

Nebraska Judicial Ethics Committee Opinion 12-1

Question Presented--

What are a judge's responsibilities under the Nebraska Revised Code of Judicial Conduct when an attorney informs the judge of misconduct by the attorney's client, who is a personal representative in one of the judge's probate cases, a guardian/conservator in other cases, and the spouse of a county court employee?

Conclusion

Although we cannot dictate what particular actions the judge should take, the judge may have reporting obligations under the Nebraska Revised Code of Judicial Conduct and may need to notify the parties in the probate and guardian/conservator cases regarding the attorney's communication with the judge.

Statement of Facts

An attorney representing the personal representative in one of the county judge's probate cases informed the judge that a bank had notified the attorney that the personal representative had withdrawn excess funds from the estate's bank account and that the attorney determined there was no legitimate purpose for the excess amount withdrawn. The personal representative is the spouse of a county court employee, is a guardian and conservator in other cases, and was recently arrested for an unrelated felony. The attorney is the county attorney in his county and does not believe that he is able to request a special prosecutor because the call from the bank was made to the attorney as counsel for the personal representative and not in his capacity as the county attorney. The attorney informed the judge that he had spoken with the Counsel for Discipline, who advised that an updated accounting needed to be filed to avoid filing a false statement, that the attorney's conversations with the personal representative were protected by the attorney-client privilege, and that the attorney should inform the judge handling the case of the situation.

Applicable Code Sections

Neb. Rev. Code of Judicial Conduct, Canon 1 and § 5-301.1

Neb. Rev. Code of Judicial Conduct, Canon 2 and §§ 5-302.5, 5-302.9, 5-302.12, and 5-302.15

Neb. Rev. Code of Judicial Conduct, Appendix A

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. §§ 29-201, 29-203, 30-2465, 30-2472, 84-203, and 84-204 (Reissue 2008)

State v. Thomas, 268 Neb. 570, 685 N.W.2d 69 (2004)

In re Estate of Jurgensmeier, 145 Neb. 459, 17 N.W.2d 155 (1945)

In re Estate of McLean, 138 Neb. 757, 295 N.W. 273 (1940)

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* (4th ed. 2007)

Discussion

The specific question posed by the judge is what action, if any, the judge should take, which we above reformulated to inquire as to the judge's responsibilities under the Code. Under the limited scope of the Judicial Ethics Committee's authority, we cannot prescribe what particular actions the judge should take; rather, we endeavor to identify duties under the Code that appear to have application based upon the facts presented.

General Duties.

First and foremost, the judge must comply with the law, including the Code. See § 5-301.1. A judge shall perform the judicial and administrative duties competently and diligently. See, Canon 2; § 5-302.5(A). The law provides a county judge with certain powers involving matters relating to the enforcement of the criminal laws of this state. See, Neb. Rev. Stat. §§ 29-201 and 29-203 (Reissue 2008). We also observe that the law empowers the Attorney General to appear for the State and prosecute in any court any cause or matter, civil or criminal, and to have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties. See Neb. Rev. Stat. §§ 84-203 and 84-204 (Reissue 2008). Although a number of statutes may have potential application, attempting to set forth how the judge should competently and diligently perform the judge's duties is outside the purview of this Committee.

Duties Regarding Reporting Attorney.

"Among the administrative responsibilities imposed on a judge . . . is that of taking or initiating appropriate disciplinary measures against a . . . lawyer for unprofessional conduct of which the judge may become aware." Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 6.08 at 6-35 (4th ed. 2007). A judge's response to lawyer misconduct is addressed in § 5-302.15 of the Code. "A judge having knowledge that a lawyer has committed a violation of the Nebraska Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority." § 5-302.15(B). Under the facts presented, it does not appear that the reporting attorney's honesty, trustworthiness, or fitness as a lawyer has been called into question; thus, the judge has no mandatory duty to report the attorney to the Counsel for Discipline. Under § 5-302.15(D), "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Nebraska Rules of Professional Conduct shall take appropriate action." According to Comment [2], actions to be taken under such circumstances "may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body." Here, the attorney represented to the judge that he had already discussed the situation with the Counsel for Discipline. If the judge has no reason to question that assertion, it appears that the judge need take no further action as to the attorney under § 5-302.15(D).

