

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION NO. 89-4

A member of the Nebraska judiciary owned stock in two banks, one state chartered and one federally chartered, and served on the boards of directors of both banks at the time of the judge's appointment to the bench. The judge still owns the stock and still serves as a director of both banks, well after taking judicial office. Both banks are located outside of the judge's district, but are located in a neighboring district.

The judge inquires:

- 1.) May the judge continue to hold stock in the banks? Yes, but the judge will need to avoid hearing any cases in which either bank is a party and to be cautious about hearing any cases the outcome of which could affect the banks or the value of the judge's stocks.
- 2.) May the judge continue to serve on the banks' boards of directors? No.

ANALYSIS

The applicable Canons of the Nebraska Code of Judicial Conduct (1987) apply: 2, 3C(1)(c), 3D, & 5C(1),(2) & (3).

The Stock Ownership Question

No laws and no canons appear to prohibit a judge from owning stock in a bank. Canon 5C(2) specifically allows judges to hold and manage investments, including real estate, and to engage in other remunerative activities. But there are limits.

A judge's investments must not tend to reflect adversely on the judge's impartiality, nor interfere with the proper performance of

judicial duties, nor appear to exploit the judicial position, nor involve the judge in frequent transactions with lawyers or persons likely to come before the judge's court under Canon 5C(1). Further, under Canon 5C(3), judges must manage their investments to minimize the number of cases in which they would be disqualified to sit.

A judge who has a financial interest, no matter how small, in a party to a proceeding, is disqualified under Canon 3C(1)(c). Canon 3C(3)(c) defines financial interest. Neb. Rev. Stat. § 24-315 (Reissue 1985) also requires disqualification for interest. The 3C(1)(c) disqualification applies even when it is only the judge's spouse or minor child residing in the judge's household who owns the interest and when the judge holds the interest as a fiduciary.

An appearance of impropriety could arise from a judge holding bank stock sitting in any case that could have an impact on the bank and, possibly, on the banking industry. Banking is a business affected with a public interest. Neb. Rev. Stat. § 8-102 (Reissue 1987). Banks may be concerned about precedents set in other parties' litigation in a wide variety of legal areas, cf., Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges 20 (1984), and especially in challenges to state banking department regulations or decisions. The judge holding bank stock will have to be careful about this aspect of potential disqualification. For a discussion of the lengths to which some will go in attempting to disqualify a judge for interest based upon stock ownership or to penalize a judge who does not opt out in questionable cases, see, Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law &

Contemp. Probs. 43 (1970). See, also, Abramson, Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct 59-63 (1986).

If a judge holding stock in a bank is inclined to hear cases that fit within the disqualification for interest under Canon 3C(1)(c), Canon 3D on remittal of disqualification provides an avenue for the judge to attempt to obtain the ability to hear such cases. Obviously, the way to avoid criticism is to not hear any such cases, but the Canon 3D escape hatch is available.

The Board of Directors Question

Service on a board of directors, while it may be directly related to a person's otherwise passive and permissible investment activities, differs from passive investment in that a board member is directly involved in the management of the business. The ABA Model Code of Judicial Conduct contains few per se proscriptions of lawful extrajudicial activities. Canon 5C(2) flatly prohibits judges from acting as officers, directors, managers, advisors, or employees of any business. In the states where the prohibition applies, it is absolute. Lubet, Regulation of Judges' Business and Financial Activities, 37 Emory L.J. 1, 16 (1988). The prohibition applies to all businesses, without regard to the nature of the enterprise, the form of its organization, or even its possible location well beyond the jurisdiction of the judge's court. Lubet, Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct, 1986 Ariz. St. L.J. 379, 384 n. 23 (1986).

