NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE

Opinion 92-6

FACTS

A member of the judiciary has asked the following questions:

1. I have a brother who is going through a dissolution.

   a: Should I recuse myself from all cases handled by the law firm representing my brother and the law firm representing his wife?

   b: If the recusal is not required, must I make a disclosure of the representation, in all matters which appear before me in which an attorney from the law firm representing my brother appears?

2. My wife has hired an attorney to probate her father's estate. I have attended meetings which my wife has had with the attorney and have assisted my wife whenever she has asked for help. The law firm will be paid by my wife's mother.

   a: Should I recuse myself from all cases handled by the law firm my wife has hired?

   b: If recusal is not requried, must I make a disclosure of the representation, in all matters which appear before me in which an attorney from the law firm represents a party?

OPINION

If the judge had no part in choosing either of the attorneys and has no special relationship with them, he need not recuse. If the judge is not obliged to recuse, he need not make a disclosure of the representation.

DISCUSSION

Canon 3 provides:

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

C. DISQUALIFICATION.

(1) A judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned . . .

The test to determine whether a judge's impartiality might reasonably be questioned is an objective test. Impartiality can reasonably be questioned when the judge's own attorney appears in unrelated cases before the judge. Shaman, Lubet, And Alfini; Judicial Conduct and Ethics, The Mitchie Company: Charlottesville: 1990, §5.18 pp. 134-136. This rule exists because of the special relationship that exists from the judge employing the attorney. The considerations include the judge's special trust and confidence in choosing the attorney, and the special relationship that develops from consulting with the attorney. This leads to a belief on the part of the public that such a law firm is somehow special in the eyes of that judge. The result may lead to unfair competitive advantage for that law firm, and to reduced public confidence in the impartiality of the judiciary.

However, a judge is not required to recuse when the judge's own attorney appears before that judge, but the representation is in connection with the judge's official acts. Reilly by Reilly v. Southeastern Pa. Transp. Auth., 479 A.2d 973 (Pa. Super. 1984), Yorita v. Okumota, 3 Haw. App. 148, 643 P.2d 820 (1982). In those instances, the judge often does not choose the attorney,

and a rule of necessity prevails.

In the event of a relationship with an attorney on account of a special family relationship, Canon 3(C)(1)(d)(ii) and Neb. Rev. Stat. §24-315 (3) are mandatory. The canon requires disqualification when the lawyer is within the third degree of relationship of the judge or judge's spouse, and the statute requires disqualification if the lawyer is a parent, child, sibling, in-law, or co-partner of the judge. However, these disqualifications can be remitted by litigants' written agreement.

In summary, the need for recusal depends upon how special the relationship between the judge and the lawyer is. It is the opinion of the committee that where the judge did not choose his family member's attorney, and plays no part in dealing with that attorney, there is no need for recusal.

In the second question, the judge indicates that the judge attends meetings between his wife and her attorney. This leads us to the conclusion that the judge and that attorney have a special relationship. The committee recommends that the judge abstain from attending such meetings if there is no need for the judge's attendance.

If the situation requires the judge's attendance at those meetings, with his wife and the attorney, then the relationship between the judge and the attorney appears special. In that event, the committee recommends a notice to the litigants about the relationship. In our opinion, this would be an instance

where the judge is disqualified. Instead of withdrawing from all proceedings, the judge may disclose on the record the basis of the judge's disqualification, and then leave it to the litigants whether to agree in writing that the judge's relationship is immaterial. If remitted, the judge may continue to serve in a case where members of that law firm appear before the judge in unrelated proceedings. Only in the event of a remittal under Canon 3 (D), may the judge continue to participate in such proceedings. As noted in the remittal section, this agreement must be signed by all parties and lawyers; and the agreement should be incorporated in the record of the proceedings.

The committee is of the opinion that the judge's assistance to his wife in the probate of her father's estate is irrelevant to the issue of disqualification. However, the judge should be cautioned that the assistance is prohibited if it amounts "to practice as an attorney in any of the courts of this state" in violation of Neb. Rev. Stat. §7-111. That statute provides that violations are a Class V misdemeanor.

Respectfully adopted this 6 day of July, 1992.

Chair