

## Nebraska Ethics Advisory Opinion No. 96-6

---

### **Question Presented--**

*A judge inquires: Would a contribution to the Committee for an Independent Judiciary (Committee) made by his spouse from an account which bears his name as joint tenant and which is composed of her contributions (account) violate the Nebraska Code of Judicial Conduct (Code)?*

---

### **Conclusion**

If the sole objective of the Committee is to promote the independence of the judiciary, then a contribution by the judge and/or the spouse from this account is not prohibited by the Code.

If the objective of the Committee is to support a "candidate," as defined in the Code, then a contribution from this account suggests political involvement by the judge and is inconsistent with the Code; however, a contribution by the spouse of her funds from a separate account would not be inconsistent with the Code.

### **Statement of Facts**

A judge in the Nebraska judiciary states:

In the course of discussing with my wife the organized attack on our current judicial system through the effort to defeat Justice Lanphier's retention, she revealed that she was going to make a contribution to the Committee for an Independent Judiciary, an organization preparing a counterattack.

Because the contribution would be made from an account which bears my name as joint tenant with her, I have prevailed upon her to consider delaying doing so for a bit so that I might have an opportunity to explore whether such would result in my violating the Nebraska Code of Judicial Conduct.

Although the account bears my name as well as hers, she has always controlled it and accumulated it over a number of years from gifts made to her, her earnings, and her social security benefits. Indeed, my name was added to the account for the first time earlier this year.

### **Applicable Code Sections and Other Authority**

#### Nebraska Authority:

Neb. Const. art. V, § 21.

Neb. Rev. Stat. § 24-813 et seq. (Reissue 1995); Neb. Rev. Stat. § 30-2716 et seq. (Reissue 1995);

Neb. Rev. Stat. § 30-2701(4) (Reissue 1989).

Neb. Code of Jud. Cond., Canons 1, 2A, 4B, 4C(3)(b)(i), 5A(1)(e), 5C(1)(a) through (3), 5C, and 5D (rev. 1996).

Advisory Opinion No. 90-3.

#### Other Authority:

*Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); *Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993); *In re McGregor*, 614 So. 2d 1089 (Fla. 1993); *In re Turner*, 573 So. 2d 1 (Fla. 1993); *Matter of Sallee*, 579 N.E.2d 75 (Ind. 1991); *Matter of Briggs*, 595 S.W.2d 270 (Mo. 1980); *In re Gaulkin*, 69 N.J. 185, 351 A.2d 740 (1976).

#### Advisory Opinions:

U.S. Compendium of Selected Opinions § 7.3(a) (1995); West Virginia Advisory Opinion (June 19, 1991, and August 28, 1995); Kansas Advisory Opinion JE-13 (July 9, 1985); New Hampshire Advisory Opinion 78-3 (Sept. 13, 1978); Florida Advisory Opinion 84-19 (Sept. 26, 1984).

#### Article:

Cynthia Gray, *Political Activity by Members of a Judge's Family*, American Judicature Society (1996).

### **Discussion**

#### The Account

The "Statement of Facts" section indicates that the account bears the judge's name as a joint tenant, that his name was added earlier this year, and that the accumulated amount is the result of the spouse's contributions. This committee understands the description of this account to be a multiple-party account, pursuant to the adoption of the uniform multiple-person accounts statutes under 1993 Neb. Laws, L.B. 250. See Neb. Rev. Stat. § 30-2716 et seq. (Reissue 1995). "Multiple-party account means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned." § 30-2716(5). The current definition of "party" is "a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent." § 30-2716(6). This committee is aware that under prior Nebraska statutes a "joint account" was defined as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." Neb. Rev. Stat. § 30-2701(4) (Reissue 1989).

Pursuant to the foregoing, this committee understands that this account is a multiple-party account and, therefore, payable on request to the judge without regard to the source of the deposit. See § 30-2722. According to § 30-2722(b), "As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount." The effect of a multiple-party account is that a contribution from this account may be logically attributable to the judge. The propriety of a contribution from this account will be evaluated by this committee in accordance with the foregoing understanding.

#### Committee for Independence of Judiciary

Canon 4C of the Code entitled "Governmental, Civic or Charitable Activities" provides at section (3)(b):

A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise: (i) may assist such an organization in planning fund raising and may participate in the management and investment of the organization's funds, but shall not participate personally in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority.

Canon 4B provides: "Avocational Activities. 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."

The commentary to Canon 4B states:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice . . . . Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession . . . .

Prior to the adoption of the current Code on May 28, 1992, with an effective date of September 1, 1992, this committee issued ethics advisory opinion No. 90-3. In opinion No. 90-3, the judge inquired into the propriety of monetary contributions to the committee supporting passage of "Constitutional Amendment 2" (C.A.2), which would remove the absolute right of appeal to the Nebraska Supreme Court in most cases and permit the establishment of an intermediate appellate court in Nebraska.

