

Nebraska Judicial Ethics Opinion 06-4

Questions Presented--

The question presented in this case concerns a district court judge's participation in a seminar about defense of driving under the influence (DUI) cases, titled "DUI Defense in the 21st Century," put on by the Nebraska Criminal Defense Attorneys Association (NCDAA). The question is whether the judge's participation is proper where he intends to present his perspective on effective motions to suppress; the title of his presentation in seminar publicity materials suggests that his presentation is, "A Judge's Personal Perspective on Motions to Suppress. What's Effective and What's Not." Other featured speakers are nationally known experts on various topics about challenging DUI charges, and the seminar publicity materials make clear that the NCDAA is committed to supporting criminal defense attorneys and solicits membership and payment of membership dues.

Conclusion

The Nebraska Code of Judicial Conduct does not bar judges from participating in continuing education seminars. However, the totality of the circumstances in the present case suggest that the judge should not participate in this seminar and, in the future, more caution must be taken concerning references to judicial participation in seminar publicity materials for continuing education seminars sponsored by specialized bar associations.

Statement of Facts

The Judicial Ethics Committee, both sua sponte and at the request of the judge, offers an advisory opinion on the above question. Although certain details are not available to the Committee, the following factual circumstances are known:

The judge has been invited to speak at an upcoming seminar of the NCDAA titled, "DUI Defense in the 21st Century." The judge's proposed presentation is titled, "A Judge's Personal Perspective on Motions to Suppress. What's Effective and What's Not." There is no indication whether the judge is going to receive a financial gift or remuneration for his comments. A review of the seminar's itinerary and publicity materials suggests that the seminar is primarily geared toward successful defense of criminal DUI cases.

The publicity materials for the seminar tout that "NCDAA is well known for presenting excellent, thorough DWI defense programs [which] provide complete information for the practitioner in all areas of representation." The seminar "is designed to provide valuable practice information to all attorneys who defend DWI cases." The publicity materials further tout that the speakers for this seminar include "one of the best known and most successful DWI attorneys in the country [who] is a former dean of the National DUI Defense College and presents regularly at national DUI defense seminars"; "another nationally known DWI defense lawyer [who] is considered one of the foremost authorities on breath test issues [and also] is a former dean of the National DUI Defense College"; "an expert in field sobriety testing and how best to challenge it"; the judge, who "spent numerous years on the county bench" prior to becoming a district judge and whose "expertise in this area is acknowledged across the state"; and a "[n]ationally known jury consultant [who] will educate on jury selection in DWI cases."

Additionally, the publicity materials for the seminar, on the same page as the judge's biographical information described above, notes that the NCDAA is "a statewide organization of criminal defense attorneys." The NCDAA "works actively in the Unicameral to monitor proposals relating to criminal law and to influence the legislative process." The NCDAA "provides mutual support for criminal defense attorneys addressing their needs and improving the quality of criminal defense practice in Nebraska." Moreover, the publicity materials specifically indicate that "[m]embership dues are very reasonable but [the NCDAA does] need YOUR support" and "[m]ember discounts at seminars alone more than cover the cost of an annual membership. An application is included in this brochure. PLEASE JOIN TODAY!"

The requesting judge has also provided the Committee with a relatively detailed outline of his proposed presentation. The bulk of the proposed content is arguably innocuous and pertains to general matters of effective advocacy, including such matters as filing written motions rather than oral motions, specificity in pleadings, and effective briefing. Where possible, the judge has proposed to cite to relevant Nebraska appellate cases to support important points in his proposed presentation. However, there are at least a few items in the judge's proposed presentation which are potentially violative of the Code provisions discussed below. For example, the judge's outline indicates that he proposes to instruct the NCDAA seminar attendees about obtaining written training materials concerning the horizontal gaze nystagmus test "to use against [the] testing officer" and about obtaining "as much material on [the officer's] training (manuals etc.) as [possible]; in many cases, this may be used against him." Additionally, the judge's outline indicates that he proposes to instruct the seminar attendees to get a copy of any video of field sobriety testing because "[g]enerally, it is more favorable for the defense to submit it [because] the video generally does not look as bad as the officer's testimony sounds."

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2A, 2B, 4A, 4B, and 4D(5).

Canon 2A provides:

"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 2B provides, in part:

"A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

Canon 4A provides, in part:

"A judge shall conduct all of the judge's extrajudicial 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."

Canon 4B provides:

“A judge may speak, write, lecture, teach, and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice, and nonlegal subjects, subject to the requirements of this Code.”

Canon 4D(5) provides:

“A judge shall not accept . . . a gift, bequest, favor, or loan from anyone except for:

“a. A gift incident to a public testimonial . . . or an invitation to the judge and the judge’s spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice.”

