

Nebraska Ethics Advisory Opinion 02-1

Question Presented--

May a clerk magistrate be a candidate for election to a non-judicial office (clerk of the district court) while remaining a clerk magistrate?

Conclusion

No judge or clerk magistrate shall be eligible as a candidate for any office except a judicial office during the time he or she is serving as a judge or magistrate.

Statement of Facts

A clerk magistrate writes for an advisory opinion asking whether a clerk magistrate may run for the position of clerk of the district court while remaining a clerk magistrate.

Applicable Code Sections

Neb. Rev. Stat. §§ 24-519 and 24-741

Neb. Code of Jud. Cond., Canons 2B, 4, 5A(2), 5E, and “Application of the Code of Judicial Conduct”

References in Addition to Nebraska Code of Judicial Conduct

Nebraska Ethics Advisory Opinions 96-1, 97-4, and 98-3

Discussion

Canon 2B of the Nebraska Code of Judicial Conduct provides: “A judge shall not allow . . . political or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others” Canon 4 of the Nebraska Code of Judicial Conduct provides that a judge shall so conduct all extra-judicial activities as to minimize the risk of conflict with judicial obligations. Canon 4 provides that a judge shall conduct all the judge’s extra-judicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge, (2) demean the judicial office, or (3) interfere with the proper performance of judicial duties. Canon 5A(2) of the Nebraska Code of Judicial conduct provides: “A Judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.” Neb. Rev. Stat. § 24-519 sets forth the duties of a clerk magistrate. Those duties include many judicial functions, including: arraignment, receipt of pleas, imposition of certain statutory penalties, limited issuance of warrants for arrest or searches and seizures, setting of bail, determining temporary custody of juveniles, appointment of guardians ad litem, and hearing and determining non-contested probate matters. Each of these duties is judicial in nature. Although the judicial functions that may be performed by a magistrate are limited in nature, they are, nonetheless, judicial functions, and the clerk magistrate acts as a judge of the county court while performing such duties. The committee is of the opinion that resignation from the office of clerk

magistrate is required prior to running for non-judicial political office to avoid the appearance of impropriety, trading on the prestige of the judicial office, and embroiling the court in political controversy. In the case *Morial v. Judiciary Commission*, 438 F. Supp. 599 (E.D. La. 1977), this position was challenged on constitutional grounds. The constitutionality of the code provision was upheld by the Fifth Circuit federal court. See *Morial v. Judiciary Commission*, 545 F.2d 295 (5thCir. 1977). In *In re Pressentin*, 139 Wis. 2d 150, 406 N.W.2d 779 (1987), a judge was suspended for 6 months for having campaigned for the position of county supervisor while holding judicial office.

In *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987), James A. Kelly, a county judge of the 11th Judicial District of the State of Nebraska, was censured for failing to resign from the elected position on the Hall County, Nebraska, Airport Authority Board upon his appointment to the bench. The Nebraska Supreme Court determined that Judge Kelly's retention of his position on the Airport Authority Board ran counter to the intention of Canon 7 (now Canon 5). It is clear that a judge appointed to the bench in this state may not run for non-judicial public office and remain on the bench. The committee believes that § 24-519 prescribes duties for a clerk magistrate that are judicial in nature and, as a result, that the Nebraska Code of Judicial Conduct applies to clerk magistrates as well. The Nebraska Code of Judicial Conduct includes a section entitled "Application of the Code of Judicial Conduct." This section clearly states that clerk magistrates shall comply with the code, with certain exceptions (part-time judges and retired judges). Ethics Committee Opinion 95-1 is no longer the opinion of the committee, as the Nebraska Code of Judicial Conduct was amended subsequent to that opinion to specifically include clerk magistrates.

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 JANUARY 3, 2002

*Judge Donald E. Rowlands
Judge Stephen M. Swartz
Judge John F. Irwin
Judge Douglas F. Johnson
Judge Randall Rehmeier
Judge Stephen Illingworth
Judge Graten Beavers*