

Nebraska Judicial Ethics Committee Opinion 15-2

Question Presented--

If clerk magistrates are married to Nebraska State Patrol Officers assigned to the same judicial district, may the clerk magistrate handle citations or complaints which involve their spouses in an official capacity, for example, sign citations issued by their spouse, collect fines for those citations, or be in the courtroom when the spouse testifies?

Conclusion

No. The Nebraska Revised Codes of Judicial Ethics applies to magistrates, and magistrates must recuse themselves where their spouse is involved.

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

In Nebraska, magistrates are appointed pursuant to Neb. Rev. Stat. § 24-507 (Cum. Supp. 2014), which provides in relevant part as follows:

(1) There shall be appointed a clerk magistrate to serve each county. Clerk magistrates shall be appointed by the county judge, or judges if the district has more than one county judge, and shall serve at the pleasure of the county judge or judges, subject to personnel rules adopted by the Supreme Court.

The duties of a magistrate are set out in Neb. Rev. Stat. § 24-519 (Reissue 2008):

Clerk magistrates shall have authority to perform the following duties:

(1) To conduct any proceeding which is based on a misdemeanor, traffic infraction, violation of a city or village ordinance, or traffic violation or infraction under the laws of this state, except the trial of defendants who plead not guilty or for whom a not guilty plea has been entered. Any penalty imposed under this subdivision shall be made pursuant to a schedule established by the Supreme Court. Such schedule shall not provide for imprisonment;

(2) To conduct any proceeding for the issuance of warrants for arrest or for searches and seizures when no county or district judge is available in the county;

(3) To hear and determine any nonfelony proceeding for preliminary examination to

determine probable cause or the release on bail of persons charged with bailable offenses;

(4) To determine temporary custody of a juvenile pursuant to sections 43-251, 43-253, 43-254, and 43-258. An order of a clerk magistrate shall be reviewed by the county judge upon the written request of any party to the action within ten days of the order. Such order may be affirmed, modified, or set aside by the county judge. The clerk magistrate may also appoint a guardian ad litem as provided in section 43-272.01;

(5) To hear and determine noncontested proceedings relating to decedents' estates, inheritance tax matters, and guardianship or conservatorship, except that matters relating to the construction of wills and trusts, the determination of title to real estate, and an authorization of the sale or mortgaging of real estate shall not be heard by a clerk magistrate[.]

Essentially, magistrates perform many of the duties of a county judge. Therefore, the Committee finds that the Nebraska Code of Judicial Ethics applies to magistrates in performing these functions.

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 Rule 2.11 (Section 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:

“**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 magistrate should recuse himself/herself in any case in which his/her spouse is involved as the magistrate’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 (3rd ed. 2000).

In *Gibilisco v. Gibilisco*, 263 Neb. 27, § 4, 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 judges 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).

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.

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 SEPTEMBER 3, 2015

Judge John F. Irwin

Judge J Russell Derr

Judge Linda S. Caster Senff – dissent attached

Judge Max J. Kelch

Judge Edward D. Steenburg – dissent attached

Judge Vicky L. Johnson

Judge Linda S. Porter

Judges Edward D. Steenburg and Linda Caster Senff, dissenting.

We respectfully disagree with the majority opinion of the committee.

Conclusion:

We agree with the majority opinion that a clerk magistrate should not be present in the courtroom when his or her spouse testifies and should not perform the judicial functions authorized by § 24-519, in cases which involve his or her spouse in an official capacity.

We disagree with the majority opinion to the extent that we believe a clerk magistrate may perform non-discretionary ministerial functions outside the courtroom such as filing or signing citations, and collecting fine money, in cases which involve his or her spouse in an official capacity.

Applicable Code Sections

Application I(A).

§ 5-302.4

§ 5-302.11

Reference in Addition to Nebraska Revised Code of Judicial Conduct

Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002)

State ex rel. School Dist. v. Ellis, 163 Neb. 86, 77 N.W.2d 809 (1956)

Analysis and Opinion

A clerk magistrate is bound by the Nebraska Code of Judicial Conduct. See Application I(A).

Performing ministerial duties with regard to citations or complaints which involve a spouse in an official capacity.

