

Nebraska Ethics Advisory Opinion 96-3

Question Presented--

May a judge preside over cases involving lawyers who play various roles in salary negotiations with the judge's spouse's employment group or the law firms with which such lawyers are affiliated.

Statement of Facts

Judge's spouse (Spouse) is a teacher for the local public school district. Spouse is currently participating as a member of the teachers' association in salary and benefit negotiations with the school board. Judge believes that the results of the salary negotiations will have an obvious, albeit small, impact on the income of Judge's family.

A local attorney, Lawyer A, is a member of the school board. He is participating in the salary negotiations and will have one of five votes to determine whether or not the school board ratifies the negotiated salary and benefit agreement. The school board employs another local attorney, Lawyer B, for periodic advice concerning the negotiations. However, Lawyer B does not participate in the actual negotiation process. Neither the members of the school board nor the teachers' association are at liberty to discuss the status of the negotiation process with outsiders, such as their spouses.

Judge inquires as to whether a substantial and real conflict exists should Judge hear cases involving either Lawyer A and his or her law firm or Lawyer B and his or her law firm. Further, if a conflict does exist, does disclosure of the apparent conflict to all parties allow Judge to proceed to hear such cases, assuming there is no objection?

Applicable Code Sections

Canon 3E(1)(a)

References in addition to Nebraska Code of Judicial Conduct

Nebraska Opinions 92-6 and 94-4.

28 U.S.C. § 455(a); § 455(b).

A.J. by L.B. v. Kierst, 56 F.3d 849 (8th Cir. 1995) U.S. v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994); Henderson v. Dept. of Public Safety and Corr., 901 F.2d 1288 (5th Cir. 1990); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985); Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985).

Cannon 3C of the 1972 Model Code, see Jeffrey M. Shaman, et al, Judicial Conduct and Ethics § 4.25 at 143-44 1 (2d ed. 1995).

Discussion

Nebraska Code of Judicial Conduct

The applicable canon of the Nebraska Code of Jud. Cond., Canon 3E(1)(a)(rev. 1996), provides:

(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[.]

Canon 3E(1)(a), quoted above, was added to the American Bar Association Model Code of Judicial Conduct

as part of the comprehensive revision to the previous model code (the 1972 Model Code), which revision was adopted by the American Bar Association House of Delegates on August 7, 1990 (the 1990 Model Code). The Nebraska Supreme Court adopted the 1990 Model Code as the Nebraska Code of Judicial Conduct on May 28, 1992, effective September 1, 1992. Consequently, issues arising in Nebraska prior to September 1992 involving a relationship or potential conflict between a judge and an attorney, such as the one posed by this inquiry, were evaluated under the general "impartiality reasonably might be questioned" language (general impartiality language) of Canon 3C(1) of the 1972 Model Code, which is nearly identical to that used in Canon 3E(1), quoted above.

Due to the recent adoption of the 1990 Model Code, our research of applicable state case law uncovered no factually similar cases which were decided under Canon 3E(1)(a)(1994). Further, the applicable federal cases are decided under 28 U.S.C. § 455(a), which requires a federal judge to recuse himself or herself "in any proceeding in which his impartiality might reasonably be questioned." Under § 455(b), a judge shall also disqualify himself or herself "[w]here he has a personal bias or prejudice concerning a party[.]" Although § 455(b) appears to mirror Canon 3E(1)(a), it does not include the language which specifically refers to relationships and conflicts between judges and attorneys. Given the historical developments and the language differences noted above, the majority of our analysis of the instant inquiry relies on literature involving issues arising and decided under the general impartiality language of the 1972 Model Code and the federal statute.

Literature Analyzing Impartiality Questions Involving Judge-Attorney Relationships

In regard to Canon 3C(1) of the 1972 Model Code, specifically in the context of a friendship between a judge and a lawyer appearing before the judge, the U.S. Court of Appeals for the Seventh Circuit stated:

[T]he statutory test is not actual impartiality but the existence of a reasonable question about impartiality. When a question arises about friendship between a judge and a lawyer, "[t]he twofold test is whether the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the relationship is disregarded."

United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985) (citing Advisory Opinion No. 11, Interim Advisory Committee on Judicial Activities (1970)). In Murphy, *supra*, the evaluation of impartiality begins with an initial assessment as to the existence of a reasonable question about impartiality, evidently based on an objective view. If the judge determines that, based on an objective view of the facts, the relationship does not cast doubt on the impartiality of the judge, then no action is required. If, however, an objective view of the facts casts doubt on the impartiality of the judge, then a "twofold test" is thereafter applied. The first prong of the "twofold test" in Murphy is whether or not the judge believes that he or she can disregard the relationship with the attorney. The second prong of the "twofold test" in Murphy is whether others can reasonably be expected to believe the relationship between the judge and the attorney is disregarded. Because the "twofold test" specifically applies to questions of impartiality involving relationships between judges and attorneys, we believe that the "twofold test" is relevant to the instant inquiry. Additionally, the objective assessment followed by the "twofold test" is in line with the language of Canon 3E(1)(a) of the 1990 Model Code, which includes both the objective general impartiality test and the specific personal bias or prejudice test, the latter of which appears to be inherently subjective. For the sake of completeness, we note that the staged analysis under Murphy differs from the straight objective test proposed by at least one treatise on Canon 3C(1) of the 1972 Model Code, see Jeffrey M. Shaman, et al. Judicial Conduct and Ethics § 4.25 at 143-44 (2d ed. 1995), under which the appearance of partiality requires recusal, notwithstanding a subjective belief by the judge that he or she can act fairly.

