

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAMES T. VAUGHN, JR.
Associate Judge

COURTHOUSE
DOVER, DELAWARE
19901

May 23, 2000

JEAC 2000-1

The Honorable
Court of Common Pleas
P.O. Box 426
Georgetown, Delaware 19947

Re: Judicial Ethics Advisory Committee Opinion

Dear Judge

You have requested an opinion from the Judicial Ethics Advisory Committee concerning whether the Delaware Judges' Code of Judicial Conduct precludes you from presiding over certain cases brought in the Court of Common Pleas. Specifically, you have inquired as to whether the Code of Judicial Conduct requires you to disqualify yourself in matters involving (1) an associate of your former law firm while the firm is indebted to you for the purchase of your former partnership interest and; (2) members of your spouse's law firm in which he is a principal.

For the reasons set forth below, this Committee has concluded that you should disqualify yourself from any proceedings involving either your former firm or your husband's firm in order to avoid any appearance of impropriety¹

INQUIRY NO. 1

Before your recent appointment to the Court of Common Pleas, you practiced law as a principal in the law firm of . One name in that firm name is that of your father, . Upon your appointment, the firm agreed to

¹ Delaware Judges' Code of Judicial Conduct Canon 2 (2000).

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purchase your partnership interest. The firm also reorganized as _____, the added name being that of your brother, _____. Your letter indicates that there is an associate who occasionally represents clients in the Court of Common Pleas. Currently, the firm remains indebted to you for your former partnership interest.

Your first inquiry reads as follows:

Am I prohibited from hearing a case brought in the Court of Common Pleas by an associate of the Firm who is not related to me by blood or marriage given that I still remain a creditor of the Firm until my partnership interest is paid in full?

While there is nothing in the Delaware Judges' Code of Judicial Conduct which specifically addresses the issue, it has long been Delaware tradition that members of the Judiciary disqualify themselves from proceedings involving their former law firm until they are paid for their partnership interest in full, any other financial ties are severed, and any cases pending at the time of their departure from private practice in which they have a financial interest are resolved. This view is in accord with that of many jurisdictions that have considered this issue.²

Canons 2 and 3 of the Code of Judicial Conduct prohibit the appearance of any impropriety and/or partiality. Under Canon 2, the assessment of an appearance of impropriety as a standard for disqualification is based upon "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is

² See Cynthia Gray, *Ethical Issues for New Judges*, American Judicature Society (1996) at 10.

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impaired.³ Canon 3 provides that a judge should disqualify himself or herself when “the judge’s impartiality might reasonably be questioned.”⁴ Specific circumstances where a judge’s impartiality might reasonably be questioned include those where the judge decides a matter where the judge has an interest that could be substantially affected by the outcome.

Until you have been paid in full, the financial benefit you derive from your former firm’s purchase of your former partnership interest could create an appearance of impropriety if you were to hear any case involving any attorney now associated with the firm. It is evident that you have an interest in the subject matter of any proceeding brought before you by the firm since any fees realized could theoretically be used to pay its debt to you.⁵

Moreover, the Committee believes that there is an additional impediment, apart from the financial relationship, which prevents you from hearing any cases involving any lawyer associated with your former law firm. This impediment arises from the close family relationship between you and that firm and the particular circumstances involved. Canon 3.C(1)(d) specifically requires that a judge disqualify himself or herself from a matter if a relative who is within the third degree of relationship is a party to the proceeding or acting as an attorney in the proceeding. However, a lawyer/judge relationship not falling within this provision may still require disqualification under Canon 3.(C)(1) if it exists under circumstances where the judge’s impartiality might reasonably be questioned. In your case, you have two close relatives who are the named partners in the law firm. Your former law firm is a small firm with just a few attorneys. Sussex County continues to be a relatively small, close knit community. The Court of Common

³ Canon 2, *supra*, cmt. (2000).

⁴ Canon 3.C.

⁵ In any event, an absolute one year period of disqualification is required pursuant to Canon 3.C(1)(b).

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Pleas in Sussex County is itself small, consisting of two judges. The name [“ ”] is both in your name and is your relatives’ names. It is likely that there would be significant public awareness that you were hearing cases brought by an attorney working with or for your father and brother. Some persons might expect or assume that in at least some of the proceedings your father and/or brother would have an interest in outcomes which could be affected by your decisions. The Committee believes that all of these factors taken together, coupled with the fact that this is the firm from which you came, might result in your impartiality reasonably being questioned, if you were to hear cases in which the associate represents a party. Therefore, it is the Committee’s opinion that you not hear cases in which any attorney associated with your former firm represents a party for the indefinite future.

The Committee’s advice to you is based on the particular facts and circumstances of your situation. As the comment to Canon 3.C(1)(d)(ii) indicates, not every instance of an appearance by an attorney in the same firm as a lawyer/relative of a judge before that judge will require disqualification.

