

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE
Advisory Opinion No. 93-5

A. FACTS

A member of the judiciary sets forth, in some detail, the potential participation of a judge on institutional bioethical committees. These committees are regularly meeting committees of hospitals, nursing homes and other medical facilities. The judge acknowledges that he would not give legal advice. He goes on to recite that, because of the likelihood of litigation, recusals could occur frequently. Further, he says that his participation may create a perception of bias on his part because people may believe that he would be more influenced by a medical viewpoint than a legal viewpoint. The inquiry does not differentiate between public or private or charitable institutions.

B. QUESTION

May judges of a multi-judge court rotate service on an institutional bioethics committee?

C. ANSWER

No.

D. APPLICABLE CANONS

The following Canons of the Code of Judicial Conduct apply to the above described situation:

Canon 2 provides that "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.

Canon 3 provides that "a judge shall perform the duties of judicial office impartially and diligently."

A. JUDICIAL DUTIES IN GENERAL. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

C. ADMINISTRATIVE RESPONSIBILITIES.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

E. DISQUALIFICATION.

(1) A judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Canon 4 provides as follows: "A judge shall so conduct all extra-judicial activities as to minimize the risk of conflict with judicial obligations."

A. Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge.

(3) interfere with the proper performance of judicial duties.

B. 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.

C. Government, civil or charitable activities.

(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

country, 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 the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that 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.

D. DISCUSSION

Bioethics is undoubtedly one of the most interesting new areas of study. It brings together competing medical, legal, philosophical, theological, and other disciplines in a context unthought of a decade ago.

The role of a judge is a full-time job. Canon 3A provides that "The judicial duties of a judge take precedence over all the judge's other activities."

The Code of Judicial Conduct goes on to give examples of what a judge may or may not do. Under Canon 4B, entitled "Avocational Activities," the Code provides "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."

Under section 4C entitled "Governmental, Civic or Charitable Activities," the Code talks about a judge participating in both legal and non-legal organizations. However, subsection (a) provides "A judge shall not serve as an officer, director, trustee or non-legal advisor if it is

likely that 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."

The Code, on the question of recusals, does not appear to address the question of multi-judge districts. It is clear, however, that recusals are to be avoided whenever possible. As additional support for this proposition, see Canon 4D(4) wherein a judge is required, if he can do so without serious financial detriment, to dispose of those investments which might require frequent disqualification.

As a general rule, the committee concludes that service on this type of a committee, while it certainly may be viewed as commendable, is not permissible. One group of commentators made the following observations:

Even ideologically neutral organizations may be engaged regularly in adversary proceedings. Thus, judges should not serve on the boards of child welfare associations which receive family court referrals or otherwise appear before the juvenile courts, or of mental health organizations which may be involved in commitment proceedings. A recurring problem is the service by judges as officers or trustees of non-profit hospitals. The commentary . . . points out that many charitable hospitals are frequently in court, and cautions judges regularly to reexamine their relationships with such organizations.

J. Shaman, S. Lubet, J. Alfani, Judicial Conduct in Ethics 1990 at pg. 269.

E. CONCLUSION

For the foregoing reasons, the Committee is of the opinion that a sitting judge should not be a member of an institutional bioethical committee.

Approved and adopted by the committee on Mar 19, 1993.


Chair