

# Nebraska Judicial Ethics Committee Opinion 17-3

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

*May a member of the judiciary who previously served as General Counsel for the Nebraska Department of Correctional Services (NDCS) preside over cases which involve claims brought directly by or on behalf of incarcerated individuals?*

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## **Conclusion**

The Committee agrees with the requesting judge's decision not to be involved with any claim that may have arisen during his or her tenure as General Counsel, and for the 6-month period immediately following. As far as cases that may have arisen outside that timeframe, the Committee would suggest that the initial determination for the requesting judge to make would depend on the nature of the claim. If the nature of the claim is to take issue with a rule or policy which was drafted or adopted during the judge's tenure as General Counsel, then recusal is required. However, if the nature of the claim involves the application of the rule or policy to a particular claimant, and the requesting judge has no prior knowledge of the operative facts of the claim, then recusal may not be necessary. However, if there is any question whether the requesting judge would be perceived as being fair and impartial, then the judge, at a minimum, should disclose on the record the potential conflict of interest and give the parties a reasonable amount of time to file a motion for recusal, even if the requesting judge believes there is no valid basis for disqualification.

## **Statement of Facts**

A newly appointed member of the judiciary has requested an opinion regarding the propriety of presiding in cases which involve claims brought directly by or on behalf of incarcerated individuals. This member of the judiciary served as General Counsel for the NDCS from June 22, 2015, until May 5, 2017. The duties of the General Counsel included supervising the legal division, formulating and drafting of policies, participating as a member of the inmate disciplinary appeals board, participating as a member of the board which decided whether to involuntarily medicate mentally ill inmates, calculating sentences, reviewing of tort claims, and making other recommendations to the department.

## **Applicable Code Sections**

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, § 5-302.11

## **References in Addition to Nebraska Revised Code of Judicial Conduct**

Nebraska Ethics Advisory Opinion 01-2

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* §§ 4.02, 4.05, 4.06, and 4.10 (5th ed. 2013)

## Discussion

The following canons and sections of the Nebraska Revised Code of Judicial Conduct apply to the above described situation:

### § 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.

....

### § 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.

....

### § 5-302.11. 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...is:

....

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

....

(6) The judge:

....

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

....

(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

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[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.

In Nebraska Ethics Advisory Opinion 01-2, a newly appointed member of the judiciary requested an opinion regarding the propriety of presiding in child support collection cases after the member had served as a deputy county attorney and chief deputy county attorney for approximately 12 years, as the supervisor of all deputy county attorneys in that county, including the deputy county attorney assigned to the child support enforcement division. We believe that opinion is a good starting point and provides some initial guidance in this situation.

Specifically, the judge asked if recusal was required in either of the following situations: (1) If a bench warrant was issued while serving in the county attorney's office, does a conflict exist requiring recusal, when the child support obligor is picked up on that bench warrant? (2) In cases which were filed or opened by the county attorney's office while the judge served as the supervising attorney, and in which a request is now being made for the issuance of a bench warrant or other action required in the case based on facts or events that occurred after the judge left the county attorney's office?

The Committee concluded as follows in Nebraska Ethics Advisory Opinion 01-2:

“With respect to question (1), it is the committee's opinion that the judge should recuse himself or herself from the handling of the case in that it involves facts directly related to the period of time that the judge was the supervising attorney in the county attorney's office. With respect to question (2), it is the committee's opinion that a recusal would not be necessary provided that the operative facts of the subsequent action were different and separate from the action as originally handled by the county attorney's office when the judge was the supervising attorney.”

In the present case, the requesting judge has already indicated that cases arising during the judge's tenure and for 6 months after would be handled by another judge. The Committee agrees with this recommendation. However, what about cases that may have arisen outside that timeframe? That is a more difficult question to answer.