References in Addition to Nebraska Judicial Code of Conduct

Nebraska Ethics Opinion 96-9
Nebraska Ethics Opinion 00-2
Nebraska Ethics Opinion 01-1
Nebraska Ethics Opinion 03-5
Nebraska Ethics Opinion 04-1
Nebraska Ethics Opinion 05-1
Utah Informal Opinion No. 88-6
Washington Advisory Opinion 93-19
D.C. Advisory Opinion 4 (1994)
California Advisory Opinion 47 (1997)

Discussion

As a preliminary matter, it bears noting that the most directly applicable Canon of the Judicial Code to issues concerning avocational speaking or lecturing by judges is Canon 4B, which is generally permissive. Indeed, the commentary to Canon 4B specifically encourages judges to contribute to the improvement of the law, the legal system, and the administration of justice, independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. However, the commentary also specifically cautions that “the use of permissive language in various sections of the Code [such as Canon 4B] does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

In the present situation, the potential problem arises from the totality of the factual circumstances when viewed in light of the Code’s provisions concerning appearances of impartiality and prestige of the judicial office. When viewed in totality, the factual circumstances of the present case suggest that the judge would be a featured speaker in a specialized bar association’s seminar on how to effectively defend criminal DUI cases, along with nationally known experts on successfully defeating criminal DUI prosecutions, that some portions of the judge’s proposed presentation might be viewed as instructional on how to defeat field sobriety tests, and that the seminar is specifically being used to promote membership and the payment of membership dues for the specialized bar association. There are a myriad of potential problems with this situation which are prohibited by the Code, its commentary, and prior opinions of this Committee.

Canons 2A and 4A

“One of the central themes of the Code is that judges must perform their duties independently and impartially and cannot participate in any activity that might suggest the appearance of favoritism or call into question the integrity of the judiciary.” Nebraska Ethics Opinion 00-2. See Canons 1A, 2A, 2B, 4A(1), and 4C(4). Canon 2A specifically mandates that judges act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The commentary to this Canon indicates that “[t]he 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.”

In the present case, the totality of the factual circumstances suggest that a reasonable mind could perceive that the judge is speaking at a seminar designed to educate criminal defense attorneys about succeeding in defeating DUI prosecutions, and this could reasonably create a perception that the judge’s impartiality is impaired. This Committee has been provided an outline of the judge’s specific proposed comments; however, even if the actual content of the judge’s comments would be largely impartial, a reasonable person viewing the seminar itinerary and publicity materials could perceive an impairment of the judge’s impartiality. The totality of the factual circumstances indicate that the judge, in the midst of other expert speakers presenting information about how to successfully defeat DUI prosecutions, will be informing attendees on how to effectively move for the suppression of evidence in a DUI prosecution, a subject that the judge has expertise in as a result of having served as a county judge.

This Committee has not previously addressed the specific question presented. Nonetheless, this Committee has previously addressed a number of other situations involving judicial conduct that arguably results in a perception that a judge’s impartiality might be impaired. This Committee has previously recognized that the mandates of Canon 2A would prohibit a judge’s membership in specialized bar associations such as the American Trial Lawyers of America (ATLA). Nebraska Ethics Opinion 00-2. This Committee has previously recognized that the mandates of Canon 2A would prohibit a judge from appearing and speaking before an advocacy group such as Mothers Against Drunk Driving unless the judge can take steps to ensure no implicit endorsement of the group’s policy objectives. Nebraska Ethics Opinion 01-1. This Committee has previously recognized that the mandates of Canon 2A would prohibit a judge from participating as a member of a charitable gala ball committee unless the judge can avoid any implication that he or she is involved in the solicitation of funds, including being singled out in any way at fundraising events, issuing press releases relating to fund-raising campaigns, or making any other public speeches or presentations related to the organization’s fund-raising activities. Nebraska Ethics Opinion 03-5. This Committee has previously recognized that the mandates of Canon 2A would prohibit a judge from accepting funding for attendance at a training conference concerning domestic violence issues from a partisan group whose interests will likely come before the judge in future cases. Nebraska Ethics Opinion 04-1. This Committee has also previously recognized that the mandates of Canon 2A would prohibit a judge from serving on a Court Appointed Special Advocate board serving a county outside the judge’s judicial district. Nebraska Ethics Opinion 05-1.

All of these prior opinions stress the importance of a judge’s extrajudicial activities being conducted in a fashion that does not potentially create the appearance that the judge is partial or otherwise affiliated with a partisan group whose interests will likely come before the judge in future cases. In the present case, the totality of the factual circumstances could lead a reasonable person to opine that the judge is either partial or otherwise affiliated with NCDAA and is

educating attendees about successfully suppressing evidence in criminal DUI prosecutions. We iterate that this is true even if the content of the judge's presentation would be primarily innocuous.

