Nebraska Judicial Ethics Committee Opinion 17-1

Question Presented--

1. *Whether an active district court judge may participate as a sitting member of a "Justice Council" without contravening the Nebraska Constitution or Code of Judicial Conduct.*
2. *The extent to which the advisory and legislative duties of a "Justice Council" are in conflict with the notion of separation of powers.*
3. *Whether any lesson can be learned, which can be applied to this situation, from Nebraska Judicial Ethics Opinions 11-2 and 14-1 where the Committee advised a judge may serve as a member of a Safety Council, but should regularly evaluate the Council's activities and thereafter service on the Council was found to raise an appearance of impropriety.*
4. *If any of the above raises disqualifying ethical concerns, the extent to which a judge may nevertheless serve a limited role on the Council, and examples of the parameters of such a role.*

Conclusion

No.

Statement of Facts

The City of Lincoln and Lancaster County entered into an interlocal agreement pursuant to the Interlocal Cooperation Act, Neb. Rev. Stat. § 13-801 et seq. (Reissue 2012), to form the Lincoln-Lancaster Justice Council (Justice Council or Council).

The Interlocal Cooperation Act permits subdivisions and governments in the State of Nebraska to cooperate with one another for the purpose of jointly exercising governmental authority and responsibilities. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291, (2003). The act's purpose is to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on the basis of mutual advantage. See § 13-802.

Members of the Justice Council include representatives from the following:

- The Lancaster Sheriff
- The Lincoln Chief of Police
- The Lancaster County Attorney
- The Lincoln City Attorney
- The Lancaster County Public Defender
- A judge, Lancaster County District Court
- A judge, Lancaster County Court
- A judge, Lancaster County Separate Juvenile Court

- Director of University Police, University of Nebraska-Lincoln
- The Corrections Administrator, Lancaster County Department of Corrections
- The Director of the Jennie B. Harrell Juvenile Attention Center

The "primary responsibility" of the Justice Council is "[t]o serve as a vehicle for coordinating planning efforts within the criminal justice system in Lincoln/Lancaster County and *to serve in an advisory capacity to elected officials regarding the best utilization of the criminal justice system* that will accord best with the geographic, economic population and other factors influencing the needs and development of the community."

Several of the enumerated powers and duties of the Justice Council call for the Council to advise other governmental agencies, which are members of the Council. (Interlocal Agreement at (3)(b), (c), (d), and (e)).

Based on the enumerated powers and duties of the Justice Council, the Council is generally understood as a policymaking and legislative body, in an advisory capacity. (See attached bylaws of the Justice Council).

Recently, the Lancaster County Board of Commissioners voted to reconvene the Justice Council, based on the following concern: "Eighteen months after opening the jail complex on West "O" Street in 2013, the jail was at 75% capacity. The jail is nearing the end of year three of operation and is at 81% capacity. With summer approaching, and if this trend continues, the jail administrator will be forced to open the remaining unoccupied pod in the jail and hire 6 additional staff at an annual starting cost of $350,000. The Lancaster County Commissioners are interested in discussing the increased use of current community based programs and considering other options that can reduce the jail population without compromising public safety."

Applicable Code Sections
Neb. Rev. Code of Judicial Conduct Canon 1 and § 5-301.2
Neb. Rev. Code of Judicial Conduct §§ 5-302.4 and 5-303.2

References in Addition to Nebraska Revised Code of Judicial Conduct
Nebraska Judicial Ethics Opinion 11-2
Nebraska Judicial Ethics Opinion 14-1

Discussion

1. Whether an active district court judge may participate as a sitting member of a "Justice Council" without contravening the Nebraska Constitution or Code of Judicial Conduct.

The generic purposes of the Justice Council do not require an automatic prohibition of judge participation on the Council.

Nebraska Judicial Ethics Opinion 11-2 discussed the county judge's ethical requirements regarding participation in the National Safety Council Greater Omaha Chapter as an ex officio board member and found it to be permissible. It also noted that the "changing nature of some

organizations and their relationship to the law makes it necessary for a judge to regularly examine the activities of each organization . . . to determine whether it is proper for the judge to continue his or her relationship with it."