The Committee is very mindful that your disqualification from matters involving your former firm may well cause administrative difficulties to both you and to your former firm and its clients. However, the Committee believes that its advice to you is the appropriate application of the Delaware Judges’ Code of Conduct. Hopefully, the addition of a second judge in the Court of Common Pleas (as well as assistance of a Commissioner) will, to some degree, help the situation. The Committee has no doubt of your actual ability to decide every case before you fairly and impartially, but that is not the issue raised by Canon 3.C(1).

INQUIRY NO. 2

Your second inquiry arises from the fact that your husband practices law as a principal in the law firm of . That firm has offices in Kent and Sussex Counties, and your husband practices out of a Sussex County

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office. We understand that the Delaware State Bar Association Committee on Professional Ethics has advised your spouse that members of his firm are *not* prohibited from appearing before you.⁶ Specifically, the Bar Association Committee has stated that Rules 3.5, 8.4(e) and 8.4(f) of the Delaware Rules of Professional Conduct do not prohibit other attorneys in the firm from appearing before you.⁷ Your husband is to be commended for seeking such an opinion. You have further informed us that the your husband and the other members of his firm have arranged to limit his financial share, as partner, to a percent share of all gains realized from cases other than those cases are that are adjudicated in the Court of Common Pleas; and that under this arrangement your husband's firm believes that he will derive no benefit, directly or indirectly, from any decision you may render.

Your second inquiry reads as follows:

Does the Delaware Judges' Code of Judicial Conduct prohibit me from hearing any cases brought by any member of my husband's law firm?

This inquiry also raises issues under Canons 2 and 3. As with inquiry no. 1, the Committee notes that Sussex County continues to be a relatively small community and that the Court itself is relatively small with only two judges. Your husband's last name, the same as yours, is prominent in the firm name. It is likely that there would be significant public awareness that you were hearing cases involving attorneys from your husband's law firm. Your husband is a principal in the firm. It is difficult to imagine that there would not be a perception that the relationship between you and the firm, through your husband, might impair your

⁶ Delaware State Bar Association Committee on Professional Ethics, Opinion 1999-2 (October 27, 1999)

⁷ That opinion, of course, did not undertake any analysis under the Delaware Judge's Code of Conduct.

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ability to carry out your duties impartially. Under these circumstances, the Committee believes that your impartiality might reasonably be questioned if you hear cases involving attorneys from your husband's law firm. Therefore, it is the Committee's opinion that you should not to hear cases in which an attorney from that firm represents a party.

While the Committee acknowledges the sincere effort on the part of your husband and the members of his law firm to isolate him from any financial benefits derived from any cases in the Court of Common Pleas, the Committee does not believe that the financial arrangement resolves the ethical issues under Canons 2 and 3. Although the Committee has assumed, while not finding, that the financial arrangement may eliminate any interest which your husband might in fact have in Court of Common Pleas cases, the perception that he would have an interest in such cases nonetheless remains. It is significant that he is a principal in the firm. A principal is perceived as having a greater interest in the outcome of a proceeding handled by another attorney in the firm than an associate. Hearing cases in which your husband's firm represents a party would place you in the awkward position, potentially, of having to explain your husband's financial arrangement in any case involving one of the other attorneys in your husband's firm.

We would like to emphasize that we do not question your ability to be impartial in fact. However, the Committee believes that a perception would exist where "[a]n objective observer might wonder whether [you] might not at some unconscious level favor the firm", and the financial restrictions devised for your husband would not overcome this perception.⁸

The Committee's opinion is consistent with what has been the usual practice for many years, at least of present Delaware judges, to disqualify themselves from a case in which a party to the litigation is represented by any member of a law firm with which the judge's spouse is affiliated. The Committee does note that most

⁸ *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992).

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affected judges have been judicial officers in Family Court or Superior Court in New Castle County, a circumstance which may make disqualification administratively and logistically easier than in the Court of Common Pleas of Sussex County. Hopefully, the addition of a second judge will lessen the administrative inconvenience.

The Committee's advice to you is based on the particular facts and circumstances of your situation. As the comment to Canon 3.C(1)(d)(ii) indicates, not every instance of an appearance by an attorney in the same firm as a spouse of a judge before that judge will require disqualification by that judge.

Very truly yours,

James T. Vaughn, Jr.

For the Majority of the Committee

cc: Members of the Judicial Ethics Advisory Committee
The Hon. Randy J. Holland
File

DISSENT OF VICE CHANCELLOR STEELE
AS TO INQUIRY NO. 2

Vice Chancellor Steele believes that (1) the steps taken by the inquiring judge's spouse assure that there would be no meaningful benefit derived from any cases heard by her; (2) the adverse impact on the inquiring judge's husband's firm's clients and their adversaries' clients by restricting them to one judge for the balance of her 12-year term in the Court of Common Pleas outweighs the supposition that "her ability to carry out her duties impartially might be impair[ed];" and (3) that the judge's impartiality could not reasonably be questioned if she were to hear cases involving attorneys from her spouse's firm under these circumstances. Vice Chancellor Steele cannot, therefore, concur in the Committee's opinion as to Inquiry No. 2.