

Nebraska Judicial Ethics Committee Opinion 24-1

Question Presented –

Can a judge preside over criminal cases when the judge's spouse is a supervisor in the largest law enforcement agency in the county?

Conclusion

A judge may not preside over criminal cases where his/her spouse was the arresting officer, issued the citation, or may be called as a witness to testify in a particular case. However, the Code of Judicial Conduct does not require disqualification from cases involving the spouse's law enforcement agency where said spouse is not involved in the case in any manner.

Applicable Code Sections

Preamble to the Code

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

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

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

Nebraska Judicial Ethics Committee Opinion 15-2

Nebraska Ethics Advisory Opinion 03-1

Nebraska Ethics Advisory Opinion 92-1

Gibilisco v. Gibilisco, 263 Neb. 27 (2002)

Discussion

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 the appearance of impropriety.

.....

§ 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.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restriction imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

.....

§ 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

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

.....

§ 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.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influence.

.....

§ 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 the 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 the 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.

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. . . .

....

“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, or their representative, as well as maintenance of an open mind in considering issues that may come before a judge. . . .

.....
“Impropriety” includes conduct that violates the law, except for traffic violations unless they also included a potential jail sentence, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality. . . .

“Independence” means a judge’s freedom from influence or controls other than those established by law. . . .

“Integrity” means probity, fairness, honesty, uprightness, and soundness of character. . . .

.....
“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 the 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 this Committee has stated in previous opinions, the appearance of impropriety must be avoided with as much zeal as the 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 de 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.

Further, the Nebraska Supreme Court, in *Gibilisco v. Gibilisco*, 263 Neb. 27, 34, 637 N.W.2d 898, 904 (2002), 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.

This Committee has previously addressed a similar situation in Nebraska Judicial Ethics Committee Opinion 15-2. In that case, the question posed to the Committee involved a clerk magistrate married to a Nebraska State Patrol officer assigned to the same judicial district and whether the clerk magistrate may handle citations or complaints that involve the clerk magistrate’s spouse in an official capacity.

This Committee then stated, “Placing the situation presented here to the objective, disinterested observer, the observer is only going to know that the trooper who issued the ticket, and who perhaps is testifying for the prosecution, is the spouse of the magistrate who is presiding over the matter. This situation inexorably would have to be viewed by the objective disinterested

observer to require disqualification...In summary, we conclude that a magistrate may not handle citations issued by his or her spouse, collect fines for those citations, and/or be in the courtroom when the spouse testifies.”

In applying the reasoning outlined in Opinion 15-2 to the present question, it would only stand to reason that a judge must disqualify himself/herself in any case involving a law enforcement spouse or domestic partner or someone who shares a close relationship with the judge. Meaning the judge should disqualify himself/herself in any criminal matter where the judge’s spouse (or domestic partner, or someone who shares a close familial relationship) is the arresting officer, the officer who signed the citation, or someone who would be a witness in a potential trial.

However, disqualification is not required in all cases involving said spouse’s law enforcement agency. This Committee in Nebraska Ethics Advisory Opinion 92-1, a case involving a judge who had a son who was a member of the local public defender’s staff, found that absent other factors, disqualification was not required when other members of the public defender’s office appeared in the judge’s court. Similarly, this Committee, in Nebraska Ethics Advisory Opinion 03-1, involving a judge in a dating relationship with a member of the local public defender’s office, stated, “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 reviewing the specific question posed to this Committee, a judge may not preside over criminal cases where his/her spouse was the arresting officer, issued the citation, or may be called as a witness to testify in a particular case. However, the Code of Judicial Conduct does not require disqualification from cases involving the spouse’s law enforcement agency where said spouse is not involved in the case in any manner.

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 AUGUST 1, 2024

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