

# Nebraska Ethics Advisory Opinion 97-6

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## ***Question Presented--***

*May a judge accept appointment to be a member of a Community Response Team which mobilizes community resources to reduce and prevent domestic violence by developing a coordinated approach to respond to crimes of domestic violence?*

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## **Conclusion**

Judges must avoid membership in even the most praiseworthy of nonjudicial organizations if they espouse or are dedicated to a particular legal philosophy or position.

## **Statement of Facts**

A trial judge has been asked to accept appointment to be a member of the Community Response Team. The stated goals of the Community Response Team are (1) victim safety and (2) batterer accountability. The objectives of the organization include the following: (1) ensuring the availability and accessibility of a network of interventions that provide safety, healing, and support for victims and their families to help break the cycle of domestic violence; (2) fully utilizing the community's civil and criminal justice system to protect victims, hold abusers accountable for their violent behavior, and enforce society's intolerance for domestic violence; and (3) engaging the whole community in prevention efforts designed to change the norms, attitudes, behaviors, and social conditions that lead to domestic violence.

## **Applicable Code Sections**

Neb. Code of Jud. Cond., Canons 2A, 4A, and 4C(3)(a) (rev. 1996)

## **References in Addition to Nebraska Code of Judicial Conduct**

Nebraska Ethics Advisory Opinions 91-2, 97-1

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* §§ 9.10, 9.11, and 9.12 (2d ed. 1995); Oregon Judicial Conduct Comm., Opinion 78-4 (1978); Florida Comm. on Standards of Conduct Governing Judges, Opinion 82-18 (Dec. 13, 1982); South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion 91-4 (May 24, 1991); Louisiana Supreme Court Committee on Judicial Ethics, Opinion 89 (Mar. 18, 1991); Matter of Castellano, 119 N.M. 140, 889 P.2d 175 (1995); California Judges Association Committee on Judicial Ethics, Opinion 46 (July 1997).

## **Discussion**

The Nebraska Code of Judicial Conduct provides:

## CANON 4

### 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;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

As discussed in Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 9.10 (2d ed. 1995), the Code of Judicial Conduct proscribes certain forms of participation in various sorts of organizations. The Shaman treatise cautions:

A judge may not engage in any activities which reflect adversely on his or her impartiality, or which interfere with the performance of judicial duties. Additionally, a judge may serve as a director, officer, or trustee of a charitable, educational, religious, fraternal, or civic organization only if it is not conducted for profit. Finally, a judge should not serve an organization that is likely to be engaged in proceedings that would ordinarily come before the judge.

Obviously, a judge who is charged with dispensing justice to all could not appear impartial if he or she belonged to the Ku Klux Klan or any other organization which promotes bias or prejudice. However, a well-intentioned judge who belongs to an advocacy group which supports certain public policy positions can give a similar appearance of partiality or bias to the general public. Perhaps a few examples will illustrate the point.

Advisory opinions have been issued to judges in Oregon and Florida that membership in an "antishiplifting" organization or in Mothers Against Drunk Driving would call into question a judge's ability to preside fairly over theft or drunk-driving prosecutions. See, Oregon Judicial Conduct Comm., Opinion No. 78-4 (1978); Florida Comm. on Standards of Conduct Governing Judges, Opinion 82-18 (Dec. 13, 1982). For the same reason, judges in South Carolina and Louisiana have been advised not to serve on the boards of rape crisis organizations. South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion 91-4 (May 24, 1991); Louisiana Supreme Court Committee on Judicial Ethics, Opinion 89 (Mar. 18, 1991). The Federal Advisory Committee on Judicial Activities has concluded that federal judges are prohibited from being officers, directors, or trustees of the Anti-Defamation League of B'nai B'rith, the Sierra Club, and the National Association for the Advancement of Colored People. Federal Advisory Comm. on Judicial Activities, Advisory Op. No. 40 (Jan. 10, 1973). And judges in New Mexico, Maryland, and Missouri are precluded from serving 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. Matter of Castellano, 119 N.M. 140, 889 P.2d 175 (1995); Maryland Judicial Ethics Comm., Op. No. 6 (Mar. 1, 1972); Missouri Comm. on Retirement, Removal and Discipline, Op. No. 91 (Nov. 19, 1982).

