Nebraska Ethics Advisory Opinion 96-8

Question Presented--

The presiding judge of a judicial district inquires: (1) Is recusal required if one of the parties to a lawsuit is an attorney who practices law in the court where that judge presides? (2) Does it make any difference if the attorney appears regularly in front of the judge? (3) Does it make any difference if the attorney is the defendant in a criminal case, as opposed to being a party plaintiff or party defendant in a civil case? (4) If one judge in a district decides that recusal is appropriate, must all judges in that district recuse themselves?

Conclusion

Under the impartiality standard set forth in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), which is partly objective and partly subjective, the fact that the attorney regularly practices before a particular judge is irrelevant. The key issue is whether the judge and attorney have formed a special relationship. If they have and if the attorney becomes a party plaintiff or party defendant in any litigation, whether civil or criminal, the judge may be perceived as having a conflict. The judge should disclose the facts to the parties and, because of the potential for prejudice, allow the parties to determine whether they wish to waive the potential conflict.

It is the opinion of the committee that if the judge discloses the facts to the parties, and the parties do not object, recusal is not required.

The committee also believes that a blanket recusal by all judges in the judicial district is not automatically required. Utilizing whatever random assignment procedure is regularly employed in the judicial district, each judge in the judicial district should independently review the case to determine if a perceived conflict exists for that judge to handle the case. Only if each judge in the judicial district is disqualified should the presiding judge contact the Chief Justice of the Nebraska Supreme Court to appoint a judge to preside over the lawsuit.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 3E (1)(a) (rev. 1996)

References in Addition to Nebraska Code of Judicial Conduct

Nebraska Ethics Advisory Opinions 92-6, 94-4, and 96-3
28 U.S.C. § 455
United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985); *U.S. v. Pitera*, 5 F.3d 624 (2d Cir. 1993); *Tonkovich v. Kansas Bd. of Regents*, 924 F. Supp. 1084 (D. Kan. 1996); *Jefferson-El v. State*, 330 Md. 99 622 A.2d 737 (1993); *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995); *Piechowicz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989); *U.S. v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982); *In re Illuzzi*, 670 A.2d 1265 (Vt. 1995); *State v. Martina*, 135 N.H. 111, 600 A.2d 132 (1991); *Purpura v. Purpura*, 115 N.M. 80, 847 P.2d 314 (N.M. App. 1993); *State v. Nunley*, 923 S.W.2d 911 (Mo. 1996)

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* §§ 4.01, 4.08, 4.15, 4.17, 4.25, and 4.26 (2d ed. 1995)

Discussion

Nebraska Code of Judicial Conduct.

Canon 3E(1)(a) of the Nebraska Code of Judicial Conduct provides:

> 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:
>
> . . . .
>
> (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[.]

The historical development of this Canon and its similarity to 28 U.S.C. § 455(a) are discussed in detail in Ethics Advisory Opinion 96-3 and will not be repeated for purposes of this opinion. Suffice it to say that the same thought process which guided the advisory committee in its analysis of the question posed in Ethics Advisory Opinion 96-3 is equally applicable to the instant inquiry.

Literature Analyzing Impartiality Questions Involving Judge-Attorney Relationships.

The seminal case which addresses the issue of friendship between a judge and an attorney appearing before that judge is *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). Under the *Murphy* decision, the trial judge, using an objective standard, makes an initial assessment as to the existence of a reasonable question about impartiality. If the judge objectively determines that the relationship with the attorney does not cause doubt on the impartiality of the judge, then recusal is not required.

If an objective view of the facts casts doubt on the impartiality of the judge, then a "twofold test" is applied. The two prongs of this test under *Murphy* are as follows: (1) Whether or not the judge believes that he or she can disregard the relationship with the attorney, and (2) whether others can reasonably be expected to believe the relationship between the judge and the attorney is disregarded.

Thus, Canon 3E(1)(a) includes both the objective general impartiality test followed by the specific personal bias or prejudice test which is inherently subjective.

As noted in Ethics Advisory Opinion 96-3, the premier treatise on the subject of judicial ethics, Jeffrey M. Shaman et al. *Judicial Conduct and Ethics* § 4.25 (2d ed. 1995) advocates a straight objective test. As stated in the Shaman treatise:

> The test for an appearance of partiality is meant to be an objective one: whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. . . . This standard calls for recusal when objective appearance casts reasonable doubt upon impartiality even though the judge in question subjectively feels that he or she can act fairly and even-handedly.

Id. at 143. See *U.S. v. Pitera,* 5 F.3d 624 (2d Cir. 1993).

The Shaman treatise further opines at § 4.26 that it is the obligation of the judge to disclose all facts that might be grounds for disqualification. It is not the duty of the parties to search out disqualifying facts about the judge. Once a judge discloses disqualifying facts and there is no objection, it will be assumed that any objection to the possible disqualification is waived.

However, the treatise further goes on to state that there are limits to recusal even under the objective test: "In the real world, judges do not live in ivory towers. They have relatives, friends, and professional acquaintances. They know lawyers, some of who may have been their law school classmates, professional associates, or even their partners." Shaman et al., *supra*, § 4.01 at 96. "[D]isqualification is not required where the judge merely had a prior professional relationship with an attorney presently appearing before the judge. . . . A policy requiring a judge to disqualify simply because he or she had a prior professional relationship with an attorney would be particularly burdensome on the judiciary." *Id.* at § 4.17 at 131.