The Lincoln-Lancaster Justice Council has been recently reconvened to address the concern that 18 months after opening the jail, it is now at 81% capacity and the Lancaster County Commissioners are interested in discussing the increased use of current community-based programs and considering other options that can reduce jail population without compromising public safety.

Generally, a judge may serve on a board or commission if the issues before the body arguably fall within the broad scope of the law, the legal system, or the administration of justice. A judge should analyze his or her prospective participation on an ad hoc basis, in light of the general principles applicable to all extra judicial conduct. First, will the judge's participation make it difficult to find time to hear the cases on the judge's docket? Will the matters before the commission be likely to come before the court later on in litigation, forcing frequent disqualification? Will the judge's alignment with the policies favored by the commission call the judge's impartiality into question? If the answer to any of the questions is "yes," participation on the commission should be declined. Judicial Conduct and Ethics Fifth Edition § 9.03[3].

The Nebraska Code of Judicial Conduct, specifically Canon 2, discusses the requirement that a judge perform the duties of his or her office impartially and not give an impression that other groups are in a position to influence the judge. Canon 1 discusses the need for judges to avoid impropriety and the appearance of impropriety. The Justice Council is seeking to address the filling of the jail and the use of current community-based programs and consider other options that can be used to reduce jail population. A judge's participation on the Council exposes the judge to pressure to adopt and follow the recommendations of the Council of which he is a member. A judge's impartiality may be called into question due to participation on a council taking positions on sentencing alternatives to be used by the judiciary to address the jail population.

The goal of reconvening the Justice Council is to discuss the increased use of current community-based programs and considering other options that can reduce the jail population without compromising public safety.

Section 5-302.4(c) provides that a judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge. Sitting on a council, whose given mission is to address jail population is an organization that would appear to be in a position to influence the judge.

Section 5-301.2 provides that a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. A judge can only consider the availability of services that the legislative body provides. The decision of what services to provide is the province of the City of Lincoln and Lancaster County. A judge who sits on a council reconvened to address jail population through the use of community-based programs in lieu of jail, can

arguably be seen as ceding independence to a group who would seek to affect the judge's sentencing and pretrial release decisions. A judge's impartiality may be questioned by sitting on a council that is not a representative body of all interested parties, such as victims, in sentencing decisions.

Therefore, based upon the request of the Lancaster County Board of Commissioners to discuss the increased use of current community based programs and consider other options that can reduce jail population without compromising public safety, participation by a judge on the Council does conflict with a judge's duty to remain independent and impartial and not permit an organization to be in a position to influence the judge.

2. The extent to which the advisory and legislative duties of a "Justice Council" are in conflict with the notion of separation of powers.

The Justice Council is a creation of the legislative bodies of the City of Lincoln and Lancaster County and reports to the legislative bodies of the City and County. The legislative bodies' implicit goal in reconvening the Council is to influence the sentencing practices of the judiciary by using more community-based programs. The judiciary should respect the separation of powers and not permit legislative bodies to attempt to influence sentencing decisions nor participate in a Council whose goal is to advocate and/or establish policies that may impact judicial decisionmaking.

3. Whether any lesson can be learned, which can be applied to this situation, from Nebraska Judicial Ethics Opinions 11-2 and 14-1 where the committee advised a judge may serve as a member of a Safety Council, but should regularly evaluate the Council's activities and thereafter service on the Council was found to raise an appearance of impropriety.

Nebraska Judicial Ethics Opinion 11-2 permits a judge to sit as an ex officio member of the board of directors of the National Safety Council. The opinion notes that the commentary to Canon 4C advises that the changing nature of some organizations and their relationship to the law make it necessary to regularly examine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue his or her relationship with it. Nothing in the interlocal agreement or the bylaws of the Council indicate a per se conflict with the Nebraska Code of Judicial Ethics. However, the stated reason for the reconvening of the Justice Council needs to be weighed and considered as to whether present participation is permitted.

Nebraska Judicial Ethics Opinion 14-1 concludes that a county judge may not serve as a board member of an organization that has a direct relationship with the jurisdiction's city prosecutor's office in administering a diversion program.