Other states have addressed the issue of judges participating in specialty bar associations. The D.C. Advisory Committee has defined specialty bar associations as "associations of lawyers who, in the main, represent a particular class of clients (e.g., plaintiffs or defendants) or engage in a specialized practice (e.g., communications) or reflect a particular group of lawyers (e.g., legal services, women, racial minorities)." D.C. Advisory Opinion 4 (1994). See, also, California Advisory Opinion 47 (1997) (using the term "partisan" lawyer organization to define organizations intended to promote the interests of a limited segment of the bar, such as district attorneys or public defender organizations, plaintiff or defense-oriented bar associations, and similar organizations). The D.C. Committee concluded that a judge could accept an invitation to attend functions sponsored by specialty bar associations *if* the judge's attendance would not create in the public's mind a reasonable perception that the judge is promoting the policy goals or the regularly advanced litigative positions of the organization. The D.C. Committee further cautioned that a judge's attendance posed an increased risk of apparent impropriety if the sponsoring organization paid for the judge's attendance, if the organization has taken a public stance on issues in cases of substantial importance before the court on which the judge sits, and the more oriented the organization is to particular issues or the interests of a certain class of clients. Finally, the D.C. Committee suggested considering whether the organization is for-profit or non-profit, and recognizing that non-profit organizations can be financed by special interests that may dictate the agenda.

In the present case, the judge is not simply attending a function of the specialty bar (the NCDAA), but is proposed to be a featured speaker. It is not clear whether the judge will be attending the remainder of the seminar or whether the judge is paying for such attendance or being paid for his own contribution to the seminar. However, it is apparent that the NCDAA has taken a public stance on DUI cases, which can sometimes appear before the judge, and the organization, even according to the seminar itinerary and publicity materials, is clearly oriented to criminal defense issues. Indeed, the publicity materials clearly indicate that one of NCDAA's primary functions is lobbying for legislative reform on criminal defense issues. Finally, the seminar is funded through membership dues and also "in part by a grant from the Nebraska Commission on Public Advocacy." All of this is further reason to suggest that the judge's participation could create in the public's mind a reasonable perception that the judge is endorsing the policy goals or the regularly advanced positions of the NCDAA.

In Nebraska Ethics Opinion 01-1, we specifically noted a number of considerations espoused by the Washington Advisory Committee in Washington Advisory Opinion 93-19. In that opinion, the Washington Committee noted that "[c]oncerns about maintaining a judge's impartiality can limit the type of audience appropriate for a judge's education efforts or other speaking engagements" and that the judge "should consider the nature of the organization and whether speaking to the group may tend to identify the judge with the aim or purpose of the organization." Among the relevant factors to consider, according to the Washington Committee, are:

- (1) whether the organization advocates positions on disputed issues;
- (2) whether the organization regularly engages in adversarial proceedings in court;
- (3) whether the organization files amicus briefs on disputed issues;
- (4) whether the organization endorses nonjudicial political candidates;

- (5) whether the organization subscribes to a particular legal philosophy or position that implies commitment to causes that may come before the court for adjudication;
- (6) whether the organization is devoted to the improvement of the law, the legal system, or the administration of justice; and
- (7) whether the organization serves a primarily social function.

Without specifically addressing each of these concerns in the present case, it is apparent that a number of them point toward further concern that the judge's participation could create a reasonable perception that the judge is identified with the aim or purpose of the NCDAA.

Canon 2B

Canon 2B mandates that a judge must not act in such a manner that lends the prestige of his or her judicial office to advance the interests of others. This Committee has previously determined that a judge's authoring of an occasional column for a local newspaper published by law enforcement officers primarily for law enforcement officers would be viewed by the average defendant or litigant as compromising the judge's ability to be impartial. Nebraska Ethics Opinion 96-9. See, also, Nebraska Ethics Opinion 05-1 (noting that judge's participation on CASA board might lend prestige of judicial office to advancement of CASA interests by causing perception that CASA volunteer's opinion might be afforded special weight).

In the present case, the judge's participation in the seminar may pose additional concerns because of the word-choice in the seminar's itinerary and publicity materials. The publicity materials indicate that the judge was formerly a county court judge and that his "expertise in this area" is acknowledged across the state." Although it is not clear whether "this area" is intended to refer simply to "motions to suppress" or to defending criminal DUI cases, the listing of the judge and his credentials in the midst of touting the expertise of other nationally known DUI defense experts creates the possibility that recipients of the materials will accord them additional prestige because of the judge's office and participation. Moreover, slightly below the judge's credentials is a request for additional membership and dues. See Nebraska Ethics Opinion 03-5 (prohibiting any involvement by judge in fundraising activities for charitable organization). Finally, the title of the judge's presentation, "A Judge's Personal Perspective on Motions to Suppress. What's Effective and What's Not," in the context of the entire seminar's purposes, connotes that the judge's perspective, because of his judicial office, will be especially informative in educating about successfully suppressing evidence in a criminal DUI prosecution.

