

Nebraska Judicial Ethics Committee Opinion 22-2

Question Presented--

Is a district judge whose brother is the county judge in two of the counties in the judge's judicial district disqualified in the following situations?

- 1. Appeals - When a party appeals a civil or criminal case from County Court to District Court?*
 - 2. A plea in abatement.
 - A. If disqualification is required and is not waived, and another judge rules on the plea in abatement, is there any reason that he or she will have to handle the entire case to its conclusion?**
 - 3. Bindovers - No plea in abatement filed.*
 - 4. Search warrants in which the defense is not challenging whether the magistrate was detached and neutral?*
 - 5. Search warrants in which the defense is challenging whether the magistrate was detached and neutral?*
 - 6. Will contests.*
 - 7. Bond review hearings.*
 - 8. Bridge Orders.*
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Statement of Facts

The party requesting the opinion is a district judge serving in a district which has multiple counties. The district judge's brother was recently appointed in the same judicial district as a county judge. Both judges will hold court in two of the counties in the judicial district. The requesting party asks under which circumstances will a district judge who is the sibling of a county judge need to disclose this fact on the record and determine whether the parties want a different judge to handle the matter, or simply recuse from the case.

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. § 24-739 (Reissue 2016)
Maryland Judicial Ethics Committee Opinion 1985-02
State of New Hampshire Supreme Court Advisory Committee on Judicial Ethics 2019-ACJE-02

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 Rule 2.11 (§ 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.

....

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:

....

"Fourth degree of relationship" includes the following persons: great-great-grandparent, great-uncle or great-aunt, brother, sister, great-great-grandchild, grand nephew or grand niece, or first cousin.

"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.

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 [person within the fourth degree of relationship] is a person who has more than a de minimis interest that could be substantially affected by the proceedings 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 reasonably be 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 of Ethics* § 4.25 (3rd 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 the judge avoid impropriety and the appearance of impropriety in all activities, and Canon 3, which requires the judge perform all duties impartially.

Citing *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

Public confidence in the judiciary is an overriding concern when dealing with judicial participation in proceedings involving relatives. As one Commentator noted:

[C]ase law and commission opinions have established, on an *ad hoc* basis and without citing specific authority, that judicial participation in a proceeding involving a relative is generally improper. These provisions and rulings are based upon the principle of impartiality to ensure a fair and proper administration of justice and promote public confidence in the integrity and impartiality of the court. Therefore, the judicial office should not be used as a vehicle promoting family interests. Additionally, a judge should know, even absent specific legislation, that presiding over cases that involve a relative is improper and diminishes public confidence in the judiciary.

Judicial Conduct on Ethics, 5th Ed. (2013), pp. 4-44, 45.

Analysis and Opinion

Question 1. Appeals from County Court

It does not appear that this Committee has dealt with a question involving “sibling judges” in the past. The first question presented is whether the district judge is disqualified from hearing an appeal from county court on a case handled in county court by the district judge's sibling.

Under § 5-302.11 a judge is disqualified when “the judge’s impartiality might reasonably be questioned.” The Rule also lists a number of circumstances in which disqualification is mandatory. However, the list is not all-inclusive, noting that circumstances include, but are not limited to, those that follow. While none of the circumstances listed expressly include a judge reviewing his or her sibling judge’s work, the Committee finds that the close familial relationship between the sibling judges, coupled with the possibility that the parties or public may view the county judge as having “more than a *de minimis* interest” in the outcome of the appeal, creates the appearance of impropriety much the same as the circumstances specified by the Rule.

Siblings are within the fourth degree of relationship. A judge must recuse when he or she knows that a person within the fourth degree of relationship has more than a “*de minimis* interest that could be substantially affected by the proceedings.” “*De minimis*” as used in the rules means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.”

Although the Committee was unable to identify any Nebraska Judicial Ethics Committee Opinions directly on point, other judicial ethics committees have found a sibling judge’s affirmance of his or her judgments is “more than a *de minimis* interest” for purposes of the Rules. A decision from the Maryland Judicial Ethics Committee is instructive. In an opinion on whether an appellate court judge should recuse himself or herself from a case decided by the trial court judge sibling, the Committee found that an appellate judge should not sit on an appeal when the correctness of a decision of his or her sibling, who is a trial judge, is before the appellate court. That Committee found the trial-judge sibling’s “interest” in his or her decision would make it “preferable” that the appellate judge recuse himself or herself when one of the sibling’s cases is before the appellate court. The Committee however, found that the “interest” issue was not necessarily dispositive. More critical was the appearance of impropriety. The Maryland Judicial Ethics Committee held that an appellate judge should not sit on an appeal in which the correctness of the decision of his or her sibling is before the appellate court due to the appearance of impropriety.

