

Nebraska Ethics Advisory Opinion 98-6

Question Presented--

May a clerk magistrate hear or act on cases of a law firm that employs the clerk magistrate's wife in the capacity of an office manager and bookkeeper? If a conflict exists, what, if any, conditions would be available to continue her employment?

Conclusion

The Code of Judicial Conduct has been extended to include clerk magistrates. A judge shall not participate in a proceeding in which the judge's impartiality reasonably might be questioned. Likewise, a judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge. It is the opinion of the committee that the judge (clerk magistrate) should not participate in any proceeding involving cases of the law firm, subject, however, to the remittal of disqualification procedure set forth at Canon 3F of the Nebraska Code of Judicial Conduct.

Statement of Facts

The wife of a clerk magistrate has taken a job as office manager and bookkeeper for a law firm. The law firm is located in the county in which the clerk magistrate serves. The law firm does civil and criminal work and regularly appears in the clerk magistrate's court.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2 and 3 (rev. 1996)

References in Addition to Nebraska Code of Judicial Conduct

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 at 143 (2d ed. 1995)
Nebraska Ethics Advisory Opinion 96-3

Discussion

The relevant portions of the Code are Canons 2 and 3. The applicable portions of said Canons are as follows:

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 . . . nor shall a judge convey or permit others to

convey the impression that they are in a special position to influence the judge
. . . .

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.

Canon 3E(1) states that a judge shall enter disqualification when "the judge's impartiality reasonably might be questioned." The Canon further provides that this includes situations where the judge or the judge's spouse has a more than de minimis interest that could be affected substantially by the proceeding. Although the financial arrangements are not disclosed in the request for the opinion, it can reasonably be assumed that the clerk magistrate's wife will be paid for her services. A law firm's ability to make payroll, offer raises, or pay year-end bonuses largely depends upon its financial success. The clerk magistrate's wife as the office manager obviously will have an integral part in determining the financial success of the law firm.

In Nebraska Ethics Advisory Opinion 96-3, the committee pointed out that an objective test should be applied in determining situations where a judge's impartiality is subject to reasonable question. The treatise Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 at 143 (2d ed. 1995), cites the following test: "The test for an appearance of impartiality 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 is objective in the sense that the standard is filtered through the eyes of a reasonable observer rather than through the subjective view of the judge in question."

It is the opinion of the committee that in applying an objective standard a disinterested observer might question or doubt the clerk magistrate's impartiality due to the relationship of the law firm and the clerk magistrate's wife.

Even if the clerk magistrate were convinced that his wife only had a de minimis financial interest regarding the matters (cases) brought before him, the clerk magistrate would also have to be concerned about perceptions of partiality and consider whether the same would be reasonable under

the circumstances. The assumed closeness of the marital relationship cannot be ignored. Due to the relationship between the clerk magistrate's wife and the firm, an obvious impression may occur that the law firm, due to such relationship, may be in a special position to influence the clerk magistrate. This would be in conflict with Canon 2B.

The clerk magistrate further requested that the committee address what, if any, conditions would be available to allow his spouse to continue her employment. The clerk magistrate's wife, of course, is free to continue her employment. That is not the problem. The issue is whether or not the clerk magistrate must disqualify himself from handling cases involving the law firm employing his wife. As previously stated, the committee is of the opinion that the clerk magistrate should disqualify himself from cases handled by the law firm employing his wife. The Canons do, however, provide for a procedure for remittal of disqualification. See Canon F. Assuming that the remittal of disqualification procedure is followed, and the parties consent, the clerk magistrate may participate in the proceeding.

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 DECEMBER 31, 1998

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