Ministerial duties refer to the official duties of a public officer in which the officer has no room for the exercise of discretion, and the performance is required a by direct and positive command of the law. The powers and duties of public officers are generally classified as ministerial or discretionary. The character of a duty as ministerial or discretionary is to be determined by the nature of the act to be performed. An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty. *State ex rel. School Dist. v. Ellis*, 163 Neb. 86, 77 N.W.2d 809 (1956).

A clerk magistrate files a citation or complaint only after the county attorney has signed the document and sends it to the court for filing. A clerk magistrate accepts guilty pleas by signing the back of a citation or signing an acknowledgment of an Internet guilty plea only after the defendant has voluntarily signed the “waiver and plea of guilty” either in person, by sending the citation through the mail, or by entering a guilty plea over the Internet. A clerk magistrate only accepts fine money for citations or complaints “voluntarily” paid by the defendant after a guilty plea or pursuant to a court order.

These are ministerial duties in which the clerk magistrate does not exercise any discretion. Performing the duties described above does not undermine the clerk magistrate’s independence, integrity, or impartiality; affect the clerk magistrate’s freedom from influence or control; or manifest any bias or lack of integrity or impartiality, whether or not a spouse is involved in an

official capacity. The clerk magistrate's impartiality cannot reasonably be questioned in the situations posed to the committee.

The majority opinion would presumably prohibit a clerk magistrate from taking any action in cases in which a spouse is involved in an official capacity, including: receiving bond money; receipting fine money paid over the Internet; preparing a DOCKET order; processing an arrest warrant or search warrant signed by the county judge; granting a continuance; and prohibit a clerk magistrate from going onto JUSTICE and typing in the correct ticket number to allow the fine to be paid and prevent the defendant from going into suspension, when the defendant enters a plea of guilty and pays a citation via the Internet, and unfortunately types in the wrong citation number.

In addition, when a defendant uses the Internet to enter a "waiver and plea of guilty," and pay the fine, the clerk magistrate is not going to know if a spouse was involved, unless a list is maintained and checked against every Internet transaction. Nor does a clerk magistrate automatically know that a spouse is involved when a county attorney sends a complaint to be filed. Thus, a clerk magistrate could file the case, put the case on JUSTICE, schedule the case, issue a citation in lieu of arrest, and subsequently discover a spouse is involved. In such instances, even where no discretion was involved, and the clerk magistrate was simply involved in the day-to-day clerical function of the job, the majority opinion would suggest that the clerk magistrate may be in violation of the judicial code should a spouse be involved. We respectfully disagree with the majority opinion in that respect.

Inconveniences do not form the basis for our opinion, but will result from the clerk magistrate's inability to perform ministerial duties which do not require the clerk magistrate to exercise any discretion or judgment.

Presumably, the clerk magistrate can inform the parties and attorneys that a spouse is involved in the matter in an official capacity and have the parties and attorneys waive any conflict on the record. See § 5-302.11(C). This process could prove problematic in many instances as citations are customarily taken care of off the record, and often electronically.

We recognize the importance of supporting the integrity and independence of the judiciary; however, we believe that allowing a clerk magistrate to complete ministerial duties as defined above, without regard to who may have issued the citation or been involved in a criminal investigation, does not violate the judicial code.

Clerk magistrates may perform many duties of a county judge pursuant to § 24-519. These duties are judicial in nature, rather than clerical, and involve discretion on the part of the clerk magistrate.

For the reasons set forth herein, we agree with the majority opinion that a clerk magistrate should not perform any of the duties in § 24-519, in cases which involve a spouse in an official capacity.

Presence of the clerk magistrate in the courtroom when a spouse testifies.

An independent judiciary requires that judges decide cases according to the law and facts. Confidence in the judiciary is eroded if judicial process or decisionmaking is perceived to be subject to inappropriate outside influences. § 5-302.4, comment 1.

Further, a judge shall not convey or permit others to convey the impression that any person is in a position to influence the judge. See § 5-302.4 (C).

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. See § 5-302.11(A). This rule applies regardless of whether any of the specific provisions of § 5-302.11 (A)(1) through (6) apply. § 5-302.11(c)(1).

A 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. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

A clerk magistrate's presence in the courtroom, while a spouse is testifying, presents a setting in which the presiding judge's impartiality might reasonably be questioned. § 5-302.11(A). This is true whether the clerk magistrate is performing discretionary functions authorized by § 24-519, or is only in the courtroom for the purpose of operating recording equipment or entering data into the JUSTICE program.