

Nebraska Judicial Ethics Committee Opinion 26-1

Question Presented--

- 1. Must a judge, who, as a practicing attorney, submitted an email to a representative of a member of a judicial nominating commission regarding an attorney's qualifications, disqualify himself/herself under the Nebraska Revised Code of Judicial Conduct from all cases involving the attorney?*
 - 2. Does the judge have an obligation to respond to an informal request for recusal by the attorney?*
 - 3. Should the judge disclose the existence of and/or the contents of the email on the record if a motion to recuse is filed by the attorney?*
 - 4. Is the attorney's stated intent to disclose the email to the attorney's clients proper and consistent with Neb. Rev. Stat. § 24-812 (Reissue 2016), and, in that event, does the judge have an ethical obligation to respond to or address such disclosure?*
 - 5. Does the attorney's stated subjective belief regarding the judge's impartiality alter the recusal analysis?*
 - 6. Does the Committee have any additional guidance for the judge regarding maintaining impartiality and the appearance of the same under the instant circumstances?*
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Conclusion

Yes, given the content of the email, the judge has a mandatory duty to disqualify himself/herself in all matters involving the attorney, without an informal request or motion by the attorney. The attorney's subjective belief regarding the judge's impartiality is not relevant to the instant analysis. Due to the Committee's limited authority under Neb. Ct. R. § 5-202(A), the Committee declines to render an opinion on the propriety of any further dissemination of the email or its contents by the attorney to his/her clients.

Statement of Facts

The relevant facts, summarized, are as follows. The judge requesting the instant opinion, prior to applying for a judicial appointment, sent an email to a representative of a member of a Judicial Nominating Commission regarding an attorney's application for a judicial vacancy. The email was sent on the morning of the Commission's public hearing. The representative subsequently provided the email to the attorney. The email detailed the judge's experiences with and opinions of the attorney, including the attorney's lack of fitness to serve as a judge. The attorney was not appointed, and the judge, having since been appointed, now presides in a jurisdiction where the attorney practices.

Applicable Code Sections

Preamble to the Revised Code

Terminology of the Revised Code

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

Neb. Rev. Code of Judicial Conduct, § 5-301.3

Neb. Rev. Code of Judicial Conduct, § 5-302.2
Neb. Rev. Code of Judicial Conduct, § 5-302.3
Neb. Rev. Code of Judicial Conduct, § 5-302.6
Neb. Rev. Code of Judicial Conduct, § 5-302.11

References in Addition to Nebraska Revised Code of Judicial Conduct

Due Process Clause of the U.S. Constitution, U.S. Const. amend. XIV
Due Process Clause of the Nebraska Constitution, Neb. Const. art. I, § 3
Neb. Ct. R. § 5-202
Neb. Rev. Stat. § 24-812 (Reissue 2016)
State v. Ezell, 314 Neb. 825, 993 N.W.2d 449 (2023)

Discussion

A fundamental tenet of the Nebraska Revised Code of Judicial Conduct (hereinafter “Revised Code”) and the Due Process Clauses of the United States and Nebraska Constitutions is the right to an impartial judge. See, also, *State v. Ezell*, 314 Neb. 825, 993 N.W.2d 449 (2023). As expressed in the Preamble of the Revised Code, an independent, fair, and impartial judiciary is indispensable to our system of justice. The term “impartial” is specifically defined in the Revised Code to mean “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, or their representatives, as well as maintenance of an open mind considering issues that may come before a judge.” (Emphasis supplied.) Rules based on the principle of impartiality are found throughout the Revised Code, including 5-301.2 (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), 5-302.2 (judge shall perform all duties of the judicial office fairly and impartially), 5-302.3 (judge shall perform the duties of judicial office without bias or prejudice), and 5-302.6 (judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law).

The test for disqualification (or recusal, as the terms can be used interchangeably) for bias or prejudice is found in Neb. Rev. Code of Judicial Conduct § 5-302.11(A). In relevant part, it provides that 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” (Emphasis supplied.) See, also, *State v. Ezell*, *supra* (when evaluating a trial judge’s alleged bias under the Revised Code, the question is whether 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 was shown). If the test is satisfied, the judge must disqualify himself/herself on all cases involving the party or the party’s attorney, even in the absence of a motion to disqualify. See, *State v. Ezell*, *supra*. Impartiality based on bias or prejudice toward a party or a party’s attorney cannot be waived pursuant to Neb. Rev. Code of Judicial Conduct § 5-302.11(C) (procedure for disclosure and possible waiver of other grounds for disqualification), as it is a necessary component of due process. *State v. Ezell*, *supra*.

Specifics of the email, with one exception contained below, are not necessary to recount for purposes of this opinion. In sum, the judge details (1) interactions with the attorney on cases they were both involved in; (2) the judge’s negative opinions of the attorney, professionally and personally, based upon said interactions; and (3) the attorney’s history of advocating for change

in the law on an issue that would frequently come before the court. In concluding the email, the judge commented as follows: “I know of no other attorney more ill-disposed and unfit to serve as a judge. [The attorney] is the epitome of what gives attorneys a bad name and reputation.”

The Committee recognizes that both judicial and attorney evaluations are an integral part of the judicial selection process and that accurate evaluations are necessary for the benefit of all who utilize the courts in the State of Nebraska. The Revised Code acknowledges that judges may participate in the process of judicial selection by cooperating with appointing authorities. See Neb. Rev. Code of Judicial Conduct § 5-301.3, comment 3. A judge’s analysis of an applicant’s abilities, whether positive or negative, does not require automatic disqualification of that judge in all further matters involving that attorney. Such a result could lead to unintended consequences, including frequent disqualifications and a resistance by judges and attorneys to evaluating prospective candidates for judicial vacancies. However, when a judge, or an attorney who later becomes a judge, expresses an opinion about an attorney, whether accurate or inaccurate, to such an extent and degree that any reasonable person would question the judge’s impartiality, the judge must disqualify himself/herself. That is the case here. Based upon the content of the email, and specifically, the ultimate opinion given by the judge, we conclude that a reasonable person who knew of the circumstances would question the judge’s impartiality. Thus, the judge must disqualify himself/herself in all matters involving the attorney. No motion or other request for disqualification need be given, and the attorney’s subjective belief is not relevant to the analysis.

Regarding any further dissemination of the email or its contents by the attorney to his/her clients, the Committee declines to render an opinion. Neb. Ct. R. § 5-202(A) limits this Committee’s authority to express opinions on proper judicial conduct with respect to the provisions of the Revised Code. This question does not involve judicial conduct, and our conclusion that the judge must disqualify himself/herself in all matters involving the attorney hopefully resolves any need for the judge to respond to or address any further dissemination by the attorney.

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 APRIL 20, 2026

*Judge Matthew L. Acton
Judge Michael W. Pirtle
Judge Travis P. O’Gorman
Judge Julie D. Smith
Judge Andrew R. Lange
Judge Bryan C. Meisner
Judge Mary M. Z. Stevens*