

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE

Advisory Opinion No. 90-3

A member of the Nebraska Judiciary has made an inquiry regarding the propriety of monetary contributions from members of the judiciary to the committee (COMMITTEE) supporting passage of Constitutional Amendment 2 (C.A.2). If adopted, C.A.2 would remove the absolute right of appeal to the Supreme Court in most cases and permit the establishment of an intermediate appellate court in Nebraska.

It is the opinion of the Judicial Ethics Advisory Committee that contributions of this type are not prohibited by the Code of Judicial Conduct. However, it is suggested that any contribution from a member of the judiciary be made in such a manner that it will not be interpreted as an endorsement by the contributing judge of fund raising activities by the COMMITTEE supporting passage of this amendment.

-COMMENT-

Three canons have a bearing on the subject matter of this inquiry. Canon 2 B provides in part that:

" - - - A judge should not lend the prestige of his or her office to advance the - - - interests of others; - - -."

One could argue that by making contributions to a private committee supporting the adoption of a constitutional amendment purporting to improve the legal system, and in particular the court structure, a judge would be displaying his or her partiality on an issue of general public interest and lending the prestige of his or her office to advance the interests of others outside the judiciary. It is submitted that such an interpretation of Canon 2 B would be unreasonable and unduly restrictive. The canons were not designed to prohibit reasonable participation in certain quasi-judicial activities by judges.

Canon 4 deals with the issue of when and to what degree a judge may become involved in quasi-judicial activities. This canon provides that a judge may engage in such activities if they do not cast doubt on his or her capacity to decide impartially any issue that may come before him or her. Included in sub-paragraph C of this canon is the following language:

"A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system,

or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. - - - "

While neither this canon nor any of the other canons specifically state that a judge may make monetary contributions to a quasi-judicial organization or committee, a fair interpretation of the language leaves no doubt that a judge may do so if the sole purpose for the use of those funds is earmarked for the purpose of improving the law, the legal system or the administration of justice.

The COMMITTEE has as its sole objective the adoption of C.A.2. It exists for no other reason or purpose. The increase in appellate litigation in Nebraska in the past few years is a matter of public record. The goal of C.A. 2 is to help relieve appellate congestion, therefore, the objective of the COMMITTEE cannot be said to be anything other than an attempt on its part to improve the legal system and thereby the administration of justice in Nebraska.

If a question should arise regarding judicial participation in the activities of this COMMITTEE (including the contribution of funds) because of the "political" context or nature of the subject involved, the matter would be governed by Canon 7 A (4) which provides in part:

"A judge should not engage in any - - - political activity except on behalf of measures to improve the law, the legal system, or the administration of justice."

Interestingly, and as a sidelight only, an examination of the proposed revisions in the code which will be submitted to the American Bar Association in Chicago during the annual meeting to be held in August of 1990 suggest that the Standing Committee on Ethics and Professional Responsibility recognizes the implications of the problem posed by the present inquiry. The commentaries and comments indicate that it is not the intent of the code to defeat or unreasonably limit a judge's participation in quasi-judicial activities that are designed to improve the law, the legal system or the administration of justice. The proposed revisions seem to liberalize the scope of a judge's participation in these activities so long as there is no appearance of improper influence by the use or prestige of the judicial office for fund raising activities.

-CONCLUSION-

It is obvious that in the situation at hand monetary

contributions are permissible under the code.

Adopted: August 13, 1990

William D. Blue

WILLIAM D. BLUE
CHAIRMAN

Concurring Opinion of Alan G. Gless:

I concur in the majority opinion, but write separately because more needs to be said. There is direct, authoritative support for our opinion in In re Staples, 105 Wash. 2d 905, 719 P.2d 558 (1976), which should not be ignored. Judge Staples believed an administrative decision of the state supreme court's chief justice would create a constitutional crisis in the state court system, as well as waste tax money. He advocated a constitutional amendment to prevent his perceived constitutional problem. To that end, he circulated petitions, ran ads in the newspapers, and made campaign speeches, but did not engage in fund raising. The campaign was controversial and highly visible. Judge Staples' amendment was narrowly defeated. The state judicial qualifications commission recommended to the supreme court that Judge Staples be publicly admonished for violating Canon 7 of the Washington Code of Judicial Conduct. The Washington Supreme Court unanimously refused to discipline Judge Staples and dismissed the complaint. The supreme court held that Canon 7A(4) permitted all of the activities in which Judge Staples had engaged, because the political question involved in the constitutional amendment he sought dealt with the administration of justice, his activities were non-partisan political activities, and there was no allegation or evidence that he had prejudiced his performance of his judicial duties by devoting too much of his time to the campaign.

Quoting Judge Irving Kaufman with approval in its opinion, the Washington Supreme Court noted:

In view of the growing concern about outside activities of judges, we think it important to reaffirm the principle that judges should not

become monastic, but should continued to work with the organized bar and the law schools of this country in efforts to improve the administration of justice. Judicial reform is no more a sport for the weak-hearted than it is for the short-winded. If judges should falter . . much of the motive power behind court reform would be lost.

The Canons of Judicial Ethics deserve careful study and possible revision, but the task should be undertaken calmly and deliberately, with full realization of the great value of judicial participation in the betterment of the law and legal institutions. Id., at 719 P.2d at 562.

Contributing funds to a committee supporting adoption of CA2 in Nebraska is likewise permitted under Canon 7A(4).

Jerry M. Gitnick and Robert O. Hippe join in this concurring opinion.