

Nebraska Judicial Ethics Committee Opinion 20-2

Question Presented--

Does a judge whose spouse is an administrative employee in the county attorney's office of one of the counties in the judge's judicial district have a conflict of interest when presiding over cases presented by the county attorney's office?

Statement of Facts

The spouse of a judge is an administrative assistant in the county attorney's office in one of the counties served by the judge. The spouse's duties in the county attorney's office are budgeting, handling monthly claims that are submitted to the county board, and human resource issues. In addition, she serves as a legal assistant to one of the deputy county attorneys though she is not a paralegal.

Applicable Code Sections

Preamble to Code of Judicial Conduct

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 2016 & Cum. Supp. 2018)

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* §§ 4.12 and 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)

Nebraska Judicial Ethics Opinion 92-1

Nebraska Judicial Ethics Opinion 03-1

Discussion

The question presented by the judge uses the term "conflict of interest." The Committee believes that the judge is requesting an opinion as to whether the judge should recuse or be disqualified from presiding over cases prosecuted by the county attorney's office where the spouse is employed. The Nebraska Revised Code of Judicial Conduct (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 sections of the Revised 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.

....

The “**Terminology**” section of the Revised 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 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.

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 a lawyer in the proceeding [or is] a person who has more than a de minimis interest that could be substantially affected by the proceeding.” The judge’s spouse is a person within the fourth degree of relationship to the judge.

This Committee considered a somewhat analogous situation in Nebraska Judicial Ethics Opinion 03-1. In that case, the question presented was 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 (11997), 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 another 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.

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.

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. The Arizona 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 whether 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.

Here, it is the opinion of the Committee that the judge need not disqualify or recuse himself in every case presented by the county attorney's office with the exception of those specific cases presented by a deputy county attorney for whom the spouse serves as a legal assistant. The spouse's involvement in these cases would, at a minimum, present the appearance of more than a de minimis interest in the outcome and, therefore, in those cases, the judge should disqualify or recuse himself.

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 16, 2020

*Judge J Russell Derr
Judge James C. Stecker
Judge Jeffrey M. Wightman
Judge Michael W. Pirtle
Judge Matthew L. Acton
Judge Mark J. Young
Judge Reggie L. Ryder*