

Nebraska Judicial Ethics Committee Opinion 16-4

Question Presented--

Shall a county court judge recuse himself/herself from a case where the judge's spouse is one of the attorneys in a prosecutor's office (17 full-time attorneys) in the following circumstances:

- A) from the trial/proceedings of a defendant where the judge's spouse did NOT file the criminal charge/complaint in County Court, but was the prosecutor participating at the arraignment of the defendant (a not guilty plea was entered and the case was continued for further proceedings)?*
 - B) from the trial/proceedings of a defendant where the judge's spouse did NOT file the criminal charge/complaint in County Court, but was the prosecutor participating in the arraignment of the defendant where the defendant failed to appear for arraignment and an additional count of Failure to Appear was added to the Complaint upon motion of the prosecutor (a not guilty plea was subsequently entered and the case was continued for further proceedings)?*
 - C) from the trial/proceedings of a defendant where the judge's spouse did NOT file the criminal charge/complaint in County Court, but participated as the prosecuting attorney in hearings before the Separate Juvenile Court where the matter was then transferred to County Court for further proceedings?*
 - D) from proceedings where the judge's spouse did NOT file the criminal charge/complaint in County Court, but participated in plea negotiations were either: (1) a plea agreement has been reached and the judge presides over the entry of plea proceeding or (2) no plea has been reached and the matter proceeds to trial before that judge?*
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Conclusion

Yes. The Nebraska Revised Code of Judicial Conduct requires that judges must recuse themselves where their spouse is involved.

Note: Resolution of these issues can be had by reference to this Committee's Opinion 15-2. This opinion mirrors in large part the language of Opinion 15-2.

Applicable Code Sections

Preamble to the Code (Reissue 2008 & Cum. Supp. 2014)
Neb. Rev. Code of Judicial Conduct, Canon 1 and § 5-301.0
Neb. Rev. Code of Judicial Conduct, § 5-302.2
Neb. Rev. Code of Judicial Conduct, § 5-302.4
Neb. Rev. Code of Judicial Conduct, § 5-302.11

References in Addition to Nebraska Revised Code of Judicial Conduct

Neb. Rev. Stat. § 24-501 et seq. (Reissue 2008 & Cum. Supp. 2014)
Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 (3d ed. 2000)
Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002)

Discussion

The Nebraska 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 Rule 2.11 (§ 5-302.11) states that in many jurisdictions, the term “recusal” is used interchangeably with the term “disqualification.” Both terms are used interchangeably in this opinion.

The preamble to the Nebraska Revised 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 sections of the Code 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.

....

§ 5-302.2. Impartiality and fairness.

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

....

§ 5-302.4. External influences on judicial conduct.

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

....

§ 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.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the fourth degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) *acting as a lawyer in the proceeding*;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

....

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into a permanent record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[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.

....

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

....

(Emphasis supplied.)

The “Terminology” section of the Code states:

“**Domestic partner**” means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. . . .

. . . .

“**Member of the judge’s family**” means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. . . .

“**Member of a judge’s family residing in the judge’s household**” means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household.

Analysis and Opinion

As stated by this Committee in previous Advisory Opinions, the appearance of impropriety must be avoided with as much zeal as improprieties themselves.

Under § 5-302.11(A)(2), a judge must disqualify himself/herself, in general, where a spouse is a person who has more than a minimis interest that could be substantially affected by the proceeding or is likely to be a witness. Further, under § 5-302.11, comment 1, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of § 5-302.11(A)(1) through (6) apply.

A judge should recuse himself/herself in any case in which his/her spouse is involved as the judge’s impartiality might be reasonably questioned. Where there is an appearance of partiality to a reasonable observer, disqualification is necessary. The test for an appearance of partiality is meant to be an objective one; whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 (3d ed. 2000).

In *Gibilisco v. Gibilisco*, 263 Neb. 27, 34, 637 N.W.2d 898, 904 (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.

Citing *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

In each of these four scenarios, an objective, disinterested observer will know that the prosecutor involved in prior court hearings is the spouse of the judge who is presiding over a matter in which the judge is required to be neutral. This situation would cause the objective, disinterested observer to question the judge’s impartiality. This requires disqualification of the judge.

In summary, we conclude that a judge may not handle cases in which his or her spouse has appeared in court or participated in plea negotiations as a prosecutor for the State in any capacity, however limited.

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 JULY 29, 2016

Judge John F. Irwin

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Judge James C. Stecker

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