The Matter of Castellano decision is particularly noteworthy because a judge whose duties included handling abuse and neglect cases was removed from office by the New Mexico Supreme Court. One of the cited reasons for removal was Judge Castellano's ties to and fundraising for a program known as First CASA, which provided volunteers to assist children involved in abuse and neglect cases. The Special Masters appointed by the court concluded that the judge had created an appearance of impropriety in that he conveyed the impression or allowed others to create the appearance that persons would be in a special position to influence the judge by making contributions to First CASA. They also found that Judge Castellano used First CASA as an organization and the funds it raised to place himself and his work in abuse and neglect cases at the center of attention to further his own interests.

Our opinion in the instant inquiry was foreshadowed by the concurrence to Nebraska Advisory Opinion 91-2, issued by this committee under the 1987 version of the Nebraska Code of Judicial Conduct, wherein it was stated:

The critical perception is the public's perception. Judges have no practical means by which they may disavow for public consumption selected policy positions of the organizations the judges choose to join. The public, or at least those segments of the public who tract specific special interest issues, may be justified in believing the judges who join advocacy groups support the policy positions of the organization the judges join. Judges' perceptions of their own extrajudicial activities and judges' ability to set aside their personal beliefs, both real and apparent, are irrelevant. \* \* \*

The key the inquiring judge should remember in answering those questions is that maintaining the appearance of judicial impartiality is more important to society than any benefits any extrajudicial organization of which the judge is a member can provide to society. Lubet, S., When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs, 69 *Judicature* 199 (1986).

Professor Lubet in his article for *Judicature* notes that victim assistance programs operate functionally in aid of the prosecution. They are advocates who are partisan, not neutral, in the criminal justice process. The "victim" is frequently the complaining witness for the prosecution, and the "offender" or "abuser" is the defendant whose constitutional rights the judge is sworn to protect. A judge's official involvement with victim witness or victim assistance programs cannot but compromise the appearance of the judge's impartiality.

The simple but insightful bright line test which Professor Lubet advances is as follows: Judges may endorse and promote the concept of victim advocacy programs, but should avoid direct involvement with any particular organization.

The California Judges Association Committee on Judicial Ethics, recently released Opinion 46 (July 1997). Although the committee stated it was impossible to draw a bright line between permissible and impermissible participation in organizations addressing issues involving social problems in the community, the opinion warns judges:

Whenever a group engages in advocacy with respect to substantive legal issues,

participation by judges should be scrutinized with great care. If the group engages in such advocacy as to make judicial participation improper, it is not permissible to separate the judge from the advocacy functions of the organization and limit his or her involvement to the non-advocacy functions of the organization since the public will nevertheless perceive the judge as fostering the advocacy functions of the organization.

Factors to be considered in determining whether judicial participation is appropriate include: (1) the extent to which the group engages in political or advocacy activities; (2) the extent to which group is perceived by the public as engaging in political or advocacy activities; (3) the size and public prominence of the organization; (4) whether the issues which concern the group are likely to come before the court; (5) whether the group is concerned with procedural or substantive changes in the law or in the application of the law; (6) whether the judge is participating in a policy making position; (7) the fundraising activities of the group.

No single one or combination of these factors is necessarily determinative. The ultimate test for judicial participation in such bodies is whether the judge's association with the group, and the necessarily resulting public perception that the judge supports the goals of the group, is likely to lead to a public perception that the judge's impartiality in administering the law may be questioned. \* \* \*

In determining whether to join a private organization and/or government board, a judge also has an affirmative duty to learn sufficient information about the organization or governmental board so that the judge can determine whether participation would violate the Code of Judicial Ethics.

The same principles which were started in 1991 remain applicable today under the revised version of the Nebraska Code of Judicial Conduct. Regardless of whether one uses a bright line test or a balancing of factors test, judges are required to avoid membership in or appointment as officers, directors, or trustees of even the most praiseworthy of organizations if they espouse or are dedicated to a particular legal philosophy or position. A judge is absolutely prohibited from being a member, officer, director, or trustee of a Community Response Team which has as a stated objective of "fully utilizing the community's civil and criminal justice system to protect victims, hold abuser's accountable for their violent behavior, and enforce society's intolerance for domestic violence."

### **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 JANUARY 23, 1998

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