A review of the original interlocal agreement and the bylaws indicate that the Justice Council is to research and make recommendations to the appropriate officials offering resolution to such problems. Facially, the purpose and construction of the Council is sufficiently vague so as to not require a judge to automatically decline service.

The call to reconvene the Council is the type of event that requires a judge to evaluate his or her participation on the Council and based on the reason and purpose of the current call, the judge should decline to serve.

4. If any of the above raises disqualifying ethical concerns, the extent to which a judge may nevertheless serve a limited role on the Council, and examples of the parameters of such a role.

Section 5-303.2 provides that a judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official except:

(A) in connection with matters concerning the law, the legal system, or in the administration of justice.
(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

A judge may be a resource, provide factual information, appear and answer questions as permitted in § 5-303.2. A judge may testify at legislative or executive branch hearings or communicate with governmental officials less informally on matters affecting the courts. However, a judge shall not vote on any substantive matter when appearing before a public hearing or consulting with an executive or legislative body. Such participation maintains the independence of the judiciary and maintains impartiality, while providing unique insights on questions of law, the legal system, and the administration of justice.

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 Revised 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 MARCH 29, 2017

Judge J Russell Derr
Judge James C. Stecker
Judge Edward D. Steenburg
Judge Vicky L. Johnson
Judge Linda S. Porter
Judge Michael W. Pirtle
Judge Jeffrey M. Wightman

BYLAWS
of the
LANCASTER COUNTY JUSTICE COUNCIL

ARTICLE I - NAME

The name of this organization shall be the Lancaster County Justice Council, hereinafter called the Justice Council.

ARTICLE II - PURPOSE

SECTION 1. Advisory.

The Justice Council shall act as an advisory body to City and County officials to best utilize the system within the justice framework.

SECTION 2. Coordinating.

A. The Justice Council shall act as a body to coordinate communication within the justice system.

B. The Justice Council shall act as a body to conduct research for criminal justice activities within the justice system.

ARTICLE III - RESPONSIBILITIES

Section 1. Primary Responsibilities.

The Justice Council's primary responsibilities shall be to:

A. Review, at the request of a member of the Justice Council, proposed changes in policies and activities within the justice system, measure the extent of impact which those proposed changes have on the entire system, and forward recommendations to the appropriate City and County officials relative to implementation of the proposed changes and subsequent requirements, including fiscal needs.

B. Research problem areas within the justice system having multi-agency impact and make recommendations to appropriate officials offering resolution to such problems.

SECTION 2. Additional Tasks.

The Justice Council shall also have the responsibility to:

A. Advise and aid in the establishment of coordinated and cooperative justice services and programs within Lancaster County.

B. Render advice and technical assistance upon request to agencies of the City and County.

C. Develop a systematic planning process to use in evaluating the quality and delivery of justice in the County for the purpose of making recommendations to the County and the justice agencies.

D. Gather and analyze data related to the justice system and publish such related reports.

E. Periodically submit reports to the City and County relevant to the activities of the Council.

F. Annually review and submit to the County a budget for the operations of the Council.

ARTICLE IV - MEMBERSHIP

SECTION 1. Membership.

The Justice Council shall consist of no more than 20 members. The membership shall be appointed in the following manner:

A. The following individuals shall be represented on the Justice Council: Lancaster County Sheriff, Lincoln Chief of Police, Lancaster County Attorney, Lincoln City Attorney, Lancaster County Public Defender, A judge from Lancaster County Court, District Court, and Juvenile Court, Director of the University of Nebraska-Lincoln Police Department, Director of County Corrections, Director of Juvenile Corrections, and the State Probation Office.

B. The Coordinator of the Justice Council shall be a non-voting member.

C. Additional Justice Council members shall include subcommittee chairs. These shall be non-voting members.

SECTION 2. Alternates

Additional members of the Justice Council (JC) who cannot attend a meeting may send an alternate. Everyone is encouraged to send a consistent alternate.

SECTION 3. Designee.

Members of the Justice Council appointed under Article IV, Section 1A may submit in writing the name of their designee, which designation is for one year.