

Nebraska Ethics Advisory Opinion 96-7

Question Presented--

Must a judge disqualify from criminal cases prosecuted by the county attorney when that judge is a party to a pending appeal challenging the assessed value of the judge's personal residence?

Conclusion

No. Criminal cases are brought in the name of the state, not the county. Absent any personal antipathy between the county attorney and the judge, there is no requirement that the judge disqualify or recuse himself or herself from criminal cases. The judge should disqualify himself or herself in any cases where the county or the county board is a named litigant.

Statement of Facts

The judge is an appellant before the Tax Equalization and Review Commission, appealing the action of the board of equalization which reviewed the assessed value of the judge's personal residence. The county attorney represents the county in the dispute.

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 3E (1) ("a judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned") and Canon 2 ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety") (rev. 1996)

Discussion

It is well settled that the judge is disqualified to preside over a case in which he or she has a financial or property interest that could be affected by the outcome of the case. The judge's interest in the assessed valuation of a personal residence would disqualify the judge from hearing his or her own case, and the appearance of impropriety would disqualify the judge from hearing any other case with the same party, the county board or the county, as long as the valuation appeal was pending. Whether the judge is disqualified from all cases where the county attorney represents a party is a different matter.

The county attorney is required to represent the county in the valuation dispute, and that relationship would be adversarial to the judge and the judge's interests. The county attorney is also required to prosecute criminal cases on behalf of the state, and these prosecutions could come before the same judge. However, the judge in the criminal cases has no interest, financial or otherwise, in the outcome of the criminal cases, and the criminal prosecutions are not filed with the county as a party, but are filed on behalf of the state to enforce the state criminal laws. As long as the judge could fairly decide the cases on the facts and law presented, there would be no need for disqualification, no impropriety, or no appearance of impropriety.

A judge presented with a motion to disqualify from criminal cases in this situation should assess whether an objective, disinterested observer fully informed of the relevant facts would entertain

a significant doubt that the judge in question was impartial. In this case, there are no indicators that the judge would be biased. The judge should also assess whether any personal bias or antipathy toward the county attorney exists because of the assessment dispute. If the judge determines subjectively that personal bias or antipathy exists to the extent that the criminal cases could not be tried impartially, the judge should disqualify himself or herself. Absent any objective indications of an interest in the cases or any subjective determination of bias, the judge should overrule a motion to disqualify or recuse.

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 Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.

*APPROVED AND ADOPTED BY
THE COMMITTEE ON MARCH 10, 1997*

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