

Nebraska Ethics Advisory Opinion 98-5

Question Presented--

May members of a judge's spouse's law firm practice before the judge? When must the judge recuse from cases involving former clients or clients of a previous employer?

Conclusion

The judge is prohibited from hearing cases involving the spouse or the spouse's law firm. This is true even where the lawyers do not share profits or any equity interest. This opinion does not address the second question because each former client relationship must be examined on a case by case basis by the judge; however, some of the issues discussed here apply.

Statement of Facts

The judge's spouse practices law in a partnership with several other attorneys. The lawyers do not share profits or hold an equity interest in the partnership, and the attorney spouse does not have an economic interest in any other attorney's case.

Applicable Code Sections

Nebraska Code of Jud. Cond., Canons 2 and 3:

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 more than de minimis interest that could be affected substantially by the proceeding;

.....
(e) Any other instance where law requires disqualification.

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. § 24-739 (Reissue 1995), entitled "Disqualification of judge; grounds," states in part:
A judge shall be disqualified from acting as such in the county court, district court, Court of Appeals, or Supreme Court, except by mutual consent of the parties, which mutual consent is in writing and made part of the record, in the following situations: (1) In any case in which (a) he or she is a party or interested, (b) he or she is related to either party by consanguinity or affinity within the fourth degree, (c) any attorney in any cause pending in the county court or district court is related to the judge in the degree of parent, child, sibling, or in-law or is the copartner of an attorney related to the judge in the degree of parent, child, or sibling, or (d) he or she has been attorney for either party in the action or proceeding.

Nebraska Ethics Advisory Opinion 96-4

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.16 (2d ed. 1995)

Discussion

Section 24-739 prohibits a judge's spouse from practice before the judge, and that prohibition extends to the spouse's copartners. It requires disclosure and disqualification. The statute is mandatory and not discretionary; however, it does permit waiver on the record and in writing by all parties. Waiver is discussed in Nebraska Ethics Advisory Opinion 96-4. The waiver itself can become coercive if the judge is not sensitive to the dynamics of the situation. Consequently, judges who routinely request and expect waivers can expect criticism from counsel. The better practice would be to disclose the prohibited relationship and disqualify. Then, unless the parties propose a waiver, a different judge would handle the case.

Even if the spouse's copartner practice was not prohibited by the statute, it would be closely scrutinized by Canons 2 and 3. Regular appearance by a spouse's copartner before the judge could easily appear improper and bring disrespect to the judge and the judiciary.

The judge must also be sensitive to professional relationships developed during the practice of law before appointment to the bench. This area particularly affects a new judge. The treatise, Jeffrey M. Shaman et al., *Judicial Conduct and Ethics*, § 4.16 at 127 (2d ed. 1995) cites the following test: "[W]hether there was a prior knowledge of the facts [in a case before the judge] or a prior interest in an issue arising out of them." Each case which involves a prior professional relationship must be assessed by the judge. This requires a two pronged effort. First, the judge determines whether there is a prohibited prior professional relationship, and then the judge determines whether there is a possible appearance of a prohibited prior professional relationship. Even though the ability to "trust your gut" is helpful, judicial sensitivity to potential prohibited relationships is the key to success.

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 SEPTEMBER 23, 1998

*Judge Darvid Quist
Judge Randall Rehmeier
Judge Stephen M. Swartz
Judge Toni G. Thorson
Judge John Irwin
Judge Cloyd Clark
Judge Donald Rowlands*