

**Nebraska Judicial Ethics Advisory Committee**

**Opinion No. 89-1.**

A newly appointed county court judge has asked for our advice. The facts underlying his request are as follows:

The new judge has been practicing law in a two partner firm in a small county seat town for a number of years. The firm emphasizes estate planning and probate practice and will continue to do so after the new judge assumes his judicial office. The firm has employed the new judge's wife for a number of years and would like to continue to do so. Her duties with the firm include the firm's bookkeeping (i.e., accounts receivable and payable, writing checks for the firm, billing, etc.) and some receptionist duties approximately 30 hours per week. Except as required by those duties, she does not do any casefile work.

In addition, the new judge has been his county's county attorney for a number of years. When he resigns that office, his former partner will succeed him as county attorney and will be hiring an associate to assist mainly in the county attorney duties.

The new judge and his partner must dissolve their partnership and are searching for the best way to structure distribution to the new judge. The new judge does not wish to force his partner to borrow the necessary funds from a financial institution. He proposes a secured promissory note from his partner to him with a payment schedule.

The new judge's county court district is a multi-county district with two county court judges.

The new judge has asked three questions:

1. Will a note approach to partnership distribution create any ethical problems? Yes.
2. Will continued employment of the new judge's wife by his former firm create conflict problems? Yes.
3. If so, can she continue at the firm until she can find herself a suitable new position and until the firm can replace her? Yes, with help from the other judge in the district.

The new judge, his wife, and his partner are all willing to do whatever is necessary to comply with the Code of Judicial Conduct.

**ANALYSIS**

The following Canons of the Nebraska Code of Judicial Conduct (1987) apply to the circumstances involved:

- 2A: A judge should conduct himself . . . at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.

3C(1): A judge should disqualify himself . . . in a proceeding in which his . . . impartiality might reasonably be questioned . . . including but not limited to instances where:

3C(1)(a): the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding

3C(1)(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 . . .

3C(1)(c): a judge knows that he . . . or his spouse . . . has a financial interest in . . . a party to the proceeding or any other interest that could be substantially affected by the outcome . . .

3C(1)(d)(iii): the judge's spouse . . . is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

3D: Remittal of Disqualification

5C(1): A judge should refrain from financial and business dealings that tend to reflect adversely on his . . . impartiality . . . or involve him . . . in frequent transactions with lawyers or persons likely to come before the court . . .

5C(3): A judge should manage his . . . financial interests to minimize the number of cases in which he . . . is disqualified. As soon as the judge can do so without serious financial detriment, he . . . should divest himself . . . of financial interests that might require frequent disqualification.

6: Financial disclosure, in item 5(C) of Judicial Financial Interest Statement

#### General Comment

The 3C(1)(b) disqualification will plague the new judge as it does almost all new judges. He will have to exercise caution in all contested cases relating to: probates pending or impending at the time he leaves his practice, all wills and other documents drafted by his firm during the time he was there, and all county attorney matters, filed or under investigation during his tenure. At least in the probate area, unless he was an attesting witness to the will involved, or next of kin to the deceased, or or a devisee under the will, or related to any of

the interested parties, or named as personal representative, see, Neb. Rev. Stat. § 24-552 (Reissue 1985), he can probably act as a judge in non-contested matters, but he will have to decide the propriety of doing so on a case by case basis. He might consider refraining from hearing all matters brought by his former partner for a reasonable period, not less than 6 months. County court actions, exclusive of probate, move through the court quickly enough that a longer respite would be somewhat unreasonable. There is no bright line rule on a time period for recusal in Nebraska.

### The Partnership Distribution Question

The position that judges must avoid maintaining economic ties to their former firms does not apply to carefully drafted partnership termination agreements, Lubet, Regulation of Judges' Business and Financial Activities, 37 Emory L.J. 1, 34 (1988), as long as no amount is paid for profits earned by the firm after the judge's departure. If possible, an exact amount representing the value of the judge's interest in the firm, including fees to be collected in the future for work completed before the judge's departure, should be agreed upon between the parties. Goldstein, Becoming a Judge: Problems With Leaving a Law Practice, 69 Judicature 88, 92 (1985). Obviously, if payment could be made at once before the new judge takes his oath, the new judge would face no disqualifications from this source. It is the payment over time that creates the problem.

Unless a remittal of disqualification can be obtained case by case under Canon 3D, Canons 3C(1)(c) and 3C(1)(d)(iii) require judges to disqualify themselves in proceedings in which they have an interest affected by the outcome. As of 1985, there was a split among jurisdictions on the questions of mandatory disqualification. Alabama, California, Michigan, New York, and the Judicial Conference of the United States all adopted a per se disqualification until the obligation is paid in full. The disqualification applies not only to matters handled by the former associates and partners, but also to matters handled by any new associates of the former firm. Ala. Adv. Op. 82-128 (1982); Cal. Adv. Op. 19 (1973); Mich. Adv. Op. CI-339 (1979); N.Y. Adv. Op. 160 (1978); and Fed. Adv. Op. No. 24 (1972). Implicit in all of these decisions is a conclusion that the judge's interest in receiving payment constitutes an interest affected by the outcome of proceedings brought by the former firm.