It is clear from our review of the relevant case law that questions relating to judicial impartiality in the context of a relationship between a judge and an attorney must be examined on a case-by-case basis. See, e.g., A.J. by L.B. v. Kierst, 56 F.3d 849 (8th Cir. 1995); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994); Henderson v. Dept. of Public Safety and Corr., 901 F.2d 1288 (5th Cir. 1990); Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985). Specifically, we must examine the extent and nature of the relationship or conflict itself, the remoteness of the relationship or conflict to the litigation in which judicial disqualification is an issue, and the potential effect, if any, of the relationship or conflict on the underlying litigation. *Id.* Thus, for example, in holding that the trial judge's membership in a social club in which several attorneys from plaintiff's counsel's firm were also members did not require disqualification, the

U.S. Court of Appeals for the Fifth Circuit stated that "[p]artiality for or against an attorney, who is not a party, is not enough to require disqualification unless it can be shown that such a controversy would demonstrate bias for or against the party itself." Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d at 1412. Similarly, the U.S. Court of Appeals for the Eighth Circuit recently opined that "[a] controversy between a trial judge and an attorney does not require disqualification of the judge in the absence of proof of bias or personal prejudice to the parties." A.J. by L.B. v. Kierst, 56 F.3d at 862.

Relevant Opinions of This Committee

Inquiries regarding the relationship between a judge and an attorney are apparent in two recent opinions of this committee. In Advisory Opinion 92-6, decided under the 1972 Model Code, this committee analyzed the relationship and potential conflict between a judge and the attorney whom the judge's wife had hired to probate her father's estate. In determining whether or not the judge was disqualified from hearing cases involving the probate attorney or his law firm, this committee stated that generally 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.

However, this committee concluded that under the facts of the inquiry under consideration in Advisory Opinion 92-6, because the judge regularly met with his spouse and the probate attorney, the judge had a special relationship with the attorney. The judge was disqualified from hearing the attorney's cases unless the conflict was waived following disclosure. Specifically, this committee directed that before withdrawing from all such proceedings, the judge should disclose the situation on the record and allow the litigants to decide whether or not to agree in writing that the judge's relationship was immaterial.

In Advisory Opinion 94-4, this committee addressed the question of whether a judge was disqualified from hearing any cases which involved the law firm that represented the nonprofit corporation of which the judge's spouse was the executive director. The committee referred to Advisory Opinion 92-6 in concluding that if the judge had no part in choosing the law firm, did not consult with the law firm, and otherwise had no special relationship with the law firm, disclosure was sufficient and recusal unnecessary. Although this committee decided Advisory Opinion 94-4 under the 1990 Model Code, the determinative subsections of Canon 3E were (1)(c) and (1)(d)(i), which are not directly applicable in the instant inquiry under subsection (1)(a).

In sum, Advisory Opinions 92-6 and 94-4 indicate that when the question is one of general impartiality and prejudice is not apparent, disclosure is an adequate remedy.

In this case, Judge is not said to be a friend of Lawyer A or Lawyer B, plays no part in the salary negotiations involving spouse and Lawyer A, and has what may be considered a de minimis interest in the final outcome of the negotiations. These facts describe an attenuated relationship between Judge and both Lawyers A and B. If Judge had determined on these facts that his relationship to Lawyers A and B could not be objectively viewed as a conflict of interest, then no action would have been required. However, in the instant case, Judge has inquired of the committee and we, therefore, conclude that by first applying the objective test for impartiality to these facts, a reasonable person could view the relationship between Judge and Lawyer A or Lawyer B as a conflict of interest. However, we must additionally apply the specific language of Canon 3E(1)(a) which requires disqualification when "the judge has a personal bias or prejudice concerning a . . . party's lawyer." The question of personal bias or prejudice under a specific set of facts would appear to be a subjective test. We conclude in this inquiry that the subjective evaluation for bias or prejudice toward Lawyer A or Lawyer B on the part of Judge would be more appropriately decided by the parties involved in and affected by each such case as may be before Judge.

Conclusion

Based on the foregoing, we conclude that under an objective standard, Judge may be seen as having a conflict and that Judge should disclose the facts to the parties in each case where the potential conflict arises and, because of the potential for prejudice, allow the parties to determine whether they believe the potential conflict is one which they choose to waive or one that they choose not to waive.

It is the opinion of the committee that if Judge discloses the facts to the parties in any case before Judge in which Lawyer A or Lawyer B is involved, and the parties do not object, recusal is not required.

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 Committee chairperson, Hon. Darvid D. Quist, District Judge.

APPROVED AND ADOPTED
BY THE COMMITTEE ON APRIL 17, 1996

DARVID D. QUIST, CHAIRPERSON