

# Nebraska Judicial Ethics Committee Opinion 16-2

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## ***Question Presented--***

*Shall a county court judge disqualify himself from adoption cases involving the adoption of children by same-sex married couples if the judge:*

- (a) is an openly professing and practicing evangelical Christian, that openly and publicly professes his faith in Jesus Christ as his Lord and Savior;*
  - (b) prays to God, reads the Bible, gives financially to the church and Christian ministries, and attends a Bible teaching church;*
  - (c) openly professes and believes the Bible is the inerrant Word of God that should be obeyed;*
  - (d) believes the Bible teaches God has ordained marriage to be between one man and one woman;*
  - (e) believes God has ordained and designed the family to be made up of a husband, a wife, and children; and*
  - (f) believes God has also made His design for the family clearly evident in nature because human physiology and the human reproductive process (as created by God) requires one male and one female in order to produce a child?*
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## **Conclusion**

The Nebraska Revised Code of Judicial Conduct does not permit a judge to disqualify himself or herself based on his strongly held religious beliefs with regard to a married couple's sexual orientation.

## **Statement of Facts**

A Nebraska county court judge requests an opinion from the Committee as to whether he may recuse himself from presiding over proceedings involving the adoption of children by same-sex married couples based on his strongly held religious beliefs.

## **Applicable Code Sections**

Preamble to the Code of Judicial Conduct

Neb. Rev. Code of Judicial Conduct, Canon 1 and § 5-301.0

Neb. Rev. Code of Judicial Conduct, Canon 2 and §§ 5-302.0, 5-302.2, 5-302.3

## **Discussion**

The revised Code of Judicial Conduct (the Code) took effect January 1, 2011, and replaced the former Code of Judicial Conduct. The revised Code employs the term "disqualification" instead of "recusal." Comment [1] to § 5-302.11 states that in many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

The preamble to the Nebraska Code of Judicial Conduct states:

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The Nebraska legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Nebraska Revised Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

The applicable Code sections, in whole or relevant part, 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 appearance of impropriety.**

....

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

....

**§ 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.

## **COMMENT**

....

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

....

**§ 5-302.3. Bias, prejudice, and harassment.**

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

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity,

disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

....

#### **COMMENT**

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Section 5-302.3(A) and (B) requires a judge to perform the duties of judicial office without bias or prejudice and, specifically, to not manifest bias or prejudice based on sexual orientation. Presiding over adoption proceedings is a duty of judicial office. If a judge is willing to preside over the adoption proceedings of a child of a non-same-sex married couple but not a proceeding involving a same-sex married couple, this would be a manifestation of bias or prejudice based on sexual orientation even if the judge states that the reason is based on sincerely held religious beliefs or upon a personal belief. Comment [2] to § 5-302.2 acknowledges that while each judge comes to the bench with a unique background and personal philosophy, "a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Thus, a refusal to preside over or a disqualification from presiding over such a proceeding, based on the married couple's sexual orientation, manifests bias or prejudice, and violates 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 MARCH 17, 2016

*Judge John F. Irwin  
Judge J Russell Derr  
Judge Edward D. Steenburg  
Judge Vicky L. Johnson  
Judge Linda S. Porter  
Judge Jeffrey M. Wightman  
Judge James C. Stecker*