Duties Regarding Personal Representative and Pending Cases.

It is not clear from the facts presented whether the personal representative is also a lawyer, but if so, the judge must take action. Comment [2] to § 5-302.15 provides, "A judge who does not have actual knowledge that . . . a lawyer may have committed misconduct, but receives

information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraph[] . . . (D).” Here, the judge received information that the personal representative had withdrawn excess money from the estate’s bank account. Thus, if the personal representative is a lawyer, the judge needs to inform the appropriate authority, which, at a minimum, would be the Counsel for Discipline. If the personal representative is not a lawyer, § 5-302.15 imposes no reporting duty on the judge. We note that under the pre-Uniform Probate Code law, the county court had supervision and control over a personal representative to see that he or she promptly and carefully administered the estate and distributed the property to those entitled thereto as soon as that could be done without undue sacrifice of the assets of the estate. See *In re Estate of McLean*, 138 Neb. 757, 295 N.W. 273 (1940). It is beyond the purview of this Committee to opine whether Neb. Rev. Stat. §§ 30-2465 and 30-2472 (Reissue 2008) have affected the power of a county court to control the actions of a personal representative in the absence of any proceeding initiated by an interested person seeking relief.

We next address the communication between the attorney and the judge. The attorney’s conversation with the judge about one of the judge’s pending probate cases constituted an ex parte communication. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). With certain exceptions, a judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers regarding a pending or impending matter. § 5-302.9(A). One of the exceptions contained in the Code is if “the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.” § 5-302.9(A)(1)(b). Similarly, “[i]f a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” § 5-302.9(B). We infer from the facts disclosed that there are interested parties to the estate other than the personal representative and that the personal representative was not entitled to distributions from the estate other than an authorized fee. Accordingly, the judge should notify all parties of the substance of the ex parte communication and give the parties an opportunity to respond. Although the Code does not directly speak to how this duty is to be performed, it seems to us that it naturally follows that the disclosure should be made in writing, filed in the court’s file with respect to each relevant case, and copies served (presumably by mail) to all interested parties in each relevant case. It appears that this duty would extend to other cases before the judge in which the personal representative is acting in a guardian/conservator capacity. We note that it is the duty of the court to protect the interests of all parties, whether actually before the court or not. *In re Estate of Jurgensmeier*, 145 Neb. 459, 17 N.W.2d 155 (1945).

Duties Regarding County Court Employee.

The facts also reveal that the personal representative is the spouse of a county court employee who would be under a judge’s control, but it is not clear if the employee is under the direction and control of the inquiring judge. “A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” § 5-302.12(A). And “[a] judge shall make reasonable efforts, including providing appropriate supervision, to ensure that [the rule concerning ex parte

communications] is not violated by court staff, court officials, and others subject to the judge's direction and control." § 5-302.9(D). The facts presented do not suggest that the employee knew of the personal representative's misconduct, acted in a manner inconsistent with the judge's obligations under the Code, or violated the rule concerning ex parte communications. But if the judge knows the facts to be otherwise and the employee is under the judge's direction and control, the judge has a duty to take appropriate action under the applicable personnel rules-- which are outside the scope of this Committee's authority. If the employee is not under the inquiring judge's direction and control, it appears that the judge need take no further action under the Code.

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 Revised Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.

APPROVED AND ADOPTED BY THE COMMITTEE
ON JANUARY 5, 2012

*Judge Lawrence D. Gendler
Judge William B. Cassel
Judge J Russell Derr
Judge Linda S. Caster Senff
Judge Max J. Kelch
Judge Edward D. Steenburg
Judge Vicky L. Johnson*