The phrase “appearance of impropriety” is widely used, and the concept is an important one. The principle is that the law requires more than a tribunal that is impartial in fact; it also requires that the tribunal appear to be impartial. Thus, “where the circumstances are such as to create in the mind of a reasonable [person] a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists.” 46 Am. Jur. 2d, “*Judges* § 86 (1994). Although the litigant’s interest in having a case decided by a neutral and detached judge is met if the judge is in fact impartial, there is another and more general interest that is achieved only if the appearance of impartiality is present. That interest is the need of “maintaining public confidence in the integrity of the judicial process.” “*Disqualification of Judges and Justices in the Federal Courts*,” 86 Harv. L. Rev. 736, 746 (1973). Courts should be above suspicion.

The appearance of impropriety is viewed from an objective standard. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). Where a disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial, an appearance of impropriety is shown. The Committee concludes that a reasonable person would question the judge’s impartiality in any case in which the judge reviews the decision made by a judge who is his or her sibling. A reasonable person could perceive that the judge, either consciously or subconsciously, has a personal bias toward affirming the decisions of his or her sibling. The Rules require disqualification.

Since the Committee has concluded that the judge should be disqualified, the next inquiry is whether the disqualification can be remedied with proper disclosure. Section 5-302.11(C) provides:

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 of the judge or court personnel, that the judge should be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into a permanent record of the proceeding.

Given the perception of personal bias stemming from the direct familial relationship between the judge and his or her sibling, the Committee concludes that the disqualification cannot be remedied, even with proper disclosure and waiver. Personal bias cannot be waived. A reasonable person could perceive that the judge has a personal bias in favor of his or her sibling. The Committee also finds that a judge reviewing his or her sibling's rulings could undermine the public's confidence in the integrity of the judicial system.

Question 2: Plea in Abatement

The second question is whether a district judge is disqualified from ruling on a plea in abatement challenging the sufficiency of the evidence at a preliminary hearing, held by the district judge's sibling, finding that there was probable cause to believe that a crime has been committed and that the defendant was the person who committed that crime.

A plea in abatement can be made when there is a defect in the record which can be established only by extrinsic evidence. See, Neb. Rev. Stat. § 29-1809 (Reissue 2016); *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009). A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing. *Id.*

For the same reasons advanced above, the Committee concludes that the district judge is disqualified from ruling on a plea in abatement when the sibling judge handled the preliminary hearing. Like an appeal, the correctness of the decision of the county judge is at issue. The Committee believes that a reasonable person would question that judge's impartiality in any case in which the judge reviews the decision made by a sibling judge. Perceived bias is likely. The Rules require disqualification.

Likewise, given the perception of personal bias stemming from the direct familial relationship between the judges, the disqualification cannot be remedied, even with proper disclosure and waiver.

Question 2(a)

Part two of this question is whether the district judge can handle the criminal matter after a different judge rules on the plea in abatement. The Committee finds that disqualification is not required.

As indicated above, the issue in a preliminary hearing and plea in abatement is probable cause. The evidence must show that a crime was committed and that there is probable cause to believe the accused committed it. See, *State v. Lasu*, *supra*. The evidence need not be sufficient

to sustain a verdict of guilty beyond a reasonable doubt. *Id.* In the present scenario, the sibling county judge will have no further involvement in the case going forward. The only decision made by the county judge has been reviewed by a detached and neutral district judge. Disqualification is not required.

Although the Committee finds that disqualification is not required, the Committee is mindful of Comment [5] to § 5-302.11, which provides:

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.**

(Emphasis added.) Due to the close familial relationship between the county and district judges, the Committee believes that out of an abundance of caution, it would be appropriate to disclose the relationship to the parties and provide an opportunity for one of the parties to file a motion for disqualification. If a motion to disqualify is filed, it would be up to the district judge, after hearing, to determine whether disqualification is required.

Question 3: Bindovers

Bindovers with no plea in abatement do not require disqualification. The decision of the county judge to bind the matter over to the district court has been accepted by the parties and no challenge is made to any decisions made by the county judge. Disqualification is not required.