Florida, standing alone, took the position that if a judge has entered into a termination agreement under which the judge is owed a predetermined amount, fixed at the time of the judge's departure from the firm, then the judge has no interest to be affected by the outcome of any proceedings the firm might file. Fla. Adv. Op. 74 - 4 (1974).

Canon 2, relating to the avoidance of the appearance of impropriety, as well as Canon 3C relating to the appearance of

impartiality, also apply to partnership termination agreements. The Michigan Supreme Court disciplined a judge under Canon 2 in part because he appointed former associates to indigent criminal defense during the time the former associates were the judge's debtors under their partnership termination agreement. By doing so, the judge assisted the former associates in generating income with which to pay the debt to the judge, *In re Lawrence*, 417 Mich. 248, 335 N.W.2d 456 (1983), thereby creating an appearance of impropriety.

Under Canon 3C(1), the question is whether the judge's impartiality might reasonably be questioned by an objective observer. Even if the judge's creditor of the former firm status does not create an interest that could be affected by the outcome of a case before the judge, that status locks the judge into an indirect relationship with the former firm leaving his impartiality in a potentially negative light as Alabama concluded. Canon 3C(1) is not limited by its specific example subdivisions. Abrahamson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct 10* (1986); Thode, *Reporter's Notes to the Code of Judicial Conduct 60* (1973).

The majority of other jurisdictions believes Canons 3C(1)(c) and (d)(iii) apply. As a result, the payments cannot be made to the judge's spouse or close relatives acting as a conduit, because the canons apply to spouses and close relatives, too. The existence of the payments and obligation cannot be kept private as in an earlier day, because the judge must disclose them in his Judicial Financial Interest Statement at item 5(c).

Canons 5C(1) and (3) seem to apply also. The payment schedule would create a continuous series of business transactions with a lawyer for the duration of the pay out agreement. The adverse reflection is the same as that under Canon 3C(1). In a small county, with the local county attorney involved, the potential number of disqualification cases would not be minimized.

Therefore, the majority of the committee concludes that the new judge will be required to disqualify himself from hearing any contested cases involving his former partner and any new firm members, both as private practitioners and as county attorneys, for however long it takes the former partner to pay the new judge in full, unless the new judge can obtain remittals of disqualification under Canon 3D on a case by case basis. The Canon 3D escape hatch only applies to disqualifications arising under Canons 3C(1)(c) and (d).

### **The Spouse's Employment Questions**

As long as the new judge's spouse is employed by any law firm appearing before the new judge, the danger is inescapable that someone, especially the disgruntled, unsuccessful litigants, and even some of the opposing counsel, could latch onto either or both of at least two theories. First, it could be claimed that the spouse learned something about the evidentiary issues at her

firm and told the new judge what she learned. Second, the claim could be made the new judge's impartiality is compromised because his spouse's continued employment depends upon the satisfaction of the spouse's employer firm with the new judge's performance in matters affecting the firm and its clients.

While there are not that many contested probate matters, the former firm here is also going to continue as the local county attorney's office. That means a large number of cases coming from the spouse's employer firm involving a number of parties likely to complain about anything available to them in the event of dispositions they do not savor. The new judge would be unable to disprove either claim to the satisfaction of the unhappy parties. That would lead to "talk" among the discontented and others who enjoy attacking the judicial and legal systems.

Knowing the reputations of the new judge and his about to be former partner, such claims would be unfounded, but we are not only concerned with facts, we are concerned here with public perception and appearances. The appearance of impropriety is next in importance only to the fact itself and cannot be sacrificed to convenience. *Wells v. Walter*, 501 S.W.2d, 259, 260 (Ky. 1973).

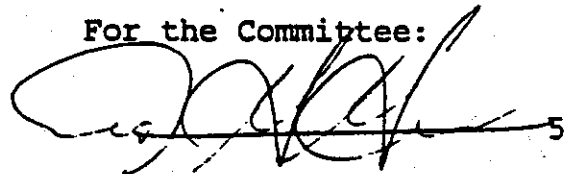
Therefore, the majority of the committee concludes the employment by any law firm of the new judge's spouse will require the new judge to disqualify himself from any matters, except the most pro forma uncontested matters, coming from the spouse's employer firm under Canons 2A, 3C(1), and 3C(1)(a). The spouse can, of course, continue her employment, but the new judge will be required to avoid cases from that firm.

Practical considerations relevant here include the facts that the new judge's district is a relatively compact multicounty district served by two county judges with a moderate caseload well balanced among the counties. The presently active county judge and the new judge can develop easily some sort of plan so that the other judge hears all matters in which the new judge faces a disqualification. The spousal employment related disqualification does not appear to be subject to remittal. There is no pressing need for the spouse to hurry in her quest for new employment should she choose to do so. The pressing need is for the new judge to recuse himself from cases coming from or involving the spouse's employer firm.

Four committee members join in this opinion without reservation. Two additional committee members join in this opinion as far as it goes, but also believe the new judge must recuse himself from hearing any cases involving his former firm for the duration of the payout period and any cases involving his spouse's employer firm for the duration of her employment there, whether the cases are contested or not.

One committee member did not participate in developing this opinion.

For the Committee:



5

