

# Nebraska Judicial Ethics Committee Opinion 17-2

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

*Is a district judge whose brother is county attorney for one of the counties in the judge's judicial district disqualified in the following situations:*

- 1. from cases in which the deputy county attorney for the county is the attorney for the State and the judge's brother did not appear in the case, nor sign the complaint, or participate in any way in the case;*
  - 2. from cases in which the judge's brother is appearing as attorney, if both parties "agree," the judge may hear the case and such waiver can later be revoked;*
  - 3. in reviewing affidavits for issuance of search warrants when the brother signs as notary and may have assisted the law enforcement affiant in preparation of the affidavit; and*
  - 4. from appointing the judge's brother as special prosecutor or guardian ad litem when the appointment is governed by a rotating list.*
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## **Statement of Facts**

The party requesting the opinion is a newly appointed district judge. Her brother is the county attorney for one of the counties in her judicial district. The judge and her brother do not reside in the same household, nor do they share any business interests or bank accounts. Her brother has a deputy county attorney, who was appointed by the judge's brother. The attorneys divide the criminal caseload, assigning some cases to the brother and some to the deputy county attorney. The county attorney and deputy county attorney are both employed part time by the county and have legal practices outside their duties for the county. In the attorneys' private practice, they do not practice in the same office. They each receive separate paychecks from the county for their county attorney duties, and their pay is not dependent on the outcome of their cases for the county.

## **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. 20140)  
Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 (3d ed. 2000)  
*An Ethics Guide for Judges and Their Families*, Cynthia Gray, American Judicature Society and State Justice Institute (2001)  
*Gibilisco v. Gibilisco*, 263 Neb. 27, 34, 637 N.W.2d 898 (2002)  
*State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997)  
*State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998)

Alabama Advisory Opinion 85-234  
Alabama Advisory Opinion 80-91  
Alabama Advisory Opinion 87-316  
Alabama Advisory Opinion 97-661  
Alabama Advisory Opinion 99-742  
Arizona Advisory Opinion 95-19  
Florida Advisory Opinion 82-13  
Florida Advisory Opinion 93-51  
Maine Advisory Opinion 93-3  
Massachusetts Advisory Opinion 92-1  
Michigan Advisory Opinion JI-101 (1995)  
Missouri Advisory Opinion 38  
Nebraska Judicial Ethics Opinion 92-1  
Nebraska Judicial Ethics Opinion 03-1  
Ohio Advisory Opinion 93-4  
West Virginia Advisory Opinion (Feb. 25, 1994)  
West Virginia Advisory Opinion (Mar. 10, 2000)

## **Discussion**

The Revised 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.” Both terms are used interchangeably in this opinion.

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 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.

The "Terminology" section of the Code states:

**"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.

As stated by this Committee in previous 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).

### **Analysis and Opinion**

Under § 5-302.11, a judge is disqualified when “a person within the fourth degree of relationship to [the judge] is . . . acting as an attorney in the matter [or is] a person who has more than a de minimis interest that could be substantially affected by the proceeding.” The first question asked in the inquiry is whether a judge is disqualified from cases in which another employee of the county attorney’s office has all responsibility for the case.

The judge’s brother is a person within the fourth degree of relationship to the judge, so the judge would be disqualified in any cases in which her brother is acting as an attorney in the case, unless the provisions of subsection (C) for a waiver are met. However, in cases where the deputy county attorney is the only attorney who appears, the situation is not as clearly governed by this section.

This committee considered a somewhat analogous situation in Nebraska Judicial Ethics Opinion 03-1. In that case, the question was presented whether a judge must recuse himself from cases involving the public defender’s office where the individual attorney employed by that office with whom the judge has a dating relationship has not appeared as an attorney of record or been involved with the case in any manner. That opinion states in relevant part:

It is significant to the committee that the attorney with whom the judge has this relationship is a government attorney rather than a partner in a law firm. Government attorneys are paid a salary and have no economic or profit motive involved in the outcome of criminal cases whereas the members of a law firm normally share profits or expenses in some manner and are motivated to acquire clients, in part, through the successful conclusion of their cases. Neither of these motivations is present when the attorney involved is employed by a governmental agency. See Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.12 (3d ed. 2000). The commentary to Canon 3E states that even in the case where the attorney relative of the judge is affiliated with the law firm, such affiliation does not itself automatically disqualify the judge. The rationale for disqualification is diminished where the attorney with whom the relationship exists is employed by a governmental agency rather than a law firm. *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997), required recusal, however, when the judge’s wife, a deputy county attorney, filed the original complaint against a criminal defendant. It is therefore clear that a judge may not make any judicial determinations when relatives as set forth in § 24-739 have been involved in a case.

This committee has previously addressed a similar situation in Nebraska Judicial Ethics Opinion 92-1. In that case, the judge had a son who was a member of the local public defender’s staff and inquired whether he must disqualify himself from cases in which other staff members of the same public defender’s office appeared as counsel for defendants. This committee found that, absent other factors, disqualification was not required when other members of the public defender’s office appeared in the judge’s court. The rationale in that opinion is applicable in this case as well.

In Opinion 03-1 this committee further noted that advisory committees in Arizona and Florida had found that similar situations did not disqualify a judge so long as the family member did not personally participate in the case before the judge in any way. This committee then advised as follows:

It is clear that, under the facts presented, the judge should not sit on cases involving the attorney with whom the dating relationship exists. Under the facts presented, however, the judge is not required to disqualify himself from ruling on cases involving other members of the government attorney's office.