Question 4: Search Warrants

The next question posed relates to search warrants. The question is whether the district court judge is disqualified from hearing a motion to suppress challenging a search authorized by the sibling judge's signing of a search warrant. The question also asks whether it makes a difference whether the challenge is whether the magistrate issuing the warrant was detached and neutral.

The Committee finds that regardless of the scope of the challenge, the district judge is disqualified from reviewing a search warrant signed by the district judge's sibling. The review of a search warrant is akin to reviewing a decision of the county court on appeal. It raises the potential of a disagreement between sibling judicial officers. Because of that potential disagreement, it also raises the potential of a perception that the district judge, either consciously or subconsciously, has a personal bias toward affirming the decision of his or her sibling. This situation runs the potential of undermining the public's confidence in the integrity of the judicial system. Disqualification is required.

Likewise, given the perception of personal bias stemming from the direct familial relationship between the judges, the disqualification cannot be remedied, even with proper disclosure and waiver.

Like the situation with the plea in abatement above, the Committee does not believe the district judge would be required to disqualify himself or herself from handling the proceedings after the motion to suppress. No other decisions made by the county judge will be subject to review by the district judge. The potential for disagreement between sibling judicial officers has been removed. Disqualification is not necessary.

Question 5: Will Contests

In this scenario, the county judge is presiding over a probate case in county court. The case is sent to district court for determination whether the Last Will and Testament is valid. A jury decides whether the Will is valid, and then the case is sent back to County Court. The district court judge does not have to make any determinations regarding the county court judge's decisions in the probate case.

The Committee does not see a need to disqualify under this scenario. Nothing the county judge does or does not do will be reviewed by the sibling district judge. The issues in the two proceedings are completely different. Disqualification is not required.

Although the Committee finds that disqualification is not required, the Committee is mindful of Comment [5] to § 5-302.11 which provides:

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.**

(Emphasis added.) Due to the close familial relationship between the county and district judges, the Committee believes that out of an abundance of caution, it would be appropriate to disclose the relationship to the parties and provide an opportunity for one of the parties to file a motion for disqualification. If a motion to disqualify is filed, it would be up to the district judge, after hearing, to determine whether disqualification is required.

Question 6: Bond Review Hearings

The next situation deals with a criminal case in which the county judge has set an initial bond and the defendant has asked the district judge to review the bond (and presumably lower it). The bond set in a criminal case impacts pretrial freedom and honors the presumption of innocence. The Constitution prohibits excessive bail.

Although a district judge reviewing bond applies his/her own analysis and exercises his/her own discretion, the Committee believes that the appearance of impropriety is still present when the initial bond is set by a sibling county judge. The Committee believes that a reasonable person would question the judge's impartiality in any case in which the judge reviews a defendant's bond initially set by the district judge's sibling. As such, the Rules would require disqualification.

Unlike an appeal from county court, however, the Committee concludes that the disqualification can be remedied with proper disclosure under § 5-302.11(C). Unlike an appeal, the district judge in this situation is not reviewing the correctness of the county judge's decision on bond. Rather, the district judge is applying his/her own analysis taking into account all the facts and circumstances that exist on the day of the bond review hearing. In this situation, the Committee believes it would be appropriate to disclose on the record the basis of the judge's disqualification and ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If the parties agree that the judge should not be disqualified, the judge may then participate in the bond review proceeding. The agreement should be made part of the permanent record of the court.

Question 7: Bridge Orders

The county judge filed a bridge order which transfers a case from juvenile court to the district court. The district judge adopts the bridge order. At times, subsequent modifications or

changes can be requested and decisions are made by the district court judge who now has jurisdiction.

The Committee finds that simply adopting the bridge order does not require disqualification. The district judge is not making any rulings or reviewing the work done by the sibling county judge.

In cases involving requested modifications, the Committee finds that the situation is similar to an appeal from the county court. The Committee believes this scenario would result in an appearance of impropriety. Given the perception of personal bias stemming from the direct familial relationship between the judge and his or her sibling, the Committee believes that the disqualification cannot be remedied, even with proper disclosure and waiver.

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 29, 2022

*Judge James C. Stecker
Judge Jeffrey M. Wightman
Judge Matthew L. Acton
Judge Julie D. Smith (not participating)
Judge Reggie L. Ryder
Judge Michael W. Pirtle
Judge Travis P. O’Gorman*