It is also a fundamental role of law that while a judge has the obligation to recuse when there is a good reason to do so, there is a strong presumption that judges are impartial participants in the legal process and the judge has an equal obligation not to recuse when there is no reason to do so. *Tonkovich v. Kansas Bd. of Regents*, 924 F. Supp. 1084 (D. Kan. 1996); *Jefferson-El v. State*, 330 Md. 99, 622 A.2d 737 (1993). This principle has recently been reaffirmed by the Tenth Circuit in an interlocutory appeal of the case involving the Oklahoma City bombing, which killed 169 people, wherein the court stated:

> The statute "'must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.'". . . Neither is the statute intended to bestow veto power over judges or to be used as a judge shopping device. . . . Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.

Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995)

Our research has revealed a paucity of decisions where the actual litigants are themselves practicing attorneys. In *Piechowicz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989), an assistant U.S. Attorney was personally sued under the Federal Tort Claims Act. The plaintiff sought to disqualify the district judge on the grounds that the attorney had previously appeared before him on other cases. The Fourth Circuit found no indication that the attorney's relationship with the trial judge was so intimate as to suggest any appearance of partiality. The court held that it was not an abuse of discretion to deny recusal, as the circumstances would not have led a reasonable person to question the impartiality of the trial judge.

By contrast, however, the trial judge did sustain a motion to recuse in *United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982). In *Ferguson*, one of the government's key witnesses who had testified before the grand jury was an attorney named "Pomerantz", who had previously been a law clerk for the trial judge. In an insightful opinion, the judge wrote:

> Despite the Court's subjective view that all matters can be resolved impartially, a judge has an independent duty to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The issue then is not the Court's own introspective capacity to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality. This is an objective standard and "where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." My relationship

> to Pomerantz is so intimate and my esteem for him so high, as it is for all my many clerks through the years, that the "average person on the street" might reasonably conclude that no matter how strongly the Court states that Pomerantz's testimony will not enter into its judgment, nonetheless, in some imperceptible manner his testimony will intrude itself and be considered with respect to the suppression motions. This situation is quite unlike the prior motion to disqualify because a former law clerk had been assigned to prosecute the case. The mere fact of close relationship did not require disqualification. In this instance, however, credibility is a vital issue.
>
> The Court concludes that under all the circumstances here presented it is required to disqualify itself on the ground that its impartiality might reasonably be questioned. It does so with reluctance since many long days and hours have been expended in studying the voluminous affidavits, exhibits and briefs submitted by the parties; in addition, this Court remains of the school that adheres to the "duty to sit" concept, notwithstanding which the case must now be reassigned to one of my colleagues, all of whom are heavily burdened with other matters. But the Court's reluctance and its "duty to sit" concept must yield to a higher authority–the majesty of law. A cardinal principle of our system of justice is that not only must there be the reality of a fair trial and impartiality in accordance with due process, but also the appearance of a fair trial and impartiality. In sum, in the words of Mr. Justice Frankfurter, "justice must satisfy the appearance of justice."
>
> The defendants' motion for the Court to disqualify itself is granted. The case is referred to the Assignment Committee for transfer by lot pursuant to the Individual Assignment System rule of this Court.

Id. at 1259-60.

The Vermont Supreme Court recused itself upon motion of an attorney in *In re Illuzzi*, 670 A.2d 1264 (Vt. 1995). An attorney appealing the Professional Conduct Board's recommendation that he be disbarred was also a state senator who had sued the justices and triggered numerous media reports focusing on his treatment by the judicial branch. Under normal circumstances, the Court stated that recusal would not have been granted because a judge is not disqualified merely because a litigant sues or threatens to sue. However, the attorney's status as a state senator and the numerous media reports created a climate in which a reasonable disinterested member of the public could doubt the Supreme Court's impartiality. The standard in Canon 3E(1) is met whenever doubt of impartiality would exist in the mind of a reasonable disinterested observer.

Several other decisions have been found where trial judges have held attorneys in contempt. The trial judge is not disqualified from hearing criminal contempt charges arising out of the attorney's conduct in the presence of the court, absent an indication that the court acted in anger or became personally embroiled in the exchange. See, *State v. Martina*, 135 N.H. 111, 600 A.2d 132 (1991); *Purpura v. Purpura*, 115 N.M. 80, 847 P.2d 314 (N.M. App. 1993).

The final issue to be addressed is whether all judges of a judicial district are disqualified if one or more judges are disqualified. The committee believes the answer is an emphatic "No." Although we have not found any Nebraska decisions which have addressed this issue, *State v. Nunley*, 923 S.W.2d 911 (Mo. 1996), decided en banc by the Missouri Supreme Court, squarely holds that a presiding judge lacks authority to disqualify all judges in the circuit from hearing a case. Each individual judge should be permitted to determine if there exists a disqualifying bias or prejudice. A particular judge is in the best position to determine if recusal is necessary.

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 *JANUARY 22, 1997*

Judge Darvid Quist
Judge Michael McGill
Judge Stephen M. Swartz
Judge Toni G. Thorson
Judge Lindsey Miller-Lerman
Judge Cloyd Clark
Judge Donald Rowlands