

NEBRASKA JUDICIAL ETHICS COMMITTEE

ADVISORY OPINION 93-4

FACTS

A member of the Nebraska Judiciary poses the following question:

"When an attorney leaves the practice of law to go on the bench and sells his interest in the firm to partners, how do you handle the contingency fee case with another law firm, wherein the agreement between your firm and their firm is a division of whatever recovery there may be, if any?"

NEBRASKA CODE OF JUDICIAL CONDUCT SECTIONS

"CANON 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities."

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"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,

(b) a 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....

"CANON 4. A judge shall so conduct all extra-judicial activities as to minimize the risk of conflict with judicial obligations."

D. Financial Activities

(1) A judge shall not engage in financial and business dealings that

(a) reasonably may be perceived to exploit the judge's judicial position; or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(4) A judge shall manage the judge's investments and other financials interest to minimize the number of cases in which the judge is disqualified.

STATUTORY SECTIONS

Neb. Rev. Stat. Section 24-739. 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 wherein he or she is a party or interested, or where he or she is related to either party by consanguinity or affinity within the fourth degree, or 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 copartner of any attorney related to the judge in the degree of parent, child, or sibling, or where he or she has been attorney for either party in the action or proceeding, and such mutual consent must be in writing and made a part of the record; or where said judge was in copartnership, at the time of his or her election, in the law business, with a practicing attorney in the district in which the said judge was elected, and which said copartnership continued in the practice of law in the district and occupied the same office or rooms which were occupied by the late copartnership, consisting of the presiding judge and his or her ex-copartner, at the time of his or her election, and where said judge or justice continues to occupy the same office or rooms with his or her said ex-copartner, the said judge or justice shall be prohibited and disqualified from acting as such, in any proceedings or litigation in which said ex-copartner of said judge is retained or in anywise interested, and the said judge or justice shall be

disqualified, as aforesaid, in all proceedings or litigations in which the ex-copartner is retained or interested, so long as said judge or justice occupies the same room with his or her ex-copartner, which said partnership occupied prior to said judge's election.

#### DISCUSSION.

The member of the judiciary posing the above question stated that he had entered into a binding contract with his former law firm, regarding its purchase of his interest in that law firm, including any cases in which the former practitioner had been handling on a contingency fee basis in association with another law firm. The initial consideration is, accordingly, not a matter of judicial ethics, but instead a matter governed by the Code of Professional Responsibility, and specifically, Ethical Considerations 2-20 and 2-22. Those Ethical Considerations permit the utilization of contingency fee arrangements in civil cases, and additionally, allow the association by one lawyer with another lawyer outside of the first lawyer's firm, provided that the consent of the client is first secured, and provided further that any fee derived from the handling of the case is divided in proportion to the services performed and the responsibility assumed by each lawyer.

The question of how much compensation the former practitioner will receive from his former firm, as the contingency fee cases are resolved in the future, is thus not a matter of judicial ethics. The negotiations that the former practitioner would have entered into with another lawyer outside his former firm, and the negotiations that the former practitioner would have entered into with his former firm regarding compensation for those contingency fee cases, would have been matters subject to the Code of Professional Responsibility, and not matters of judicial ethics.

Once the former practitioner is sworn in, then the Canons cited above come into play, with the primary emphasis being placed on Canon 4 and its sections as cited above. Without question, the judge must recuse himself from any case involving not only his former firm, but also the other or outside law firm with whom the judge had previously associated, as a practitioner, in the contingency fee cases. For as long as the judge's former firm is required to pay him compensation, as a result of the sale by the judge of his interest in that law firm, or until a remittal of his disqualification occurs, the judge must disqualify himself from serving in any case involving any member of the judge's former firm. The financial interest of the judge in continuing to receive the agreed-upon compensation, is sufficient itself to require recusal. Moreover, until such time as all of the contingency fee cases with respect to which the judge had associated himself, as a

practitioner, with another, firm are resolved, the judge must similarly recuse himself from serving in any case involving any member of that other law firm.

### CONCLUSION

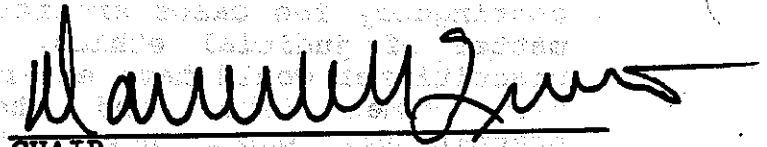
The value placed upon a lawyer's interest in a contingency fee case, when that lawyer leaves the practice of law prior to the conclusion of the contingency fee case is not a matter that is controlled by the Nebraska Code of Conduct.

In any event, a judge shall not participate in any case involving the judge's former firm or the associated firm for as long as the judge has a financial interest in either firm, or in litigation pending in either firm. This opinion does not address other factors which may or could require recusal of the judge from hearing cases involving the former firm under the Nebraska Code of Judicial Conduct.

Approved and adopted by the committee on  
1993.

Approved and adopted by the committee on

Nov 17

  
CHAIR