

Nebraska Judicial Ethics Opinion 08-2

Question Presented --

Can a judge permit judicial staff attorneys to provide legal representation for individual clients apart from their regular employment with the State?

Conclusion

The Nebraska Code of Judicial Conduct does not prohibit judicial staff attorneys from providing legal representation for individual clients outside their regular employment by a court. The Judicial Ethics Committee has no authority to establish guidelines for personnel policies and procedures.

Statement of Facts

A judge requests an advisory opinion. Two staff attorneys from the judge's court wish to take on cases from the Nebraska Volunteer Lawyer Project (VLP). The attorneys have been able to learn the names of potential clients and have been able to ascertain that the potential clients have no current litigation in the judge's court. It is their intention to use no state resources or time for any activities relating to the pro bono representation.

The court asks whether it is permissible for judicial staff attorneys to provide legal representation for individual clients apart from their regular employment with the State? If so, what limitation might be placed on the representation (in addition to any ethical obligation from the Nebraska Code of Judicial Conduct)? Further, what guidance can be provided with respect to avoiding the appearance of impropriety in any representation?

Applicable Code Sections

Neb. Code of Jud. Cond., Canon 3C(2)
Neb. Code of Jud. Cond., Canon 3B(4)
Neb. Code of Jud. Cond., Canon 3B(5)
Neb. Code of Jud. Cond., Canon 3B(7)
Neb. Code of Jud. Cond., Canon 3B(9)
Neb. Code of Jud. Cond., Canon 4C(3)(b)(iv)
Neb. Code of Jud. Cond., Canon 2

Discussion

The Judicial Ethics Committee has authority to express its opinion on proper judicial conduct with respect to the provisions of the code. It does not have authority to express its opinion on personnel policies and procedures for any employee of the respective courts including staff attorneys, career law clerks, law clerks, or any other employee who may have a license to practice law.

The Code does not prohibit a judge from allowing court staff under the judge's supervision to practice law.

The Code requires a judge to control and supervise court staff under the judge's direction to act in a manner consistent with the judge's obligation under the Code. For example, under Canon 3C(2), "A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties." A judge must also ensure staff members are courteous (Canon 3B(4)), do not manifest bias or prejudice (Canon 3B(5)), do not allow ex parte communications (Canon 3B(7)), do not make improper public comment (Canon 3B(9)), and do not solicit funds on the judge's behalf even for charitable purposes (Canon 4C(3)(b)(iv)).

Courts have personnel policies and procedures that address outside employment by employees. If a judge determines that court staff under the judge's supervision are allowed outside employment to practice law, then the judge must in addition see that the employee is supervised within the above code guidelines. Staff attorneys, law clerks, and other employees having a license to practice law are held to a higher standard than other employees. They must comply with employment policies and procedures. Because of their education, experience, and license to practice law, they are expected to understand the judge's duties and responsibility under the Nebraska Code of Judicial Conduct. They must also comply with the Rules of Professional Conduct.

Canon 2 provides, "A judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities." Under its comments, the Code provides, "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." This suggests that if the judge permits outside employment by staff, then he must satisfy this canon. Without attempting to limit the questions the judge must consider, we point out the following:

- (1) The outside employment is not with an entity that regularly appears in court or conducts business with the court system and it does not require the court employee to have frequent contact with attorneys who regularly appear in the court system.
- (2) The work is capable of being fulfilled outside normal working hours, without court resources, and is not incompatible with the performance of the court employee's duties and responsibilities.
- (3) It does not require disclosure of confidential information acquired in the course of official duties.
- (4) Where a conflict of interest exists or may reasonably appear to exist or where the outside employment may reflect adversely on the integrity of the court, the employee must inform the judge prior to accepting the outside employment.

These represent only a few of the considerations a judge must consider in making this decision. The Nebraska Code of Judicial Conduct cannot control the employee and the Judicial Ethics Committee has no authority to establish personnel policies and procedures.

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 Judicial Ethics Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON JUNE 6, 2008

*Judge John F. Steinheider
Judge Carlton E. Clark
Judge John A. Colborn
Judge Robert B. Ensz
Judge Lawrence D. Gendler
Judge William B. Cassel
Judge Sandra L. Dougherty*