NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE
Advisory Opinion No. 90-1

SITUATION

A member of the Nebraska Judiciary is a member of the Board of Trustees of a private, nonprofit educational institution, and the membership predates the appointment of that judge to the judiciary.

The Board of Trustees of which the judge is a member recently engaged in certain fund-raising activities, including a fund-raising dinner. In the solicitation of funds process, invitations were mailed out to certain selected members of the general public, requesting their presence at the dinner, and the invitation was made by "the Board of Trustees," though no individual board member was named in the dinner invitation.

The member of the judiciary inquires as follows:

1. Can a judge be a member of the Board of Trustees of such institutions?

2. Because the fund-raising activities of the Board of Trustees is likely to continue in the future, should the judge, though not participating by name or directly in any fund-raising function, resign from the Board of Trustees?

3. May the judge attend the fund-raising dinner, providing the judge pays the same fee for said dinner as is required of any other attendee.

APPLICABLE CANONS

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

Canon 1 provides that "a judge should uphold the integrity and independence of the judiciary."

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself/herself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 provides that "a judge should avoid impropriety and the appearance of impropriety in all his/her activities."

2A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

2B. A judge should not allow his/her family, social or other relationships to influence his/her judicial conduct or judgment. He/she should not lend the prestige of his/her office to advance the private interest of others; nor should he/she convey or permit others to convey the impression that they are in a special position to influence him/her. He/she should not testify voluntarily as a character witness.

Canon 3 provides that "a judge should perform the duties of his/her office impartially and diligently."

3C(1) A judge should disqualify himself/herself in a proceeding in which his/her impartiality might reasonably be questioned, including but not limited to instances where . . . . (d) he/she and his/her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

3D. Remittal of Disqualification. A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his/her disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his/her financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceedings. The agreement, signed by all parties and lawyers, should be incorporated in the record of the proceeding.

CANON 5

A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such

avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

Commentary: Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which he or she lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his or her impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or her or will be regularly engaged in adversary proceedings in any court.

Commentary: The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities to each organization with which he or she is affiliated to determine if it is proper to continue the relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use of permit the use of the prestige of the office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary: A judge's participation in an organization devoted to quasi-judical activities is governed by Canon 4.

ANALYSIS AND OPINION

In the situation under analysis, while the mandates and

prohibitions of Canons 1, 2 and 3, require that a judge's involvement with a membership on a Board of Trustees of a educational institution be conducted with the maximum of discretion, Canon 5 clearly permits a judge to serve as an "officer, director, trustee . . . . of an educational . . . . organization." While acknowledging the numerous pitfalls associated with non-judicial activities, the Code of Judicial Conduct is not based on the expectation that judges will wall themselves off from all such activities. On the contrary, service by a member of the judiciary on a Board of Trustees of an educational organization can lend prestige to the organization and yet not concurrently taint the judge's reputation nor impair his/her impartiality.

Section B(1) of Canon 5 stresses an obvious peril that a judge in this situation must be alert to. "A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or her or will be regularly engaged in adversary proceedings in any court." Attention should be given to the last portion of that section: "adversary proceedings <u>in any court</u>." If the educational organization regularly is or becomes involved in litigation, whether in the court on which the judge sits or in any other court, the judge must then re-examine his/her membership and very likely terminate that membership.

While membership alone in such organizations is permitted, participation in fund-raising activities is expressly prohibited by section B(2) of Canon 5. The prohibition against such participation applies not only to active participation (e.g., active personal solicitation of funds by the judge), but also to passive participation, and thus requires that a judge disassociate himself totally from any such fund-raising activity, even so far as to require that a judge's name not be connected with any fund-raising activity or the literature utilized in a fund-raising activity/event. An opinion rendered by the New York Office of Court Administration is worthy of recitation here:

> In our view, reasonable reading of the rule indicates that while a judge may not serve on a committee related to fund-raising, nor sign a fund-raising letter, nor be mentioned in the text of any letter connected with fund-raising, the judge may be listed on letterhead as director of the organization that is included separately in a mailing that also contains the fund-raising literature. The basic requirement is that the literature not imply to the reader that the judge is requesting or participating in a request that a contribution be made to the organization. It would seem that this requirement clearly is met if the letter or memorandum soliciting funds does not include the judge's name and title, although other enclosed

organizational literature, not concerned with the fund-raising, contains the judge's name, title or quotations. (State of New York Office of Court Administration, Opinion No. 179, June, 1979)

The utilization by an educational organization of its standard "letterhead" stationery, even if that stationery lists the judge's name and title, is permissible, provided that all other persons similarly serving are listed with their occupation, profession, or business association disclosed.

A judge may attend an organization's fund-raising events, but should not be recognized at such events, nor give speeches, nor be singled out in any way at such events. Not only the strict prohibition against personal solicitation would be in danger of violation, but would also clearly run afoul of the "appearance of impropriety" prohibition of Canon 2. A judge should avoid even seemingly innocent activity at such fund-raisers, such as handing out literature, serving as co-host/hostess, etc. The judge's attendance at such fund-raising activities should be of the same category as any other solicited individual, and not as a solicitor.

In summary, a judge may serve as a member on the Board of Trustees of a nonprofit educational organization, providing that such membership does not adversely reflect upon that judge's impartiality nor interfere with the performance of his/her judicial duties. However, a judge must painstakingly avoid any and all involvement in any fund-raising activities engaged in by the educational organization, except for more attendance at fund-raising events.

For the Committee:

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