The Model Code as proposed contained a strict, and preferred, 5C(2), but also proposed an alternative, less strict 5C(2). Florida adopted the strict proposal. Under that provision, the Florida Committee on Standards of Conduct Governing Judges, when asked whether a Florida judge could serve on the board of directors of a closely-held, family corporation located in another state, concluded, although reluctantly, that such service was prohibited by Fla. Canon 5C(2). Fla. Adv. Op. No. 83/6 (1983).

The alternative 5C(2) allows judges to participate in business operations. But, the Traynor Committee, the drafters of the Model Code, suggested that states adopting the alternative might still wish to prohibit judges from engaging in certain types of businesses, such as banks, public utilities, insurance companies, and other businesses affected with a public interest. Thode, Reporter's Notes to the Code of Judicial Conduct 22-23 (1973). In order to avoid particular hardship, the Traynor Committee inserted a grandfather clause in the effective date of compliance section of the Code to allow continued service as an officer, director, or non-legal advisor of a family business as long as the demands on such judges' time and the possibility of conflicts of interest are not substantial, but remained adamant that its preferred 5C(2) was the proper approach. Thode, *supra*, at 80-83.

Of the 47 states that have adopted the Code, thirteen have adopted the permissive 5C(2). Eight have adopted the permissive 5C(2), but have also adopted the per se prohibition relating to businesses affected with a public interest. Lubet, Regulation, *supra*, at 27. Louisiana is one of the eight.

Seven Louisiana judges who had been serving on the boards of directors of various financial institutions before the adoption of the Code in Louisiana continued to serve on the boards after the Code was adopted. Disciplinary actions were brought against them. The Louisiana Supreme Court held their continued service on the boards of directors after adoption of the Code was in clear violation of the Code and constituted persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Babineaux, 346 So. 2d 676 (La. 1977), cert. denied, 434 U.S. 940 (1977).

The Nebraska Supreme Court did not adopt any of the Traynor Committee proposals of 5C(2) in the language of the proposals. Instead, the court adopted the strict formulation of 5C(2) with the addition of some unique local language. Neb. Canon 5C(2) provides:

Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity. [A judge may engage in such authorized personal investment activities in corporate form and act as officer, director, or employee of such personal corporation] but should not serve as an officer, director, manager, advisor, or employee of any [other] business.

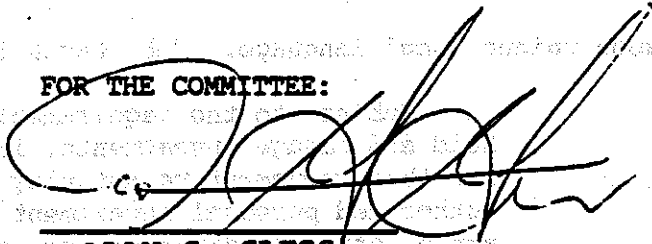
The bracketed language is the language the Nebraska Supreme Court added to the model language. A close reading of the Nebraska language in comparison with the model language shows the supreme court did not intend to allow judges to serve as officers, directors, managers, advisors, or employees of any businesses except the personal corporations referred to in the Canon.

The Nebraska Supreme Court adopted its version of 5C(2) on April 18, 1973, after a public hearing in January, 1973, of which no record was

kept. Other than the language of Neb. Canon 5C(2) there is no written or recorded evidence of the supreme court's intention. However, a reasonable interpretation is that a personal corporation is an entity in the nature of a closely-held, family type of business conducted in corporate form.

A bank is generally not the type of personal corporation referred to in Neb. Canon 5C(2). Generally, a bank would fit the description of any other business as described in Neb. Canon 5C(2). Therefore, in the absence of any indication that the banks the inquiring judge serves as a director fit within the description of a personal corporation or family business, see, Neb. Code of Judicial Conduct, Effective Date of Compliance (1987), the inescapable conclusion is that a Nebraska judge is absolutely prohibited from serving as a director of a bank.

FOR THE COMMITTEE:



ALAN G. GLESS

Six members of the Committee concurred in the above opinion; one member concurred in the conclusion only.



William D. Blue

Chairman