

Nebraska Judicial Ethics Opinion 05-2

Question Presented--

Should a judge recuse himself in a case during the pendency of which a pro se litigant in the action informs the judge that a complaint has been filed against the judge by the pro se litigant?

Conclusion

The Code of Judicial Conduct does not require recusal.

Statement of Facts

A replevin action has been initiated in which the defendant appears pro se. Following hearing, a temporary order of replevin is entered against the defendant. The defendant then complains to others as to the judge's knowledge of the law and informs the judge that a complaint has been filed, which the judge assumes to be with the Judicial Qualifications Commission. The judge believes that he can treat the defendant "fairly and impartially," notwithstanding the defendant's statements. The defendant has not requested that the judge recuse, but the judge inquires as to whether he should do so nevertheless.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 3

References in Addition to Nebraska Code of Judicial Conduct

Nebraska Judicial Ethics Opinion 94-3

Nebraska Judicial Ethics Opinion 96-8

Discussion

The inquiring judge suggests that this matter is "a different twist on the older theme of suing your trial judge to force recusal." Our opinion is that a like analysis may be used here.

Nebraska Judicial Ethics Opinions 94-3 and 96-8 discuss recusal where a litigant has filed a separate lawsuit against the trial judge. The Committee has previously stated that "a litigant cannot control pending litigation by simply filing a separate suit against the trial court." See Nebraska Judicial Ethics Opinion 94-3. In Nebraska Judicial Ethics Opinion 96-8, the Committee referenced *In Re Illuzzi*, 670 A.2d 1264 (Vt. 1995), for the proposition that "a judge is not disqualified merely because a litigant sues or threatens to sue." In the present situation, the judge is faced with a similar situation of having a complaint filed against him, albeit in a different forum.

Neb. Code of Jud. Cond., Canon 3, provides that a judge must impartially and diligently perform his judicial duties. Those duties include hearing and deciding matters assigned to the judge except those in which disqualification is required. A judge must not participate in any proceeding in which a judge's impartiality reasonably might be questioned, including instances where a judge has a personal bias or prejudice concerning a party (or a party's lawyer). See Neb. Code of Jud. Cond., Canon 3B (1) and E (1)(a).

We note that a judge might never become aware of the filing of a complaint with the

Judicial Qualifications Commission absent being so informed by the litigant. If, however, the judge determines that his or her having either this knowledge or knowledge of other comments made by the litigant generates a personal bias or prejudice toward that party, the judge should then recuse himself or herself pursuant to Canon 3 E (1)(a). In making this determination, the judge should include a review of those points set out in the conclusion to Nebraska Judicial Ethics Opinion 94-3.

Disclaimer

This opinion is advisory only and is based on the specific facts and question submitted by the person requesting the opinion pursuant to Appendix A of the Nebraska 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 MAY 26, 2005

*Judge John F. Irwin
Judge Douglas F. Johnson
Judge Stephen R. Illingworth
Judge John F. Steinheider
Judge Carlton E. Clark
Judge John A. Colborn
Judge Robert B. Ensz*