

Nebraska Ethics Advisory Opinion 02-5

Question Presented--

Would it be ethical for the Nebraska District Judges' Association to take public action in the event a district judge is unjustly criticized? If it would not be ethical, would the answer be different if the Association did not take the public action itself, but assisted local and/or state bar associations?

Conclusion

A definitive answer cannot be given without a clearer explanation of what would constitute "unjust criticism" and what "public action" would be recommended by the Association. The Code strictly prohibits judges from making public statements that might cast doubt on the judge's impartiality. The Code also strictly prohibits judges from making public statements concerning any proceeding that is pending or impending in any court, even if the case is not before the judge making the comments. Finally, even in situations where a judge who is facing a retention vote is confronted with active opposition, the Code places strict limitations on what sort of public comments are permissible. As such, although a definitive answer cannot be given, it is apparent that any sort of public comments by a judge, or group of judges, about any particular case in which another judge has faced criticism is likely to be prohibited by the Code.

Statement of Facts

The Nebraska District Judges' Association is considering the formation of a "rapid response committee" to make a recommendation to the Association concerning what action, if any, the Association should take in the event a district judge is "unjustly criticized in the press." Some members of the Association have expressed concerns about whether taking "public action" to respond to "unjust criticism" of a district judge in the press would be prohibited by the ethical guidelines of the Nebraska Code of Judicial Conduct.

Applicable Code Sections

The following Canons of the Code of Judicial Conduct may apply to the above-described situation:

Canon 3 provides that a judge shall perform the duties of judicial office impartially and diligently. Canon 3B(9), concerning a judge's adjudicative responsibilities, provides, in pertinent part:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to interfere substantially with a fair trial or hearing. . . . This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Canon 4 provides that a judge shall so conduct all extrajudicial activities as to minimize the risk of conflict with judicial obligations. Canon 4A(1), governing extrajudicial activities in general, provides in pertinent part as follows:

A judge shall conduct all of the judge's extra-judicial activities so that they do not:
(1) cast reasonable doubt on the judge's capacity to act impartially as a judge.

Canon 4B, governing avocational activities, provides in pertinent part as follows:

A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Finally, Canon 5 provides that a judge or judicial candidate shall refrain from inappropriate political activity. Canon 5A(1), governing standards of political conduct in general, provides as follows:

Except as authorized in Sections 5B(2) and 5C(1), a judge or candidate for retention in or appointment to judicial office shall not:

.....
(b) publicly endorse or publicly oppose another candidate for public office.

Canon 5A(3) provides, in relevant part, as follows:

A candidate for a judicial office:

.....
(d) shall not:

.....
(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court [but]

.....
(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

Canon 5C, governing judges subject to retention election, provides as follows:

(1) A judge or candidate subject to retention election may, except as prohibited by law, when the judge's candidacy has drawn active opposition:

.....
(d) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

.....

(2) . . . A judicial candidate for retention election whose candidacy has drawn active opposition may . . . establish committees of responsible persons to conduct campaigns for the candidate

References in Addition to Nebraska Code of Judicial Conduct

Arizona Advisory Opinion No. 89-2 (Sept. 25, 1989)

Florida Advisory Opinion No. 92-13 (Mar. 15, 1992)

Florida Advisory Opinion No. 90/8 (Mar. 20, 1990)

Nevada Advisory Opinion JE00-006 (Oct. 18, 2000)

New York Advisory Opinion No. 93-133 (133)

Texas Advisory Opinion No. 209 (1997)

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 10.34 at 353 (3d ed. 2000)

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

In re Conrad, 944 S.W.2d 191 (Mo. 1997)

Discussion

Although a definitive answer to the questions cannot be provided without further information concerning what "unfair criticism" is or what "public action" would be recommended to be taken by the District Judge's Association, a review of the above Code provisions, as well as the spirit of the Code concerning public commentary by members of the judiciary, reveals the dangers of any sort of public comment. It would appear that if the Association's "public action" involves any sort of public comment concerning a particular case or a particular issue, then public comment on such is likely to violate the Code's mandates that judges not act in such a manner as to cast reasonable doubt on their impartiality.