The Committee would suggest that the initial determination for the requesting judge to make would involve the nature of the claim. If the nature of the claim is to attack, protest, or otherwise take issue with a rule or policy which was drafted or adopted during the judge's tenure as General Counsel, and subject to his or her supervision and approval, then recusal is required. However, if the nature of the claim involves the application of the rule or policy to a particular claimant, and the requesting judge has no prior knowledge of the operative facts of the claim, then recusal may not be necessary, subject to the following considerations:

If it is the former, and the requesting judge authored or was involved in the drafting of or the implementation of the particular rule or policy, then recusal is required. If it is the latter, and the requesting judge has no knowledge of the operative facts, then recusal may not be necessary, subject to the following:

If there is any question whether the requesting judge would be perceived as being fair and impartial, then the judge, at a minimum, should disclose on the record the potential conflict of interest and give the parties a reasonable amount of time to file a motion for recusal, even if the

requesting judge believes there is no valid basis for disqualification. See § 5-302.11(C) and Comment 5 following, cited earlier.

In the treatise, Jeffrey M. Shaman et al., *Judicial Conduct and Ethics*, § 4.02 at p. 4-6 (5th ed. 2013), it states as follows:

“The drafters of the Code made it clear that the ‘laundry list’ of disqualifying factors was not intended to be exclusive and that the general standard should not be overlooked. Any circumstance that would lead a reasonable person to question a judge’s impartiality is a basis for disqualification for that judge. [See also footnote 14 that follows:] Thus, allegations about the appearance of impropriety require that ‘each such case must be evaluated on its own facts,’” *Joyner v. Commissioner of Corr.*, 55 Conn. App. 602, 740 A.2d 424 (1999)).

Further, in the same treatise at § 4.05, p. 4-13, appears the following:

“The test for an appearance of partiality is meant to be an objective standard, that is, whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. This is objective in the sense that the standard is filtered through the eyes of a reasonable observer, rather than through the subjective view of the judge in question or a party or lawyer appearing before the judge. This standard calls for disqualification when objective appearance casts reasonable doubt upon impartiality even though the judge in question subjectively feels that he or she can act fairly and evenhandedly.”

With regard to the parties and/or lawyers involved in the proceeding, § 4.06, on pp. 4-13 and 4-14, tells us:

“Model Code Rule 2.11(A) subjects judges to disqualification for reasonably perceived partiality, whereas Rule 2.11(A)(1) requires disqualification for partiality in fact, when ‘the judge has a personal bias or prejudice concerning a party or a party’s lawyer....’ It has been pointed out that personal bias or prejudice is more difficult to ascertain than other types of judicial partiality.....

“It is often said that bias and prejudice are only improper when they are personal.... The point is not that ‘judicial’ prejudice or bias is somehow acceptable; the point is that when the judge’s views of a litigant are informed by what the judge learns in the courtroom, such views will not ordinarily constitute disqualifying bias or prejudice. Rather, it is only when the judge’s antipathy toward a litigant derives not from what transpires in judicial proceedings, but is attributable to personal feelings of ill will or, conversely, favoritism toward one of the parties, that disqualification becomes necessary.”

And finally, at § 4.10, p. 4-41, is the following:

“A judge is disqualified if he or she has prior personal knowledge of evidentiary facts regarding a proceeding before the judge.... Even where a judge is not sitting as a fact-finder, he or she should not possess prior knowledge of the facts of a case, because knowledge could unfairly

influence the judge’s rulings and other actions in the case. And where a judge is sitting as a fact-finder, there is all the more reason to prohibit prior knowledge of factual matters.”

In conclusion, if there is any question whether the requesting judge would be perceived as being fair and impartial, then the judge, at a minimum, should disclose on the record the potential conflict of interest and give the parties a reasonable amount of time to file a motion for recusal, even if the requesting judge believes there is no valid basis for 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 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 NOVEMBER 22, 2017

*Judge J Russell Derr  
Judge James C. Stecker  
Judge Edward D. Steenburg  
Judge Vicky L. Johnson – not participating  
Judge Linda S. Porter  
Judge Michael W. Pirtle  
Judge Jeffrey M. Wightman*