

Nebraska Judicial Ethics Committee  
Advisory Opinion 93- 3

**ISSUE**

Can a judge of a juvenile court serve as a member and/or serve as the chair of the Nebraska Commission for the Protection of Children?

The Nebraska Commission for the Protection of Children was created by Governor E. Benjamin Nelson in July 1991. Its purpose is set forth as follows:

To develop and evaluate methods to improve the investigative, administrative, and judicial processes which constitute the response and support mechanisms for children and families at risk or experiencing abuse and neglect; and to establish an achievable implementation plan which will result in accessible, coordinated, equitable, and effective systems for children and their families.

The Commission is comprised of 20 individuals who represent the following areas: law enforcement, judiciary, child advocates, health and mental health professionals, child protective services, education, professionals who have experience working with children with disabilities, parents, representatives of parents' groups, legislators, and the business community. The Commission is charged with the responsibility for addressing all segments of services for children and families including child protection, foster care, child abuse prevention efforts, and services to youth adjudicated as status offenders. The governor has designated the Commission as a standing committee so that it will be able to monitor the

effectiveness of its recommendations and hold accountable those charged with the implementation process. At present, there are four judges and one state senator who serve on the Commission.

The judge requesting the opinion was elected vice chair by the Commission and the chair has since resigned. The judge has served as acting chair and is potentially the Commission's next chair.

#### APPLICABLE CODE SECTIONS

The applicable sections of the "Nebraska Code of Judicial Conduct" (1992) state:

**CANON 4. A JUDGE SHALL SO CONDUCT ALL EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.**

C. (2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law; the legal system or the administration of justice. A judge may, however, represent a county, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law; the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely the organization will be engaged frequently in adversary proceedings in the court of which the

judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

**CANON 2. A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.**

A. 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.

The commentary to this section provides in part:

Actual improprieties under this standard include violations of law, court rules or other specific provisions in this Code. 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.

**DISCUSSION**

It is the function of the Judicial Ethics Committee to render advice on the Canons of Judicial Ethics and not to render opinions on matters of law. However, in the present situation there is an additional issue of whether the judge's membership on the Commission could violate article II, § 1 of the Nebraska Constitution, which provides: "The powers of government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to

either of the others, except as hereinafter expressly directed or permitted."

In State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), the court held that Conway, as a state senator and an employee of a state college, was therefore a member of the executive branch exercising the powers of the legislative branch and as a consequence, was in violation of art. II of the Nebraska Constitution. The court stated: "As a consequence, article II prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Conway, 238 Neb. at 782, 472 N.W.2d at 412.

The first question is whether the judge, as a member of the Commission, is a member of the executive branch. Secondly, is the judge, by holding both positions, in violation of article II, § 1 of the Nebraska Constitution. Without giving an opinion, we point out there is a possibility that the judge, being a member of the Commission, is a member of both the executive branch and the judicial branch. Therefore, the judge should request an opinion from the Attorney General whether his occupation as a judge and his service as a member of the Nebraska Commission for the Protection of Children violates art. II, § 1 of the Constitution of the State of Nebraska.

The issue for our consideration is whether membership on such a commission is a violation of the Nebraska Code of Judicial Conduct. Under Canon 4C(2), a judge is prohibited from accepting

any governmental position except one relating to the law, legal system, or administration of justice as authorized by Canon 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in the light of the demands on judicial resources and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

The Commission for the Protection of Children is charged with the responsibility for addressing all segments of Nebraska services for children and families. A judge is permitted to serve as an officer of a governmental agency devoted to the improvement of the law, the legal system, or the administration of justice, 4C(3). The Commission's stated purpose appears to be devoted to improvement of the law, the legal system, and the administration of justice. Therefore, we do not find any prohibition of membership in the Commission or violations of the Nebraska Code of Judicial Conduct under Canon 4C.

Under Canon 2, our question for consideration is whether membership in the Commission would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality is impaired.

The Nebraska Commission for the Protection of Children . . . exists to identify, promote, and implement strategies to assure that Nebraska's children are provided with safe, nurturing environments for development and growth. The Commission also accepts as an integral part of its role

actively supporting the work of people who provide direct services to children in Nebraska. The Commission also functions as a catalyst to facilitate the implementation of private-public partnerships for child protection. The Commission seeks to enhance the public awareness of issues to child protection, and to mobilize public support for child-protection efforts in Nebraska. (Statement of Mission, Nebraska Commission for the Protection of Children.)

We find that membership on the Commission would not create a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality would be impaired.

#### CONCLUSION

In the event it is determined that the judge's membership on the Nebraska Commission for the Protection of Children violates the distribution of powers clause found in Neb. Const. art. II, § 1, then the judge would not be permitted to serve on the Commission, since membership would be a violation of Canon 2 of the Nebraska Code of Judicial Conduct.

A determination whether the Commission membership is in violation of article II of the Nebraska Constitution should be made by the Attorney General for the State of Nebraska. The Judicial Ethics Committee does not render opinions involving matters of law.

If membership on the Commission does not violate art. II § 1 of the Nebraska Constitution, we find that the Nebraska Code of Judicial Conduct would not prevent the judge from serving on the Commission. However, the Code governs the judge's activities on such Commission and the nature of this organization may require the

judge to regularly reexamine the activities of the organization to determine if it is proper to continue membership on the Commission.

APPROVED AND ADOPTED BY THE COMMITTEE ON September 22, 1993

*Darvid D. Quist*, Chair  
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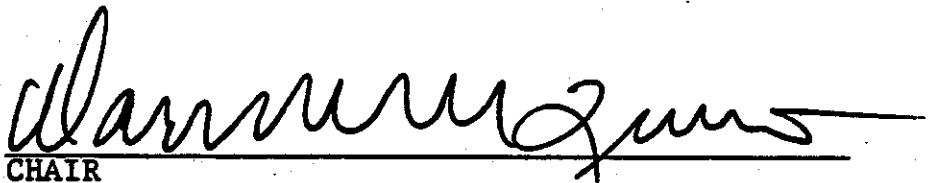
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ADDENDUM TO ADVISORY OPINION 93-3

Our original opinion states that the judge should request an opinion from the attorney general whether his occupation as a Judge and his service as a member of the Nebraska Commission for the Protection of Children (Commission) violates article II, § 1 of the Constitution of the State of Nebraska. The Committee points out that perhaps a more appropriate method of obtaining an opinion would be for the Commission to request an opinion from the attorney general, rather than the judge, who is a member of the judicial branch. The Committee does not attempt to limit or direct the manner in which the judge may obtain such a determination, but feels that the Commission would have standing to make such a request.

The above addendum is adopted by the Committee this 12 day of November, 1993.

  
CHAIR