The language of Canon 3 specifically provides that a judge shall not make any public comment that might reasonably be expected to interfere substantially with a fair trial or hearing while a proceeding is pending or impending in any court. Canon 3B(9). Comparable language has been interpreted as a broad prohibition of public comment concerning specific cases, even if the case is pending or impending before a court or judge other than the one making such public comment. Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 10.34 at 353 (3d ed. 2000) (citing New York Advisory Opinion No. 93-133 (133) (judge may not appear as television commentator, even though observations would concern out-of-state cases)). The breadth of this prohibition is in recognition that judges, either individually or through their association of judges, must be ever mindful of appearances to the public in promoting public confidence in the integrity and impartiality of the judiciary. See Arizona Advisory Opinion No. 89-2 (Sept. 25, 1989).

Public commentary by judges, except for judicial statements explaining the procedures of the court, is often prohibited because a judge's editorial efforts, even if unwittingly, may cast reasonable doubt on the judge's capacity to act impartially as a judge. See Texas Advisory Opinion No. 209 (1997). This is generally true for editorial comments on pending matters, even in defense of the judge's reputation. *Id.* As the Texas committee recognized, "We are sympathetic with the judge's desire to refute unfair or false criticism of his actions, but any response to critics of the judge's actions or motives places that judge in a potentially adversarial position that may cast doubt on his impartiality." *Id.*

Because of a judge's position, his or her comments to the media must at all times promote public confidence in the integrity and impartiality of the judiciary. Canon 3; Nevada Advisory Opinion JE00-006 (Oct. 18, 2000). As such, if the "public action" by the Association involves communications with the media concerning a particular case or a particular issue, extreme caution must be exercised. The Code prohibits judges from participating in extrajudicial activities which cast reasonable doubt on the judge's capacity to act impartially as a judge. Canon 4(A)(1). If the "public action" by the Association involves communications with the media concerning a particular case or a particular issue, the comments could quite easily be construed as reflecting the Association's, or the members', position on such case or issue and could cast reasonable doubt on the judge's capacity to act impartially if the particular case or the particular issue could be raised in another case. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (public comments concerning a pending case required disqualification of judge). See, also, Texas Advisory Opinion No. 209 (1997) (prohibition of discussing in newspaper article position on matters already decided because they may come up again).

There is some authority upholding a judge's qualified privilege to respond to public criticism. See *In re Conrad*, 944 S.W.2d 191 (Mo. 1997). However, even where such a privilege is recognized, it must be limited to a moderate and dignified response to the attack made upon the judge and may not be of a nature in quantity or substance that creates more harm than benefit to the judicial system. *Id.* The Code, in Canon 5, provides specific circumstances in which a judge in Nebraska may make public comments concerning his or her reputation. Specifically, Canon 5 concerns judges' facing retention votes or candidates for judicial office. Even in that situation, where a judge is deemed to be facing "active opposition," however, a judge is prohibited from making statements that appear to commit the judge with respect to cases, controversies, or issues that are likely to come before the court. Canon 5A(3)(d)(ii). A similar provision has been interpreted to prohibit judges, even in such a circumstance, from making public comment concerning the merits or facts of a particular case. See Florida Advisory Opinion No. 92-13 (Mar. 15, 1992) (interpreting Florida Code Canon 7). Similarly, it has been held that a judge is prohibited from publicly responding to criticisms of another judge. See Florida Advisory Opinion No. 90/8 (Mar. 20, 1990).

In the present case, a definitive answer to the questions cannot be provided without more information concerning exactly what "public action" might be recommended by the Association. Nonetheless, the specific language of the Code and the spirit of the Code suggest strongly that any public comment by a judge or the Association concerning the particular issues or merits of any case that has been decided or may come before the judge or members of the Association at some point in the future is prohibited. Such comments would reasonably call into question the judges' impartiality on similar issues and would amount to a public statement of position on issues that might arise in future cases. To the extent this is what is being considered, the questioned conduct would violate the Code. Further, to the extent the spirit of the Code demands impartiality and the continued appearance of integrity and impartiality, if particular conduct is prohibited from being taken directly by the Association, the same conduct would be prohibited from being taken with "the assistance" of the Association.

The Code does not prohibit judges from making public comments in every circumstance. However, the strict tenets and spirit of the Code severely restrict public comments by members of the judiciary concerning issues, facts, and merits of particular cases, whether such cases are

now pending before any court or are impending and may, at some future time, be pending. Judges are permitted to make public comments concerning the judicial process and procedures, but even in situations where a retention vote is taking place and a judge is facing active opposition by way of challenges to the judge's record and character, comment on particular issues and cases is prohibited. As such, with the above discussion in mind, the Association is encouraged to act with extreme caution in pursuing any "public action."

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 OCTOBER 4, 2002

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