ADVISORY OPINION NO. 89-3
Nebraska Judiciary Ethics Advisory Committee

SITUATION

The daughter of a member of the State Judiciary was recently hired as a salaried associate in a law firm which frequently appears in cases before the Court in which the judge in question sits. The judge has posed two questions:

1. Should the judge recuse himself/herself in cases handled by other attorneys of the firm which employs the daughter?

2. In the event recusal is not mandated by the Code of Judicial Conduct, should the judge, in any case where another member of the daughter's firm is appearing, make a disclosure of the relationship between the judge, daughter and the law firm by which she is employed?

APPLICABLE CANONS

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

Canon 1 provides that "a judge should uphold the integrity and independence of the judiciary."

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides that "a judge should avoid impropriety and the appearance of impropriety in all his activities."

2A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

2B. A judge should not allow his family, social or other relationships to influence his judicial

conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3 provides that "a judge should perform the duties of his office impartially and diligently."

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 . . . . (d) he and his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

3D. Remittal of Disqualification. A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceedings. The agreement, signed by all parties and lawyers, should be incorporated in the record of the proceeding.

Neb. Rev. Stat. Section 24-315 provides as follows:

Disqualification of judge or justice; grounds. A judge or justice is disqualified from acting as such in the county, district or Supreme Court, except by mutual consent of the parties, in any case . . . . where any attorney in any cause pending in the county or district court is related in the degree of parent, child, sibling, in-law, or is the co-partner of an attorney related to the judge in the degree of parent, child, or sibling . . . , and such mutual consent must be in writing and made a part of the record . . . .

ANALYSIS AND OPINION

The Commentary to Canon 2 states that a "judge must avoid all impropriety and appearance of impropriety (emphasis added). He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." The admittedly often times onerous but common theme which runs throughout the Code of Judicial Conduct is that judges must at all times conduct themselves so as to avoid not only impropriety but the appearance of impropriety. As the Commentary indicates, one of the heavier burdens that a member of the judiciary must shoulder is the necessity to anticipate situations where the judge's continued involvement could be reasonably viewed by the public as improper. In other words, it is not only the "literal" interpretation that could ensue, but also the "figurative" interpretation that could be placed on a given situation. An excellent discussion of the ethical dilemmas created by this situation can be found in SCA Services, Inc. v. Morgan, 557 F.2d 110 (1977). In that case, a mandamus action instituted for the purposes of forcing a federal judge from continuing to preside in a given case, a Federal Court addressed the situation where a relative of the judge presiding (a brother) was a member of the law firm acting as counsel of record for one of the parties. While the case dealt primarily with a federal statute governing instances in which members of the federal bench must recuse themselves (28 USC Section 455: a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"), the rationale is equally applicable to the member of any bench, state or federal. Although the lawyer-brother of the judge presiding in the SCA Services case was never going to appear before his brother-judge, the judge's impartiality might still be questioned, because of the lawyer-brother's potential financial benefit or detriment ensuing from the result, as well as nonpecuniary considerations, including the increase or decrease of the lawyer-brother's firm's reputation and good will.

The financial interests of the daughter in the situation under analysis might still be affected, since she may arguably receive a benefit, depending on the financial success of her law firm, even though she is an associate with a fixed salary. A common and correct assumption is that the financial success of an entity is passed on to all of those involved in the activities of the entity, by means of bonuses, salary increases, etc.

It must be conceded that a strict application would very likely result in frequent recusals. However, as stated by the United States Supreme Court in In re Murchison, 349 U.S. 133, 75 S.Ct 623, 99 L.Ed 942 (1955), "[s]uch a stringent rule may

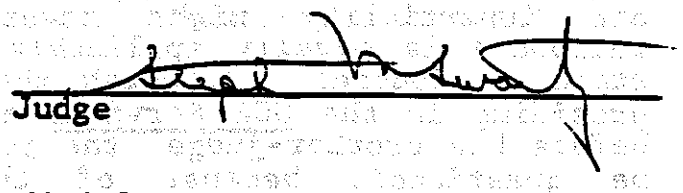
sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Stated in another way, it is not the likelihood or even the remote possibility that a temptation might be yielded to, but instead the mere existence of the temptation, or the appearance of the existence of a temptation that must be avoided.

The remittal procedure offers an alternative, and an acceptable one, but should be an option seldom used. Remittal might be proper with respect to any court proceeding which is totally "uncontested" (e.g., as plea of not guilty entered at arraignment), but it is often difficult to determine whether a contest exists. Because the court in which the judge in question sits is a multi-judge county, there should always be other available judges to step in in recusal situations.

CONCLUSION

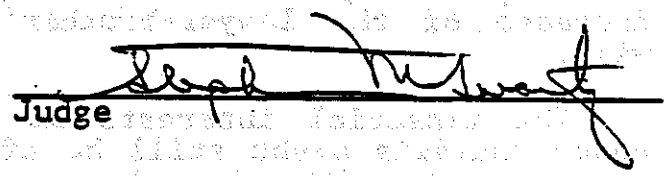
Based on the foregoing, a judge should recuse himself/herself in connection with any case in which any lawyer of the firm employing the daughter appears.

Date: March 28, 1989 FOR THE COMMITTEE:



Judge

All members of the Nebraska Judicial Ethics Advisory Committee concurred in the above opinion.



Judge

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