may be required to disqualify, even if there is no showing that the judge was involved or had knowledge of the case while prosecutor." Since the operative facts of the matter pending directly relate to the time that the judge was the supervising attorney for the office, the judge should disqualify himself or herself from the further handling of the case. It should be further noted that Remittal Disqualification provides a clear and effective option for the handling of this type of situation. Because of the minimal contact that the judge had with the handling of such case(s), in most cases, the parties may well be willing to waive the disqualification. In the event that no such waiver is achieved, the recusal is the proper course to take.

It is also the committee's opinion that recusal would not be necessary if the current matter before the judge was based upon different facts. As above pointed out, we believe that the judge should disqualify himself or herself from any case opened during the period that the judge was the supervising attorney until all issues are resolved regarding the matters that were the subject of the action or proceeding. Once all issues

in the matter that was initiated during the period of time that the judge was the deputy county attorney have been resolved through a final order or dismissal by the court, a later matter, not arising out of the same facts, involving different and separate facts, would not result in the disqualification of the judge. For example, if the action initiated was a paternity action which resulted in a final order establishing paternity and child support, the judge would not be disqualified from hearing a contempt action involving the failure to pay child support. The initial action (the paternity action) was to establish paternity and the obligation to pay support. The operative facts regarding the contempt action involve the obligor's failure to pay the child support that had been previously ordered. The issues of paternity and the amount of support were resolved by the original order, and at issue in the contempt action is whether or not the support ordered to be paid has been paid and whether or not the obligor has willfully failed to pay the child support. Likewise, if there had been a prior contempt action while the judge was the deputy county attorney, and that action has been resolved either through a dismissal of the contempt action or through the obligor purging himself or herself of the contempt, the judge would not be disqualified from the handling of a different contempt action based upon separate facts.

Regarding the judge's handling of such subsequent matters, it is the committee's opinion, however, that although a disqualification is not necessary, that the judge should bring his or her prior involvement in the case to the attention of the parties and their lawyers. This should be done in order to determine whether or not any of the parties wish to argue that the present matter involves a "same or similar factual situation."

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 Ethics Advisory Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON NOVEMBER 8, 2001

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