

Nebraska Judicial Ethics Opinion 04-3

Question Presented –

The Supreme Court, in attorney discipline cases, appoints an attorney to act as a referee to conduct a hearing on the charges brought by the Counsel for Discipline against attorneys. When a lawyer in the law firm of the appointed referee is married to the first cousin of a Supreme Court judge, should the judge recuse in the case?

Conclusion

It is the opinion of the Committee that the Supreme Court judge should recuse because (1) the referee is a law partner of a relative (by marriage) of the judge within the fourth degree of relationship, and the judge's relative's spouse may have more than a de minimis interest that could be affected substantially by the proceeding, and (2) there may be an appearance of impropriety by the judge's involvement in the case.

Statement of Facts

The Supreme Court, in attorney discipline cases, appoints referees to conduct hearings on the charges brought by the Counsel for Discipline against attorneys. These referees are paid from the fund created by the assessment of all attorneys for disciplinary functions. When the report of the referee is finished, if a discipline violation is found, a copy goes to each Supreme Court judge. If the report is not excepted to by either the attorney or the Counsel for Discipline, the report is the basis of a Supreme Court opinion which will impose the sanctions to be applied. If the report is excepted to, then the matter is set for oral arguments and a decision of the Supreme Court is rendered. The report, however, is a vital part of the process.

The Supreme Court utilizes the services of a lawyer as a referee. In this case, the lawyer is a partner in a law firm. Another partner in the same law firm is married to the first cousin of the Supreme Court judge. The relative's spouse does not participate in any way in the case nor does the relative's spouse serve in a supervisory capacity of the referee. In the past, the judge recuses in cases where the firm represents a party on an appeal that is being heard before the Supreme Court.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2, 3, and "Application of the Code of Judicial Conduct"

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. §§ 24-739 and 25-1129 et seq. (Reissue 1995)

Nebraska Judicial Ethics Opinion 92-8

Discussion

A referee is a person appointed by the court to study, take testimony in, and report his judgment on a matter. Referees are judicial officers according to the Nebraska Code of Judicial

Conduct. See, Application of the Code of Judicial Conduct A(4); § 25-1129 et seq.; Nebraska Judicial Ethics Opinion 92-8.

In this matter, the judge is related by marriage within the fourth degree to a law partner of the referee. The judge's first cousin's spouse is a law partner of the referee.

The relevant portions of the Code of Judicial Conduct are Canons 2 and 3. These Canons provide, inter alia, as follows:

Canon 2

A Judge Shall Avoid Impropriety
and the Appearance of Impropriety in all of
the Judge's Activities

....

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment

....

Canon 3

A Judge Shall Perform the Duties
of Judicial Office Impartially and Diligently

....

E. DISQUALIFICATION.

(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:

....

(d) the judge or the judge's spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

....

(iii) is known by the judge to have a more than de minimus interest that could be affected substantially by the proceeding [.]

....

The above two sections of the Code should be considered when answering the question presented. Canon 3 requires in all cases that a judge must perform his or her duties impartially. More specifically, Canon 3 states that a judge should not participate in any proceeding in which the judge's impartiality reasonably might be questioned where the judge's relative is known by the judge to have more than a de minimis interest that could be affected substantially by the proceeding. "De minimis" is defined in the Code's "Terminology" section as follows: "denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality." The judge's relative's spouse in this case is a partner in the referee's law firm and may share in the fee paid to the referee for his services as a judicial officer. The Committee recognizes that the referee's fee is not based upon the outcome of the

proceedings. It does appear to the Committee, however, that the judge's relative may have more than a de minimis interest in the proceeding due to the fees to be paid to the referee as approved by the Supreme Court. Rather than going into a detailed examination of billing and compensation practices for the referee's firm, it is preferable that the judge disqualify in all cases.

It is also notable that the Supreme Court judge has recused in other cases (presumably appeals) that come before the court involving the same law firm. It is the opinion of the Committee that the judge should also recuse himself on the basis that by remaining on the case the judge raises an "appearance of impropriety," since the judge recuses in all other cases where the firm appears before the Supreme Court. Additionally, as above noted, the Nebraska Code of Judicial Conduct applies, at least in part, to referees. In this matter, the spouse of the relative stands in the same position as his or her partner who is acting as the referee. It is the opinion of the Committee that there would be an "appearance of impropriety" if the Supreme Court judge were to review the decision of the referee where a member of the referee's law firm is related to the judge (by marriage) within the fourth degree of relationship.

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 1, 2004

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