

# Nebraska Ethics Advisory Opinion 96-4

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## ***Question Presented--***

*Under what circumstances, and pursuant to what procedure, may the law partners of an attorney appear and practice before a Nebraska judge who is the brother of that attorney?*

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## **Conclusion**

The judge may not permit any attorney who is a law partner of the judge's brother from appearing or practicing in or participating in any case in front of the judge, unless the judge has disclosed the relationship between himself and his sibling, as well as the partnership relationship between that sibling and the attorney appearing in the case. If, after such disclosure, all parties consent to the judge's continued participation in the case, that judge may then continue to preside over the case. If the mutual consent of all parties to the litigation is not obtained, the judge must disqualify himself.

## **Statement of Facts**

A Nebraska judge inquires under what circumstances the law partners of his brother, an attorney licensed to practice in the State of Nebraska, may practice before the Nebraska judge. The judge's brother is a partner in a 20-lawyer firm, the office of which is located in a city bordering Nebraska. The firm has 11 partners who actively practice in the State of Nebraska (not counting the judge's brother). The judge acknowledges the clear prohibition against his brother's practicing in the judge's court, but requests an opinion as to whether it is ever permissible for any of his brother's 11 partners to practice in front of the judge.

## **Applicable Code Sections**

### CANON 2

A Judge Shall Avoid Impropriety  
and the Appearance of Impropriety in all of  
the Judge's Activities

....

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. . . .

....

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:

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

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

.....  
(e) Any other instance where law requires disqualification.

**References in Addition to Nebraska Code of Judicial Conduct**

Neb. Rev. Stat. § 24-739 (Reissue 1995), entitled “Disqualification of judge; grounds,” states:

A judge shall be disqualified from acting as such in the county court, district court, Court of Appeals, or Supreme Court, except by mutual consent of the parties, which mutual consent is in writing and made part of the record, in the following situations:

(1) *In any case in which* (a) he or she is a party or interested, (b) he or she is related to either party by consanguinity or affinity within the fourth degree, (c) *any 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,* or (d) he or she has been attorney for either party in the action or proceeding . . . .

(Emphasis supplied.)

**Discussion**

The answer to this inquiry is provided not by resort to the Nebraska Code of Judicial Conduct, but instead by the Nebraska Revised Statutes. As acknowledged by the judge, § 24-739 clearly prohibits the attorney brother from practicing in front of his sibling, the judge. However, the above-referenced section goes further and disqualifies the judge in cases in which “the copartner of an attorney related to the judge in the degree of parent, child, or *sibling*” (emphasis supplied) appears as counsel, and thus the statutory prohibition extends to the brother’s copartners. The statute is not discretionary, but clearly mandatory, and thus the judge, in any case where any party is represented by any of the partners of the judge’s brother’s firm, must disclose that relationship and inquire as to whether all parties are willing to consent to the judge’s continued participation in the case. The disclosure by the judge must be made on the record. In the event that the consent of all parties is given, that consent must be reduced to writing, and such written consent must also be made part of the record.

Canon 3E of the Nebraska Code of Judicial Conduct ratifies the statutory prohibition in question by causing the disqualification of a judge in any other instance where the law requires such a disqualification. This is simply one of those instances where the law requires disqualification, unless mutual consent of all parties is obtained.

The pervasive impact of the “appearance of impropriety” factor, derived from Canon 2 of the Nebraska Code of Judicial Conduct, also has application to the situation under consideration. Whether a case is measured in terms of its economic impact--whether to the parties, their counsel, or both--or in terms of notoriety or by any other standard, the relationship between a judge and that judge’s sibling, as well as the partners of that sibling, can easily be recognized as a potential influence on the judge’s handling of any case. A sizable financial award rendered by the judge to a party represented by a partner of the judge’s sibling might reasonably and realistically be considered as beneficial to that sibling, in terms of partnership income. Similarly, a judgment rendered by the judge from which little economic benefit might flow but from which the partnership gains much positive publicity can be perceived as equally beneficial to all partners, including the sibling.

Thus, the necessity for avoidance of even the appearance of impropriety provides further reason for adherence to the statutorily mandated disclosure and eventual disqualification in the absence of the mutual consent of all parties.

#### **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 OCTOBER 17, 1996

Judge Cloyd Clark, Vice Chairperson  
Judge Michael McGill  
Judge Lindsey Miller-Lerman  
Judge Donald Rowlands  
Judge Stephen Swartz  
Judge Toni Thorson  
Judge Darvid Quist, Chairperson: *Not participating*