

Nebraska Judicial Ethics Committee Opinion 11-1

Question Presented--

If a retired county judge appears as a practicing attorney before a judge with whom he formerly served in the same county, must the judge be disqualified or required to recuse?

Conclusion

The Nebraska Revised Code of Judicial Conduct does not require recusal from a case solely because one of the attorneys is a retired judge who served with the judge in the same county.

Applicable Code Sections

Neb. Rev. Code of Judicial Conduct, Canons 1 and 2

Discussion

The Preamble to the Nebraska Revised Code of Judicial Conduct provides that the Code “establishes standards for the ethical conduct of judges and judicial candidates.” The Code specifically notes that it is applicable to all judges appointed pursuant to Neb. Const. art. V, § 21. A retired judge who does not file with the Nebraska Supreme Court a statement of consent to be recalled for temporary judicial service, or who is ineligible for judicial service, need not comply with the Code.

This question involves a current judge, although it specifically inquires of future conduct that will not occur until the judge has retired. Further, this judge does not intend to file with the Nebraska Supreme Court a statement of consent to be recalled for temporary judicial service. The question is really whether the soon-to-be-retired judge will cause a conflict of interest for his former colleagues if he appears in front of them following his retirement from the bench.

Since this question could impact a significant number of the judiciary, this committee will address the concern.

The committee understands the following definitions from the Code to apply: “Integrity” means “probity, fairness, honesty, uprightness, and soundness of character.” “Impartial,” “impartiality,” and “impartially” mean “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, or their representatives, as well as maintenance of an open mind in considering issues that may come before a judge.”

Canon 1 provides as follows: “**A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.**”

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge. Neb. Rev. Code of Judicial Conduct § 5-301.2, comment 5.

The fact that a practicing attorney is a retired judge and a former colleague of the judge presiding over the practicing attorney’s case does not, in and of itself, violate Canon 1. Additional facts, such as a close personal relationship or a business relationship, would obviously affect the integrity of the court. That would have to be resolved by each judge on a case-by-case basis.

Canon 2 provides as follows: “**A judge shall perform the duties of judicial office impartially, competently, and diligently.**”

To ensure impartiality and fairness to all parties, a judge must be objective and open-minded. Neb. Rev. Code of Judicial Conduct § 5-302.2, comment 1.

A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. Neb. Rev. Code of Judicial Conduct § 5-302.3(A).

A judge shall not permit family, *social*, political, financial, or other interests or *relationships* to influence the judge’s judicial conduct or judgment. Neb. Rev. Code of Judicial Conduct § 5-302.4(B).

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including when the judge has a personal *bias or prejudice concerning a party or a party’s lawyer*, or personal knowledge of facts that are in dispute in the proceeding. Neb. Rev. Code of Judicial Conduct § 5-302.11(A)(1).

The mere fact that a practicing attorney is a retired judge and a former colleague of the judge presiding over the practicing attorney’s case does not, in and of itself, create a conflict, so long as the judge is able to perform the duties of judicial office impartially, competently, and diligently.

Each individual judge would need to consider the relationship that judge has with the attorney to determine if there is any bias or other factor which exists, that would affect the judge’s ability to perform the duties of judicial office impartially, competently, and diligently.

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 Judicial Ethics Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON FEBRUARY 22, 2011

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