Nebraska Ethics Advisory Opinion 03-1

Question Presented –

Is a judge who is socially involved in a dating relationship with an attorney in a public defender's office disqualified from all cases involving the public defender's office or only from cases which the specific attorney, with whom the judge is involved, has appeared as attorney of record or been involved in any manner?

Conclusion

The Code of Judicial Conduct does not require recusal from a case involving the public defender's office where the individual attorney employed by that office with whom the judge has a dating relationship has not appeared as an attorney of record or been involved with the case in any manner.

Statement of Facts

The judge in question has been separated from his wife for 6 months and is in the process of obtaining a dissolution of marriage. He is socially involved with an attorney from a public defender's office which has numerous attorneys in the office. Members of such office appear in the judge's court. The judge in this instance indicates that his social involvement with the attorney is in the nature of a dating relationship which for purposes of this opinion shall be considered more than casual and/or unplanned encounters. The judge is currently disqualifying from any cases involving the particular attorney in such office. The inquiry is whether disqualification is required of the judge when other attorneys in the same office appear in the judge's court.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2 and 3

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. § 24-739 (Reissue 1995)
Arizona Opinion 00-01(Apr. 7, 2000)
Florida Judicial Ethics Advisory Opinion 91-17 (Oct. 22, 1991)
Mississippi State Bar Opinion 194 (Dec. 6, 1991)
Nebraska Ethics Advisory Opinion 92-1
Utah Informal Opinion 88-3 (May 15, 1988)
State v. Vidales, 6 Neb. App. 163, 571 N.W.2d 117 (1997)
Jeffrey M. Shaman et al., Judicial Conduct and Ethics (3d ed. 2000)

Discussion

Most of the authority addresses the issue of the disqualification of the judge where the judge is related to an attorney in the office. Canon 3 of the Nebraska Code of Judicial Conduct provides, in part, as follows:

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:

. . . .

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(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, or the judge has been a material witness concerning it;

. . . .

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be affected substantially by the proceeding;

(d) the judge or the judge's spouse, or a person with the fourth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be affected substantially by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) Any other instance where law requires disqualification.

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality reasonably might be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "affected substantially by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 2 of the Code of Judicial Conduct provides, in part, as follows: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities."

This Canon provides that the judge must act with integrity and impartiality and may not allow family, social, political, or other relationships to influence the judge's conduct or judgment. See Section 2A and 2B. Canon 3 is the more specific Canon setting forth when disqualification is required, although judges must always consider whether or not their activities involve any appearance of impropriety.

Neb. Rev. Stat. § 24-739 (Reissue 1995) requires disqualification, in part, when an 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."

It is significant to the committee that the attorney with whom the judge has this relationship is a government attorney rather than a partner in a law firm. Government attorneys are paid a salary and have no economic or profit motive involved in the outcome of criminal cases whereas the members of a law firm normally share profits or expenses in some manner and are motivated to acquire clients, in part, through the successful conclusion of their cases. Neither of these motivations is present when the attorney involved is employed by a governmental agency. See Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.12 (3d ed. 2000). The commentary to Canon 3E states that even in the case where the attorney relative of the judge is affiliated with the law firm, such affiliation does not itself automatically disqualify the judge. The rationale for disqualification is diminished where the attorney with whom the relationship exists is employed by a governmental agency rather than a law firm.

State v. Vidales, 6 Neb. App. 163, 571 N.W.2d 117 (1997), required recusal, however, when the judge's wife, a deputy county attorney, filed the original complaint against a criminal defendant. It is therefore clear that a judge may not make any judicial determinations when relatives as set forth in § 24-739 have been involved in a case.

Social relationships may require a judge to disqualify in some circumstances, but not always. The question of disqualification turns on the extent of the social relationship. See Shaman, s*upra*, § 4.15.

This committee has previously addressed a similar situation in Nebraska Ethics Advisory Opinion 92-1. In that case, the judge had a son who was a member of the local public defender's staff and inquired whether he must disqualify himself from cases in which other staff members of the same public defender's office appeared as counsel for defendants. This committee found that, absent other factors, disqualification was not required when other members of the public defender's office appeared in the judge's court. The rationale in that opinion is applicable in this case as well. The Arizona Supreme Court Judicial Ethics Advisory Committee reached a similar result finding that a trial judge may continue to preside in criminal cases brought by the prosecutor's office in which his son was a deputy county attorney. See Arizona Opinion
00-01 (Apr. 7, 2000).

Similarly, the Mississippi State Bar found that the public defender's office was not prohibited from defending cases before a circuit court judge whose son was an assistant public defender, so long as the son was not directly involved in the cases. See Mississippi State Bar Opinion 194 (Dec. 6, 1991).

The Florida Supreme Court Judicial Ethics Advisory Committee allowed a judge to preside in criminal cases where the defendant was represented by an assistant public defender other than her

spouse, who was also employed in the public defender's office. See Florida Judicial Ethics Advisory Opinion 91-17 (Oct. 22, 1991). The committee found that if "the circumstances of the case somehow place [the judge's] impartiality in question," the judge should disqualify herself. The committee further recommended that the trial judge advised the parties of her spouse's position in the public defender's office and had offered to step down.

A contrary result was reached by the Utah Ethics Advisory Committee in Utah Informal Opinion 88-3 (May l5, 1988). In that case, it was not clear to the Utah committee that the judge's spouse was employed by "a governmental agency," although she worked for the legal defender's association. The committee found that members of the legal defender's association shared information, that the judge and his spouse shared in each other's income and had privileged communications, and that thereby there was a basis for questioning the judge's impartiality. The committee concluded that the judge should disqualify himself in all cases where the legal defender's association was involved whether the judge's spouse was specifically involved in the case or not.

It is clear that, under the facts presented, the judge should not sit on cases involving the attorney with whom the dating relationship exists. Under the facts presented, however, the judge is not required to disqualify himself from ruling on cases involving other members of the government attorney's office.

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 FEBRUARY 21, 2003

Judge Randall L. Rehmeier
Judge John F. Irwin (not participating)
Judge Graten Beavers
Judge Douglas F. Johnson
Judge Stephen R. Illingworth
Judge John F. Steinheider
Judge William B. Cassel