

Nebraska Judicial Ethics Committee Opinion 11-4

Question Presented--

Must a judge disqualify himself/herself from all cases pending before that judge in which a litigant is represented by an attorney who also represents the judge's former spouse in a pending matter in a different court in which the judge is an adverse party?

Conclusion

The Nebraska Revised Code of Judicial Conduct does not require the judge's disqualification in the absence of any personal bias or prejudice concerning the attorney.

Statement of Facts

The county judge is involved in litigation in the district court with the judge's former spouse. That litigation involves the modification of a dissolution decree entered several years ago. The former spouse's attorney has requested that the judge recuse himself/herself from all cases before the judge in which the attorney represents one of the litigants, even though such litigation has no connection to the case involving the judge and the judge's former spouse.

Applicable Code Sections

Neb. Rev. Code of Judicial Conduct, Canon 1 and § 5-301.2

Neb. Rev. Code of Judicial Conduct, Canon 2 and §§ 5-302.2, 5-302.3, and 5-302.11

References in Addition to Nebraska Revised Code of Judicial Conduct

Nebraska Judicial Ethics Opinion 96-3

Nevada Judicial Ethics and Election Practices Opinion JE07-005

Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002)

Discussion

The revised Code took effect January 1, 2011, and replaced the prior Nebraska Code of Judicial Conduct. The revised Code employs the term "disqualification" instead of "recusal." Comment [1] to Rule 2.11 (§ 5-302.11) states that in many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification." Those terms are also used interchangeably in this opinion.

The applicable code sections read as follows:

§ 5-301.0. Canon 1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. ["Impartiality" is defined by the Code as the 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. "Impropriety" is defined in part as conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.]

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[Rule 1.2] § 5-301.2. **Promoting confidence in the judiciary.**

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

....

§ 5-302.0. **Canon 2. A judge shall perform the duties of judicial office impartially, competently, and diligently.**

....

[Rule 2.2] § 5-302.2. **Impartiality and fairness.**

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

....

[Rule 2.3] § 5-302.3. **Bias, prejudice, and harassment.**

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

....

[Rule 2.11] § 5-302.11. **Disqualification.**

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) 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

....

]COMMENT[

....

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

....

There is nothing contained in the foregoing provisions of the Code that dictates an automatic disqualification or a disqualification upon motion from the specific facts given to us by the judge. The only suggestion of impropriety that we discern is that the judge may have some bias against the attorney representing the judge's former spouse, which is attributable to that case. However, the facts of that case are not shown to have any relationship to any cases in which the attorney appears before this judge.

In *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W. 2d 898 (2002), the Nebraska Supreme Court stated:

[A] trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. This test is consistent with Canon 2 of the Nebraska Code of Judicial Conduct, which requires that a judge avoid impropriety and the appearance of impropriety in all activities, and Canon 3, which requires that a judge perform all duties impartially.

Id. at 34, 637 N.W.2d at 904, citing *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

Those provisions of the prior Code are materially identical to those of the revised Code. The judge would therefore need to apply this objective standard on a case-by-case basis whether or not it involved this particular attorney. However, disqualification may still be dictated if the judge has a personal bias concerning the attorney outside the case itself. This committee has previously stated the following regarding disqualification: “[W]e must additionally apply the specific language of Canon 3E(1)(a) which requires disqualification when ‘the judge has a personal bias or prejudice concerning a . . . party’s lawyer.’ The question of personal bias or prejudice under a specific set of facts would appear to be a subjective test.” Nebraska Judicial Ethics Opinion 96-3.

The Nevada Standing Committee on Judicial Ethics and Election Practices was asked to decide whether a judge was disqualified from presiding in a case where one of the litigants was represented by counsel who also represented the judge in unrelated litigation. The Committee determined that he could do so unless that relationship created in fact a personal bias or prejudice toward counsel or counsel’s clients. In reaching that decision, the Committee referenced a decision of the Nevada Supreme Court which observed that the “attitude of a judge toward an attorney for a party is largely irrelevant” because it is not “indicative of extrajudicial bias against the party. Instead, the opinion of the judge as to whether he or she can be impartial must be given great weight.” Nevada Judicial Ethics and Election Practices Opinion JE07-005, citing *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 940 P.2d 127 (1997).

In summary, we conclude there has been no basis stated for a blanket disqualification in all cases. The judge, however, must apply an objective standard to each case to determine whether disqualification is required. If that standard is satisfied, the judge must then determine subjectively whether he or she has a personal bias or prejudice concerning the attorney which would then necessitate disqualification.

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 NOVEMBER 22, 2011.

*Judge Robert B. Ensz
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*