

Nebraska Ethics Advisory Opinion 94-3

Question Presented--

Must a sitting Nebraska judge recuse himself or herself simply because the judge is named as a party defendant in a case assigned to the judge?

Conclusion

The Committee concludes that the facts outlined above do not require disqualification by the judge. However, the judge must make an independent determination as to whether he or she has any personal bias or prejudice.

In support of the judge's decision not to disqualify on the basis of bias or prejudice, the court may look at the following points:

1. The lawsuit is obviously vexatious and without merit.
2. Other judges in the jurisdiction have been sued by the party.
3. The Court has no prior personal contact with the party.
4. The party has not been before the Court previously or, if he had, did not receive an adverse ruling.
5. The party filing the suit is pro se.

On the other hand, the following points might be reasons for the judge to recuse himself or herself:

1. The party has received a money judgment against the Court.
2. There have been heated exchanges between the party and the Court.
3. The Court has sued or counterclaimed against the party.

Judicial Conference, Judicial Conduct Committee, Ethics Opinion No. 87-2 (Oregon).

Statement of Facts

A judge advises that he previously had entered an order of foreclosure against two defendants. These defendants have now brought a separate suit entitled *Amended Formal Complaint in Equity for a Breach of Contract by Means of Fraud*. The plaintiffs name as defendants the plaintiffs from the former foreclosure suit and the judge who presided over the first suit. Other than naming the judge as a defendant, no specific allegations are made against the judge. The prayer requests compensatory and punitive damages "from each defendant." The requesting judge states an opinion that the second suit is frivolous.

Applicable Code Sections

Canon 3B, Canon 3E

References in Addition to Nebraska Code of Judicial Conduct

Sham, Lubet & Alfini; Judicial Conduct & Ethics, 1990, § 5.04 p. 105.

Discussion

CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

....

B. ADJUDICATIVE RESPONSIBILITIES.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

....

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;

....

(d) the judge or the judge's spouse, or a person within the fourth degree or relationship to either of them, or the spouse of such a person:

(i) is party to the proceeding, or an officer, director or trustee of a party;

....

(3) a judge shall disclose on the record information that the judge believes the parties or their lawyers reasonably might consider relevant to the question of the judge's disqualification, even if the judge believes there is no real basis for disqualification.

When a motion for recusal is filed, the judge must carefully examine all of the circumstances of the particular case to determine if the Nebraska Code of Judicial Conduct requires recusal.

It is axiomatic that a litigant cannot control pending litigation by simply file a separate suit against the trial court.

One write commented:

A lawsuit pending between a judge and a party may be good cause for recusation, but a party cannot disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced. Absent a showing that a judge in fact is influenced adversely as a result of a "collateral" lawsuit, disqualification serves no purpose because the party would join any judge as a party who becomes connected with the original case. To permit wholesale disqualification in this situation would allow litigants to choose their judge by filing lawsuits against all judges not to their liking.

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 MAY 11, 1994