Opinion No. 90-3 opined under the predecessor Canon 4C, the language of which is consistent with current Canon 4C(3)(b)(i), that the judge could make such a contribution. Opinion No. 90-3 states:

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 judge.

Opinion No. 90-3 notes that the committee under consideration in that inquiry "has as its sole objective the adoption of C.A. 2. It exists for no other reason or purpose."

In the instant inquiry, the Committee is said to be preparing a counterattack to "the organized attack on our current judicial system." This Committee is called the Committee for an Independent Judiciary. Efforts by judges to promote the independence of the judiciary are specifically favored by the commentary to Canon 4B. The judge's inquiry indicates that the current judicial system is under attack. The current judicial system features, inter alia, the merit selection of judges and their periodic retention. Neb. Const. art. V, § 21; Neb. Rev. Stat. § 24-813 et seq. (Reissue 1995). If the sole objective of the Committee is the promotion in general of an independent judiciary through this process there is no prohibition in the Code to contributions made from this account. Based on, but not limited to, the reasoning of opinion No. 90-3 and Canons 4B and 4C(3)(b)(i), monetary contributions by a judge and, a fortiori, his spouse, from a multiple-party account are permissible under the Code where the Committee receiving such funds has as its sole objective the promotion of the independence of the judiciary.

## Committee to Conduct Campaign for Retention of Judicial Candidate

Canon 5D provides: "Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law."

Canon 5A(1)(e) provides:

### A. All Judges and Candidates[.]

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

....

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions. Under the Code, the term "candidate" is defined as

... a person seeking selection for or retention in judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the secretary of state or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Sections 5A, 5B, 5C, and 5E.

Canon 5C(1)(a) through (e) provides:

### C. Judges Subject to Retention Election.

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

(a) purchase tickets for and attend political gatherings;

(b) contribute to a political organization;

(c) speak to gatherings on his or her own behalf;

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

(e) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

The commentary to Canon 5C(1) states in part: "Section 5C(1) permits judges subject to retention election with active opposition to be involved in limited political activity."

Canon 5C(2) provides:

A judicial candidate for retention election whose candidacy has drawn active opposition shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A judicial candidate for retention election whose candidacy has drawn active opposition may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than six months before an election and no later than 30 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

We note that Canon 5C(2), which describes the terms and conditions of the operation of the committees which a challenged judge may establish, states that "[s]uch committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers," but the Canon is silent regarding the propriety of contributions by judges. The commentary to Canon 5C(2) does indicate, however, that "the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances." We further note that Canon 5C(2) provides that the campaign committee cannot solicit contributions or public support earlier than 6 months before the election and no later than 30 days after the election. Based upon these time limitations, it is clear that committee activities are tied to the political electoral season.

Taking the foregoing canons and commentary together, it is clear that the judicial candidate and a committee formed to conduct a campaign for the retention of a judicial candidate engage in and are permitted to engage in limited political activity. The candidate is excused from the general proscription against political activity by judges due to the fact of an active opposition. Other judges who are not candidates are not so excused.

A judge shall uphold the integrity and independence of the judiciary. Canon 1. A judge shall avoid impropriety and the appearance of impropriety and shall act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2A. It is axiomatic that judges are not to engage in political activity, except as authorized by the Code or law. Canon 5D. We recognize other states have different electoral and/or retention systems. Nevertheless, for guidance we refer to the following examples which illustrate prohibited activity: *Matter of Codispoti*, 190 W. Va. 369, 438 S.E. 2d 549 (1993) (pertaining to magistrate's activities in connection with his wife's candidacy for circuit judge); *In re McGregor*, 614 So. 2d 1089 (Fla. 1993) (pertaining to judge's activity in connection with his wife's candidacy for clerk of court); *In re Turner*, 573 So. 2d 1 (Fla. 1993) (pertaining to judge's activities in connection with his son's candidacy for county court judge).

If the Committee identified in the judge's inquiry is a committee established to conduct a campaign for a judicial candidate for retention election whose candidacy has drawn active opposition pursuant to Canon 5C(2), then it is the opinion of this committee that a contribution to the Committee would be political in nature and a judge would be prohibited by the Code from making a contribution to such Committee.