In the present situation, we likewise have government attorneys who do not appear to share any financial interest in the outcome of criminal cases. However, in the present situation, the brother of the judge is the county attorney for the county, and the other attorney in question is the deputy county attorney. Judicial ethics committees from other states have examined situations where the judge's relative has *supervisory* authority over other attorneys in a government office, and most of those committees have come to the conclusion that recusal is necessary in those cases.

A judge must recuse himself from all cases involving the district attorney's office when his spouse is the brother of the district attorney even though the district attorney does not personally prosecute all criminal cases, because the cases are prosecuted under the district attorney's ultimate direction and control and it may be assumed the district attorney is personally involved in prosecutorial decisions in the cases. See Maine Advisory Opinion 93-3. A judge whose spouse serves as chief trial attorney for the county prosecutor is disqualified whenever the prosecutor's office appears before the judge. See Michigan Advisory Opinion JI-101 (1995). See, also, An Ethics Guide for Judges and Their Families, Cynthia Gray, American Judicature Society and State Justice Institute (2001), citing the following: West Virginia Advisory Opinion (Feb. 25, 1994); Massachusetts Advisory Opinion 92-1; Florida Advisory Opinion 93-51; West Virginia Advisory Opinion (Mar. 10, 2000).

The Arizona Judicial Ethics Advisory Committee examined a case where the judge was married to a prosecuting attorney who supervised other attorneys in his office. That committee found that the supervisory role did not automatically disqualify a judge, and that the judge should consider the following factors: whether the spouse was required to evaluate the attorneys in their performance before the judge; whether the spouse's position or compensation depends on the performance of the attorneys he supervises; whether the supervisory role includes reviewing orders issued by the judge; and if the spouse consults with and advises the other attorneys regarding strategy and technique or other matters not of an administrative nature. The Arizona committee found that in cases where the judge had had no personal communications regarding the case, and in which all the above questions were answered in the negative, then recusal would not be necessary. See Arizona Advisory Opinion 95-19.

The Arizona case is distinguishable from the present case in that the spouse was a supervising deputy county attorney, and not the elected county attorney. Ultimately, an elected county attorney does have an interest in how all cases are prosecuted by the attorneys affiliated with his office, and in this, case the county attorney is the direct supervisor, and only supervisor, of his deputy county attorney.

This committee finds that if the judge's relative has substantial supervisory or policy responsibilities in the government office, the judge is disqualified from cases involving the office even if the relative does not make an appearance in the case.

Therefore, this committee adopts the reasoning of the above-referenced committees in numerous jurisdictions and finds that in the present situation, a judge should recuse herself from all cases prosecuted by her sibling and all deputy county attorneys appointed by and supervised by him.

The next question presented is whether all parties can waive any conflict of interest and agree that the judge can hear cases in which her brother is an attorney. Section 5-302.11(C) states:

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.

Based on the above section, unless the judge has an actual personal bias or prejudice under § 5-302.11(A)(1), the parties may waive the disqualification and agree that the judge could hear a case in which her brother was appearing as an attorney, so long as the requirements of the section are met. The question as to whether the waiver of disqualification could be withdrawn would seem to be very dependent of the specific facts and circumstances of the request for the withdrawal of the waiver.

Therefore, this committee takes no position on that issue. However, the fact that the potential withdrawal of the waiver of disqualification may be an issue would suggest that while a waiver of disqualification may be allowed, it may not be wise as a general practice.

The third question presented is whether the judge is disqualified when her brother was the notary on an affidavit for arrest warrant or similar document. The factual basis given by the judge further states that the judge has knowledge that the attorney who notarizes such an affidavit has often given legal advice to the law enforcement affiant regarding the preparation of that affidavit. Section 5-302.11 requires recusal when a relative is either a witness or an attorney in any proceeding. If the brother has served as a notary, he is potentially a witness in the proceeding, and if he provided any legal advice in the preparation of the affidavit, the brother has acted as an attorney.

Therefore, this committee finds the judge would be disqualified.

The final question presented is whether the judge may ethically appoint her brother as special prosecutor or guardian ad litem in certain cases so long as the appointments were governed by a rotating list. As noted above, the judge would be disqualified on any cases in which her brother was an attorney. In appointing her brother as attorney or guardian ad litem on any case, that judge is acting as a judge in that case, and such appointment would be contrary to the Code. Numerous other jurisdictions have examined this issue and have come to the same conclusion. See, Alabama Advisory Opinion 85-234; Alabama Advisory Opinion 97-661; Alabama Advisory Opinion 80-91; Alabama Advisory Opinion 87-316; Alabama Advisory Opinion 99-742 (prohibited even when case is on docket of another judge); See, also, An Ethics Guide for Judges and Their Families, Cynthia Gray, American Judicature Society and State Justice Institute (2001), citing the following: Missouri Advisory Opinion 38 (prohibited even when assignments had been customarily rotated among all members of bar); Ohio Advisory Opinion 93-4 (prohibited even when appointment is nonremunerative); West Virginia Advisory Opinion (Feb. 25, 1994); Florida Advisory Opinion 82-13.

This committee finds that the Code prohibits a judge appointing her brother as a special prosecutor or guardian ad litem.

**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 19, 2017

*Judge J Russell Derr  
Judge James C. Stecker  
Judge Edward D. Steenburg  
Judge Vicky L. Johnson  
Judge Linda S. Porter  
Judge Michael W. Pirtle  
Judge Jeffrey M. Wightman*