

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE

OPINION 92 - 1

FACTS

A member of the judiciary has a son who is a lawyer member of the local public defender's staff. Various members of that staff, which number in excess of ten lawyer members, regularly and routinely represent clients who are charged with criminal and traffic violations of city ordinances and state statutes, including both misdemeanors and felonies. Because of the number of staff attorneys comprising the public defender's staff, as well as because of the fact that the judge sits in a multi-judge district, it can fairly easily be arranged so that the son never has to appear in front of his father, the judge.

QUESTION

May the judge in question hear any cases in which any other staff member of the same public defender's office appears as counsel for the defendant?

APPLICABLE CANON

**CANON 1. 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 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. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities**

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

**CANON 3. A Judge Should Perform the Duties of the Office Impartially and Dilligently**

The judicial duties of a judge take precedent over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

**A. ADJUDICATIVE RESPONSIBILITIES**

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor or fear of criticism.

**C. DISQUALIFICATION.**

(1) A judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to instances where:

Commentary: A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if his or her impartiality might reasonably be questioned because of such association.

(c) a judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge's spouse, or a person within the third 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;

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

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

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

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

#### D. 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 the judge's 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 or her financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary: This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that the party's consent will be subsequently filed.

#### APPLICABLE STATUTES

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 an 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. (Nebraska Revised Statutes)

#### DISCUSSION

As this Committee has previously opined, a member of the judiciary must clearly and voluntarily initiate recusal, in any situation where a participant in litigation either comes within the prohibited degree of affinity or consanguinity, or when the attorney who appears in front of the judge falls within the "copartner" category, as set forth in Neb. Rev. Stat. Section 24-739. In Advisory Opinion Number 89-9, this Committee, applied those recusal mandates to an instance where a daughter of a judge was merely conducting research on certain cases that may have come before the judge. However, in that same Opinion, this committee pointed out that there was no provision in the Canons of Judicial Ethics which would prohibit a judge from presiding at any other cases represented by that same legal agency as long as the judge's daughter had neither any involvement of any kind in any such case nor had any financial interest in the outcome of such cases. Earlier, in Advisory Opinion Number 89-5, this Committee had explored the "copartner" category and issued its opinion on the "whens" and "when nots" of recusal in related circumstances.

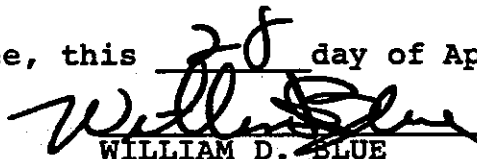
Accordingly, it is quite clear that the judge may not allow the son to appear before him in any case, unless the only action engaged in by the judge is of such a routine and mechanical nature that it will have absolutely no affect on the outcome of the case. As an example previously cited, a judge may allow a former copartner, or a lawyer who falls within the fourth degree of affinity or consanguinity, to appear before that judge for the mere purpose of entering a plea of not guilty and obtaining a trial date (of course, the caveat again must be stated that no preference or deference must be given in the setting of a trial date).

The distinction between the situations treated in Advisory Opinions Number 89-5 and 89-9, and the situation before the committee here, is that there is no possibility that the financial interest of the judge's son will be affected by any decision that judge makes, in any case where another staff member of the public defender's office appears in front of that judge. The outcome of any criminal proceeding will clearly affect the defendant, adversely or not, and will clearly affect the counsel for the defendant, advsersely or not, but in either event, there is no direct relationship between that affect and the judge's son. Nor can that affect be passed on to the judge's son, in any logical fashion. The Commentary to Canon 3C(1) clearly explains that there is absent in this kind of governmental agency the kind of association between any one lawyer member of that agency and the other lawyer members of that agency. In other words, lawyer members of the same public defender's staff simply do not automatically and necessarily have any financial interest in the outcome of the cases handled

by other staff members, do not have the same interest in good will which is necessary for the attraction of clients in a private law firm, and do not share a common pecuniary interest in the reputation of the other staff members.

Admittedly, not all courts which have been required to pass judgment on various disqualification situations of this ilk have been in agreement. At least one court determined that disqualification was required, when the spouse of the judge worked in the prosecutor's office, even though the spouse had taken great pains not to be involved with any cases which came before the judge. In Smith v. Beckman, 683 P.2d 1214 (1984), the court reasoned that the public's perception of the close and personal nature of marital relationships is such that the appearance of impropriety required the disqualification "even though no other facts call into question that judge's impartiality" (683 P.2d at 1216). On the other hand, at least one other court has held that disqualification is not required when a relative of the judge, within the prohibited degree of affinity or consanguinity, is a member of the legal staff of a government agency, as long as the lawyer-relative is not involved in any way, shape or form with the cases that come before the judge. The rationale in that case is that disqualification is not necessary because a government attorney's clientele, compensation, and prestige in office are not greatly affected in the same fashion as those of attorneys in the private sector. As is in almost every situation which is subjected to scrutiny for its ethical complications, the appearance of impropriety must be given fair consideration. However, absent any other factor, this committee does not believe that disqualification is required in the situation presented. As long as the judge's son does not appear before his parent-judge, and is not involved in any other fashion in the cases that come before that judge, recusal is not necessary.

Approved by Committee, this 20 day of April, 1992.

 Chairman  
WILLIAM D. BLUE