Canon 4B

As noted above, Canon 4B is the most directly relevant provision of the Code. Canon 4B permits, and the commentary thereto encourages, judicial participation in extrajudicial activities concerning the law, the legal system, and the administration of justice. However, the commentary further cautions that the remaining provisions of the Code, such as the provisions discussed above concerning the appearance of impartiality and the prestige of judicial office, must also be strictly complied with. In Informal Opinion 88-6, the Utah Ethics Advisory Committee concluded that Canon 4B prohibits a judge from teaching a continuing legal education course operated by a private for-profit group because teaching would lend the prestige of the judicial office to the advancement of the for-profit group's financial interests.

Similarly, the judge's participation in the present seminar, when viewed along with the totality of the factual circumstances about the itinerary and publicity for the seminar and the seminar's general tenor, and when combined with language in the publicity materials that

specifically solicits membership and dues and touts member discounts for attending seminars like this one as a benefit of membership, could lend the prestige of the judge's office to the financial interests of the NCDAA. In addition, as noted above, there are a host of other concerns about the appearance of judicial impartiality that must be taken into account in this case.

Canon 4D

Finally, Canon 4D prohibits a judge from accepting a financial gift, bequest, favor, or loan from anyone except for, inter alia, a gift incident to a public testimonial or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice. The commentary to Canon 4D specifically cautions that "[a] judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation" Although the Committee does not have any details about whether the judge will be attending the remainder of the seminar or whether the judge will be required to pay for such attendance or be paid for his own contribution to the seminar, the commentary to Canon 4D is yet another reason for caution.

Conclusion

The question in this case is a complex one, without an easy or clear definitive answer. We iterate that the Code does not absolutely prohibit a judge from participating in a continuing legal education seminar. Indeed, the Code encourages judges to participate in such programs, provided the participation is done in a fashion that is consistent with the entirety of the Code. In this case, however, the totality of the factual circumstances bring a number of other Code provisions into consideration and raise significant concerns about judicial impartiality and prestige of the judicial office, all of which must be considered before the judge continues to participate.

Because the seminar is sponsored by a specialty bar association, the NCDAA, and the tenor of the entire seminar is successfully defending criminal DUI prosecutions, the judge's participation may raise significant reasonable perception that the judge endorses or otherwise supports the NCDAA's policy objectives. The materials presented to the Committee indicate that the NCDAA has publicized the judge as an expert who, along with national experts in defending criminal DUI prosecutions, will be presenting about his personal perspectives, as a judge, on what is effective and what is not effective when seeking to suppress evidence in a criminal DUI prosecution. Based on the Committee's review of a detailed outline of the judge's proposed remarks, at least some of the content of the judge's presentation could be perceived as instructional on challenging field sobriety testing. Further, even if the bulk of the judge's proposed content is innocuous, the reasonable perception of a person viewing the publicity materials and not hearing the actual presentation raises sufficient concerns without knowledge of the actual content. Additional concerns center on whether the presentation of the materials and the publicity concerning the judge's involvement serve to lend the prestige of the judicial office to the interests of the NCDAA, and whether there are any concerns about fundraising or improper financial gifts.

The totality of these considerations suggests that the judge should not continue to be involved with this particular seminar. In future instances, it is possible that a judge could properly be involved with a presentation at such a seminar, but only if pains are taken to avoid the myriad of problems and concerns discussed herein. Judges who are approached about such participation should be mindful of these concerns and take steps to address them.

Disclaimer

This opinion is advisory only and is based on the specific facts and question submitted by the person 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 7, 2006

*Judge John F. Irwin
Judge Lawrence Gendler
Judge Stephen R. Illingworth
Judge John F. Steinheider
Judge Carlton E. Clark
Judge John A. Colborn
Judge Robert B. Ensz - dissent attached*

Judge Robert B. Ensz, dissenting

I respectfully dissent from the majority opinion. While I generally agree with the principles discussed, I disagree with their application. I have reviewed the judge's proposed outline. The judge discusses how effectively to present evidence in a suppression hearing and provides statutory and case law citations to support his discussion. It is a speech on neither winning motions to suppress before him nor advocating any legal position. In my opinion, the judge's speech as outlined offends neither Canon 2A nor Canon 4A.

I fear this opinion creates a greater problem beyond the current request. Although the majority expresses deference to Canon 4B, the effect of the opinion may be one of deterrence. A judge may now be justifiably reluctant to speak to any "specialty" bar organization, whatever his or her topic may be.

Judge Carlton E. Clark joins in this dissent.