

Nebraska Ethics Advisory Opinion 97-2

Question Presented--

What ethical considerations apply to the winding up of the affairs of a professional corporation, of which a newly appointed judge is the sole shareholder, particularly with respect to certain employment agreements the corporation has with other attorneys.

Conclusion

The winding up of the affairs of the professional corporation must be accomplished in such a fashion that the judge-appointee, from and after the date of swearing-in, will have no further involvement or participation in the affairs of the professional corporation, if the professional corporation continues its existence, and has no further input or involvement in the handling of any cases which will not be fully completed by the date of the swearing-in. Similarly, any agreements entered into by the professional corporation and/or the judge-appointee, which agreements will not be fully completed and performed prior to swearing-in, must be limited to a single type of involvement or participation by the judge-appointee, after the swearing-in, namely, the passive receipt of fees for legal services previously rendered.

Statement of Facts

A recent appointee to the bench (who has now been sworn in and has commenced service as a judge) seeks an opinion regarding the winding up of the affairs of a professional corporation of which he was, and still is, the sole shareholder. The corporation employs several attorneys under different types of employment contracts, which contracts will require either the continuation of the professional corporation, and/or the handling by the employee-attorneys of cases which will not be concluded for several years past the date of swearing in of the judicial appointee.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2A and 2B, 3E(1), 4A(1), 4D(1)(a)(b), and 4D(3)(4)G

Discussion

As discussed in *Judicial Conduct and Ethics* (Jeffrey M. Shaman et al., Section 7.23), winding up the affairs of a law practice is problematical for a judicial appointee. In the winding up process, a judicial appointee “must terminate all representation” of all clientele; “ensure that their names (of the judicial appointee) are removed from firm titles, stationary and office doors;” make arrangements “to transfer cases to successor counsel;” and “avoid maintaining economic ties to their former firms.”

Certain provisions of the existing employment agreements of which the professional corporation is a party will require the continued payment of the employee-attorneys for a period of time after the swearing in of the judge-appointee, even as long as several years into the future. The judge-appointee acknowledges the necessity of recusal in any case in which any of the employee-attorneys appear in the future, for as long as any such compensation or financial arrangements will

continue. The judge-appointee is more concerned with what other ethical considerations may apply.

The various Code sections enumerated above require the avoidance of the appearance of impropriety, the impartial performance of the judicial duties, and the prohibition against involvement or participation in certain organizations and in certain financial arrangements and investments, as well as the prohibition against the practice of law. If the professional corporation is to continue its existence, and the judge-appointee continues as its shareholder (or as a shareholder at all), it is difficult to imagine how that continued involvement by the judge-appointee will not violate Canon 2 (the avoidance of the appearance of impropriety), and Canons 3 (the impartial and diligent performance of judicial duties) and 4 (the minimization of involvement in extra-judicial activities). As a shareholder in a professional corporation, the judge-appointee would have input in the operation of the affairs of the professional corporation, which affairs are devoted to the practice of law. It would not require even a slight stretch of the imagination to predict the real possibility of third parties concluding that the judge (now no longer a judge-appointee) is still engaged in the practice of law, still making strategic decisions concerning the cases which are still pending, if the professional corporation continues its existence and the judge continues involvement or participation in that professional corporation. The judge's impartiality could be equally subject to question, were the judge to preside over cases of a like or similar nature to those residual cases which the professional corporation is still handling. And finally, it is certainly conceivable that the devotion of the judge to judicial duties and the minimization of the conflict between those judicial duties and extra-judicial activities would be jeopardized, if the judge continued to participate in the affairs of the professional corporation in any way.

The clear solution is that the judge-appointee must either: (a) completely wind up the affairs of the professional corporation prior to his swearing in, so that the existence of the said professional corporation ceases prior to the swearing in, or (b) place any share holdings of the professional corporation in a blind trust, or any other similar type of arrangement, pursuant to which the judge - appointee will have absolutely no participation or input into the affairs of the professional corporation, for so long as that professional corporation continues in existence, and with the sole permitted exception being the entitlement of the judge to receive fees for legal services previously rendered. If the latter option is chosen, it is suggested that the name of the professional corporation (which now includes the surname of the judge-appointee) be changed to delete any reference to that surname.

The judge-appointee also requests advice as to the ethical considerations that might apply if the professional corporation were to enter into an agreement with an attorney for the purpose of hiring that attorney to complete the representation of certain plaintiffs who previously recovered substantial money judgments, and which judgments have now been appealed to the Nebraska Supreme Court. The same considerations, and the same Code sections set forth above, apply with equal force to such a prospective agreement or arrangement. If the professional corporation continues to exist, and the judge-appointee continues to be a shareholder or have input in the operation of the professional corporation, even with respect to the handling of the appellate cases, the conditions are again conducive to the appearance of impropriety and real and valid concerns over the judge's impartiality, devotion to judicial duties, and the appearance of the prohibited practice of law.

From and after the date of the swearing in of the judge, the only permitted involvement must be the passive receipt of fees for those cases in which the appointee has previously rendered legal services.

APPROVED AND ADOPTED BY
THE COMMITTEE ON *JULY 1, 1997*

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