

Nebraska Ethics Advisory Opinion 99-2

Question Presented--

A Nebraska lawyer who is considering applying for a judicial vacancy inquires as to what restrictions would arise from his co-ownership, with his current law partner of a corporation which operates a retirement home in the county where the judge, if appointed, would preside. Another partner in the same corporation is also a law partner of the potential applicant. Additionally, the brother of the potential applicant appears, on occasion, in the court for which the potential applicant might apply.

Conclusion

The continued ownership interest of the potential applicant in the corporation which operates the retirement home, as well as the ownership interest of his present law partner, and the possible appearance by the potential applicant's brother in the court for which the potential applicant may apply, all will cause restrictions on the ability of the judge to sit in cases involving the corporation, the retirement home, the law partner, and the potential applicant's brother.

Statement of Facts

The potential applicant is a co-owner, along with one of his law partners, in a corporation which operates a retirement home in a city located within the county where the judicial vacancy exists. Although not stated, this committee assumes the potential applicant is concerned about whether the ownership interest in the retirement home corporation can be retained and what restrictions must be placed upon that ownership interest. Additionally, the potential applicant presently serves on the board of directors of the corporation which operates the retirement home and inquires as to whether he could continue to so serve.

Finally, the potential applicant discloses he has a brother who is a lawyer in a nearby city, which brother also appears on occasion in the court in which the judicial vacancy exists. The applicant inquires as to what restrictions are placed by the Code of Judicial Conduct upon the appearance of the brother in the court for which the applicant seeks appointment.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 2; Canon 3A, 3B and 3E; and Canon 4A and 4D

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. § 24-315

Nebraska Ethics Advisory Opinions 89-1, 89-3, 89-4, 89-5, 92-1, 96-4, 96-5, 98-2, and 98-5

Discussion

The previous opinions cited above provide general guidance with respect to the areas inquired herein. However, with respect to the inquiry regarding what restrictions would be imposed upon an applicant should that applicant be appointed as a judge with respect to the appearance of the judge's brother, Neb. Rev. Stat. § 24-315 would clearly disqualify a judge from presiding over any case in which a sibling of that judge was appearing. The statutory section, as well as the appearance of impropriety principle which resounds throughout Canon 2, leave absolutely no option in such an instance. In addition, the appearance by any member of the sibling's law firm would also require

recusal. Nebraska Ethics Advisory Opinion 89-3 provides a detailed analysis of the rationale behind such recusal.

With respect to what restrictions may arise from the continued ownership by the potential applicant in a corporation co-owned by a former law partner, the appearance of impropriety would similarly require a judge from presiding over any case in which the lawyer/co-owner might appear. Ownership of a corporation which operates a retirement home is likely a matter of common knowledge, and thus the appearance of impropriety could easily arise whenever the judge/co-owner presides over a case in which the lawyer/co-owner appeared. The appearance of a former law partner before a sitting judge is problematical enough from the standpoint of the appearance of impropriety, without the additional relationship which would arise from the judge and the former law partner also being co-owners in a business venture. The appearance of impropriety that would arise in instances where a former law partner appears before a sitting judge eventually dissipates, through the passage of time. However, if the additional relationship arising from the co-ownership in the retirement home continues, so will the appearance of impropriety.

Additionally, Canon 4D(3) prohibits a judge from serving "as an officer, director, manager, general partner, advisor or employee of any business entity," except for certain exceptions that do not apply here. Accordingly, the potential applicant would, if appointed, be required to resign from the board of directors of the corporation in question.

In conclusion, the potential applicant, if appointed, would be required to liquidate his interest in the corporation which operates the retirement home or, in the alternative, recuse himself from presiding over any judicial proceeding in which the lawyer/co-owner might appear. Regardless of whether the ownership interest is retained, the applicant, if appointed, must resign from the board of directors of said corporation. With respect to the appearance of either of his former law partners, the applicant, if appointed, should recuse himself from cases in which either former law partner appears, until a reasonable period of time has elapsed. With respect to any case in which the applicant's brother/lawyer might appear, recusal is mandated in each such instance.

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 OCTOBER 21, 1999

*Judge Darvid Quist
Judge Stephen M. Swartz
Judge John F. Irwin
Judge Wadie Thomas
Judge Randall Rehmeier
Judge Donald Rowlands
Judge Graten Beavers*