NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE
Advisory Opinion No - 89-5

SITUATION

A member of the Nebraska Judiciary has a brother-in-law who practices law in the city and county wherein the judge sits. The brother-in-law shares offices with one other attorney, though not on a partnership basis but instead on an office sharing arrangement.

The judge has zealously avoided presiding at all trials in which the brohter-in-law appeared, although the judge has allowed the brother-in-law to appear in front of him/her for the purpose of the entry of pleas of guilty or no contest, and thereafter the judge has turned the balance of the proceedings (presentence investigations and sentencings) over to another judge. The judge has also permitted the brother-in-law to appear before him/her in the context of other "mechanical" routine appearances (e.g., the entry of pleas of not guilty and setting of trial dates), with the remainder of any such proceedings being handled by a different judge.

The member of the judiciary inquires:

1. In order to avoid even the appearance of impropriety, should the judge recuse himself/herself from every facet of the brother-in-law's criminal cases?

2. Should the judge recuse himself/herself from handling any case in which the lawyer with whom the brohter-in-law practices appears?

APPLICABLE CANONS AND STATUTE

The following Canons of the Code of Judicial Conduct apply to the above-described situation:

Canon 1 provides that "a judge should uphold the integrity and independence of the judiciary."

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself/herself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides that "a judge should avoid impropriety and the appearance of impropriety in all his/her activities."

2A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

2B. A judge should not allow his/her family, social or other relationships to influence his/her judicial conduct or judgment. He/she should not lend the prestige of his/her office to advance the private interest of others; nor should he/she convey or permit others to convey the impression that they are in a special position to influence him/her. He/she should not testify voluntarily as a character witness.

Canon 3 provides that "a judge should perform the duties of his/her office impartially and diligently."

3C(1) A judge should disqualify himself/herself in a proceeding in which his/her impartiality might reasonably be questioned, including but not limited to instances where . . . . (d) he/she and his/her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

3D. Remittal of Disqualification. A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his/her disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his/her financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceedings. The agreement, signed by all parties and lawyers, should be incorporated in the record of the proceeding.

Neb. Rev. Stat. Section 24-315 provides as follows:

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 . . . . 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 co-partner of an attorney related to the judge in the degree of parent, child, or sibling . . . , and such mutual consent must be in writing and made a part of the record . . . .

ANALYSIS AND OPINION

As previously stated by this committee in Advisory Opinion No. 89-3, the "appearance" of impropriety must be avoided with as much zeal as improprieties themselves. The appearance of impropriety can clearly arise in any situation in which a member of the judiciary must make any kind of decision which would affect the outcome of a case. Clearly, the mere receipt and notation of a plea of not guilty, and the scheduling of the case for trial, are not decisions of the type which affect the outcome. Instead they are of a nature purely routine and have no bearing on the outcome. There may exist the possibility of the appearance of deferential treatment to the brother-in-law, if the scheduling of a trial date is made by the judge himself/herself and not according to some pre-arranged, established method. For example, if the judge would schedule trial dates either sooner or later than the normal method would dictate, then the mere act of scheduling the trial would appear to be deferential, and thus constitute an improprietous act. If, however, the trial dates are assigned not by the judge but instead by some member of the bailiff or clerical staff, or if the trial dates are assigned according to an already established calendaring method, then even the appearance of impropriety does not exist in such situations. Consequently it is proper, and not violative of the Code of Judicial Conduct, for the judge to continue to allow the brother-in-law to appear for such routine "mechanical" purposes.

An answer to the second question posed by this member of the Judiciary is somewhat more elusive. Neb. Rev. Stat. Section 24-315 does not require the disqualification of a judge in situations where the attorney appearing before that judge is a "co-partner" of an attorney related only by marriage to the judge. The statute section in question clearly prohibits the appearances of co-partners of any attorney who is related to the judge "in the degree of parent, child or sibling,"but does not prohibit the appearance of attorneys who are not co-partners, nor does it prohibit attorneys associated with the "related attorney" on some kind of office-sharing, secretary-sharing, expense-sharing or other similar basis.

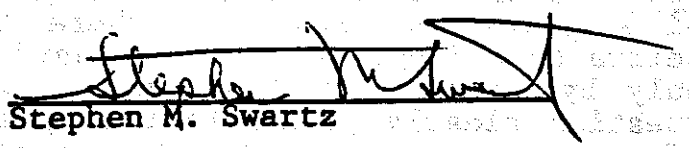
Consequently, the situation under analysis has two factors which remove it from the application of Section 24-315: namely, the attorney associated with the brother-in-law attorney is not the "co-partner" of the related attorney, nor does the statute expressly prohibit even co-partners when the related attorney is only related by marriage.

It might be advisable for the inquiring judge to insure that the relationship between the brother-in-law attorney and the "associated" attorney is not conducted as to rise to the "partnership" level. Even if that relationship might be a partnership in every way except its name, Section 24-315 would still not require recusal in cases in which the associated attorney appears. However, the "appearance of impropriety" might be a sufficient pitfall to suggest careful consideration by the inquiring judge.

Furthermore, if the financial arrangements between the brother-in-law attorney and the "associated attorney" are something more than "a shared expense" arrangement, and the possibility exists that the brother-in-law attorney may receive financial "gain" as a result of the associated attorney's practice in front of the inquiring judge, the impartiality of the inquiring judge may then be reasonably questioned, and the strictures Canon 3 would prevail.

The inquiring judge further indicates that, in some instances, the brother-in-law attorney and the "associated attorney" share some cases or some clients. A special effort should be made to inquire, in each case in which the "associated attorney" appears, to determine whether the case involving the appearance is such a shared-client case, and if so, the judge must recuse himself/herself, on the basis that the active participation by the brother-in-law attorney outside the courtroom would be a sufficient involvement to require recusal.

FOR THE COMMITTEE



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