The judge's question indicates that it is his wife who is contemplating a contribution to the Committee from a multiple-party account which bears his name and inquires as to whether such a contribution would be improper as to the judge. The subject of spousal activities are treated in an article distributed in 1996 entitled "Political Activity By Members of a Judge's Family" by Cynthia Gray of the American Judicature Society under a grant from the State Judge Institute. The article notes that the 1972 American Bar Association Model Code of Judicial Conduct provided, in Canon 7B(1)(a), that a candidate judge "should encourage members of his family to adhere to the same standards of political conduct that apply to him," but that this provision has been superseded by the 1990 model code language, which in Canon 5A(3)(a) provides that "[a] candidate for judicial office . . . shall encourage members of the candidate's family to adhere to the same standards of political conduct *in support of the candidate* as apply to the candidate." (Emphasis supplied.) As of May 1996, Gray reports that 15 states, including Nebraska, added the "in support of the candidate" qualification, which implies that the family members of judges are to be encouraged to adhere to the political conduct of judges only where their family member is a judicial candidate. The commentary to Canon 5A(3)(a) states: "Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to

the candidate, family members are free to participate in other political activity." The limited duty expressed in Canon 5A(3)(a) is inapplicable to the instant inquiry because the judge is not a candidate.

*In re Gaulkin*, 69 N.J. 185, 193, 351 A.2d 740, 744 (1976), the Supreme Court of New Jersey reviewed its earlier opinions which had limited the political activities of the nonjudicial spouse and which had caused the nonjudicial spouse to forebear from running for school board; the court found the earlier opinions to be inconsistent with "the trend of modern law which reflects society's realistic appreciation of the independence of both spouses in marriage." Referring to the First Amendment, the *In re Gaulkin* court observed that our system of government is predicated upon the premise that every citizen shall have the right to engage in political activity. See *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311, (1957). Although as a result of *In re Gaulkin*, the New Jersey Supreme Court approved of spousal political involvement, it stated that the court was, nevertheless, determined that every precaution would be taken to assure that the judiciary itself would continue its careful separation from direct or indirect involvement in politics. The *In re Gaulkin* court observed that to avoid the appearance of impropriety, the court

. . . would regard the use of any part [of marital assets] in the political forum as degrading to the court and plainly within the reach of the adjuration that the judge abstain from politics. Such assets normally are marked by a lack of an identifiable interest of either spouse, thus at least suggesting indirect involvement of the judge.

69 N.J. at 199-200, 351 A.2d at 748. See, also, *Matter of Sallee*, 579 N.E.2d 75 (Ind. 1991) (reprimanding judge who delivered check drawn on joint account with his wife to political campaign of candidate for Secretary of State); *Matter of Briggs*, 595 S.W.2d 270 (Mo. 1980) (removing judge from office for various improper activities including making contributions to political candidates on checks drawn by his wife from a joint bank account in which the judge's paychecks were deposited). Numerous judicial ethics advisory opinions indicate that, provided contributions are made from the spouse's separate funds, preferably from a separate account, a judge's spouse may make financial contributions to political candidates. See, West Virginia Advisory Opinion (June 19, 1991 and August 28, 1995); Kansas Advisory Opinion JE-13 (July 19, 1985); New Hampshire Advisory Opinion 78-3 (Sept. 3, 1978); Florida Advisory Opinion 84-19 (Sept. 26, 1984); U.S. Compendium of Selected Opinions § 7.3(a) (1995).

In evaluating a spousal political contribution, the committee for federal judges advises that the judge must play no role in the decision to contribute and must make "reasonable efforts to insure that the contribution is perceived as that of the spouse and not the judge, including, but not limited to, requiring that the contribution be made from a separate account over which the judge has no control." *U.S. Compendium of Selected Opinions*, *supra*. The previously cited state advisory opinions tend to be less strict.

It is clear from the foregoing that the spouse of the judge is free to participate in political activity with the caveat that with respect to the judge's own campaign, not at issue here, the judge has a duty to encourage his family to comply with the standards of political conduct to which he is bound under the Code. Provided that contributions are made from the spouse's separate funds, the judge's spouse may make financial contributions to political candidates, including a judicial candidate for retention. However, to the extent that the Committee identified in the judge's inquiry has been organized to campaign for the retention of a judicial candidate and the funds are proposed to be drawn from a multiple-party account which bears the judge's name, the proposed contribution would be problematic for the judge. The judge has a present interest in the multiple-party account, and the presumption is that one-half of the funds are his. A contribution from such an account suggests the involvement of the judge and may appear to violate the prohibition against political activity. This

committee therefore advises that the contribution to the Committee by the spouse, if any, be made from a separate account of the wife consisting of her separate funds.

**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 17, 1996*

Judge Darvid Quist, Chairperson  
Judge Cloyd Clark, Vice Chairperson  
Judge Michael McGill  
Judge Lindsey Miller-Lerman  
Judge Donald Rowlands  
Judge Stephen Swartz  
Judge Toni Thorson