

Nebraska Ethics Advisory Opinion 95-2

Question Presented--

Under the Nebraska Code of Judicial Conduct (1992), may a Nebraska state court judge accept compensation for teaching as a adjunct faculty member at the state-supported college of law?

Statement of Facts

The inquiring judge has continued teaching as a adjunct faculty member at the University of Nebraska College of Law since being appointed to the bench. The inquiring judge accepted compensation for teaching before the judge's appointment and has declined compensation since the judge's appointment. Adjunct faculty members at the UNL Law College have no faculty status as such, have no right to participate in faculty decisions, and do not participate in faculty meetings. Adjuncts at the UNL Law College simply teach their assigned students, assess their students' progress, and evaluate their students' performance. Beyond that, adjuncts at the UNL Law College have no official standing as part of the university community and no official influence on any form of UNL Law College policy considerations or decisions. The Law College does not accord adjuncts the rank of even part-time faculty members. The inquiring judge once again wishes to accept compensation for service as an adjunct faculty member at the UNL Law College.

Applicable Code Sections

§4B, 4C(2), 4A(1), 4A(3), 4D, 4H, 4I, & 2A.

References in addition to Nebraska Code of Judicial Conduct

Discussion

Canon 4

Under §4B, judges are given express permission to engage in specific extra-judicial activities, including speaking, writing, lecturing, and teaching law, subject to all other requirements of the Nebraska Code of Judicial Conduct (1992), including the prohibition on public comment on pending and impending proceedings contained in §3B(9), a simple matter of circumspection.

Under §4C(2), judges generally cannot accept appointment to governmental positions other than their judicial positions. The limits on the rights and status of adjunct faculty members at the UNL Law College indicate no reasonable way to classify Law College adjuncts as persons holding a governmental position by virtue of their adjunct service. Thus, §4C(2) does not prohibit adjunct service at the UNL Law College.

Under §4A, judges must conduct all of their extra-judicial activities so that the judges' extra-judicial activities do not cast reasonable doubt on the judges' capacity to act impartially as judges. This code section, as with §3B(9), simply requires circumspection in the performance of the teaching function.

Under §4A(3), judges must not allow their extra-judicial activities to interfere with the proper performance of judicial duties. This code section simply requires that teaching judges exercise good time management practices.

Under §4D(1)(a), judges cannot engage in financial and business dealings that reasonably may be perceived to exploit the judicial position. Teaching judges can satisfy §4H(1)(a) by ensuring the compensation they receive for their teaching does not exceed the compensation paid to persons who are not judges for the same or similar teaching services.

Under §4D(2), judges specifically are permitted to engage in non-judicial remunerative activities, subject to all other requirements of the Code of Judicial Conduct.

Generally, §§4H and 4I require simply that judges who teach for compensation report their teaching compensation in their annual judicial financial interest reports. Judges who teach uncompensated have no reporting obligations.

None of the sections of Canon 4 prohibits a Nebraska state court judge from teaching for the UNL Law College. However, Canon 2 remains for discussion.

Canon 2

The only potential impediments in the Code to Nebraska state court judges teaching for compensation at the UNL Law College arise from §2A, which provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." §2A applies both to actual impropriety and to the appearance of impropriety.

a. Actual impropriety

The most serious problem arising under §2A relates to the potential for a separation of powers violation resulting from the acceptance by a judge of compensation for teaching in a state supported law college. We have no jurisdiction to resolve the potential separation of powers question. Thus, we cannot give an opinion on the question other than to point out that a judge who violates the constitutional separation of powers provision thereby also violates §2A of the Nebraska Code of Judicial Conduct (1992), an actual impropriety under the code. If accepting compensation for adjunct teaching services at the state supported law college does not violate the constitutional separation of powers doctrine, then §2A presents no actual impropriety impediment.

We advise the inquiring judge to seek a resolution of the separation of powers question from a proper authority before accepting compensation for adjunct teaching services at the state supported law college. We do note, however, the clear factual distinctions between the inquiring

judge's situation and the situations presented in *State ex. rel. Spire v. Conway*, 238 Neb. 766, 472 N.W. 2d 403 (1991) (state legislator/full-time college faculty in state college) and similar cases such as *In the Matter of Sawyer*, 286 Or. 369, 594 P.2d 805 (1979) (state court judge/part-time faculty member in state college), and others cited in *Conway*, 472 N.W. 2d at 416.

b. Appearance of impropriety

The Commentary to §2A contains the statement: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality is impaired." Commentary to §2A at p. 2. Thus, the perception of impropriety to which §2A relates is tied directly to a judge's ability to perform judicial duties with integrity and impartiality.

Whether a judge's conduct creates an appearance of impropriety explicitly covered by §2A is not a question of a generalized perception of impropriety. To the contrary, it is quite specific. We do not believe that reasonable minds could perceive an impairment of a judge's ability to perform judicial duties with integrity and impartiality simply because the judge accepts compensation for teaching at the UNL Law College, except in the very limited realm of litigation against the Law College or its faculty. However, the specific coverage of §2A does not bring discussion of the appearance of impropriety questions to an end. Another appearance of impropriety question remains.

The Preamble to the Code contains several points we need to emphasize:

..Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system...[T]his Code is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards...Preamble, at P. ix (emphasis added).

In keeping with these points, we are concerned that the public flavor of a member of the judicial branch accepting money from an institution considered to be part of the executive branch, no matter how well-deserved and no matter how well-earned, might create a generalized, public appearance of impropriety inconsistent with the best interests of the judiciary.

We advise the inquiring judge to consider this last point fully before accepting compensation from the UNL Law College. The inquiring judge should not confuse this last point with the resolution of the separation of powers question. This potential problem exists independently of the separation of powers question.

Of course, the inquiring judge remains ethically free to teach for the UNL Law College uncompensated.

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 Committee chairperson, Hon. Darvid D. Quist, District Judge.

APPROVED AND ADOPTED
BY THE COMMITTEE ON JULY 21, 1995