

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE

Opinion No. 91-2

QUESTION

UNDER THE CODE OF JUDICIAL CONDUCT, MAY A JUDGE BE A MEMBER OF THE KNIGHTS OF COLUMBUS?

At the request of the Committee, the judge has sent publications which show that the Knights of Columbus is a fraternal organization of Catholic men which is involved in social activities and performs functions such as providing for insurance, providing for the less fortunate and so forth. The judge indicates that he is an inactive member of this organization.

According to the literature furnished to us, the Nebraska State Council of the Knights of Columbus has also engaged in the following activities:

Established the "Book-A-Month" Club to provide assistance for Pro-Life efforts.

Collects about \$40,000 annually through the One Rose-One Life Campaign for the Bishop's Pro-Life causes.

Annually sponsors a Pro-Life essay Contest for Youth in Public and Parochial Schools.

A \$100,000 per year grant to support the U.S. Catholic Bishop's Pro-Life activities.

Apparently, it is the organization's involvement in the above activities that prompts the judge's question to this Committee. This question is probably especially appropriate because of LB425 passed in 1991, which requires judges to determine whether abortions will be permitted in certain situations.

**APPLICABLE CANONS**

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 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 activities."

2A. A judge should respect and comply with the law and should conduct himself or 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 family, social or other relationships to influence his or her judicial conduct or judgment. A judge should not lend the prestige of his or her office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

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

3C(1) A judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned.

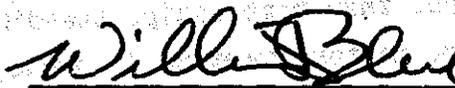
We are of the opinion that a judge who is either an inactive or active member of the Knights of Columbus need not resign from that organization.

The judge's attention is called to the above canons. While we are not prepared to say that it would be unethical for him to hear cases under LB 425, he should "avoid the appearance of impropriety" and should consider whether he should disqualify himself under Canon 3C(1).

At a minimum the judge should disclose his membership in the Knights of Columbus and give the party the opportunity to request that the judge disqualify himself. This, of course, should be on the record.

The Committee is not suggesting that a judge who is a member of the Knights of Columbus, cannot be fair and impartial in these cases or related cases, but it is concerned with the appearance of impropriety.

Adopted by Committee this 10<sup>th</sup> day of October, 1991 with two members writing concurring opinions.



**WILLIAM D. BLUE**  
Chairman

## CONCURRENCE TO OPINION 91-2

While I agree with the advice given in this opinion, I don't agree it considers everything. The opinion shows that the organization restricts membership to men. Canon 2 enjoins judges to avoid "the appearance of impropriety" in all activities. Thus, there is a question of whether membership in organizations that exclude women or men "appears improper."

Proper appearances depend on the times and the milieu. What appears proper today wouldn't have appeared proper in 1776. What appears proper in New York wouldn't appear proper in Tokyo.

We live in a time and place where gender-based distinctions are condemned. The revised Code of Judicial Conduct proposed by the American Bar Association, and the Code being considered for adoption by the Nebraska Supreme Court expressly provides under Canon 2: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." The Nebraska Supreme Court is currently promoting policies to study and insure gender fairness in the administration of justice in Nebraska courts. A nominee for the U. S. Supreme Court recently resigned from a men's-only club amid public criticism of his membership, and a nominee for attorney general did the same. These examples convince me that our time and place is sensitive to the appearance of judges' membership in clubs that have gender-based restrictions on membership. If such membership appears improper because it gives rise to perceptions that a judge's impartiality is impaired, then membership, standing by itself, would violate our existing Canon 2, no matter how much the judge recuses.

I believe our opinion should also warn the judge asking for this advisory opinion in the same way the U. S. Judicial Conference advised federal judges on a similar point in Opinion 82, dated 09/14/87, as follows:

If the judge believes that his or her personal, direct advocacy to the public of the policy positions advanced by the organization might reasonably be seen as impairing the judge's capacity to [be impartial based on gender], and . . . *affiliation* may be reasonably be seen as *indirect advocacy* of these policy positions, the judge should not be a member of the organization. (emphasis added)

In other words, if you are going to belong to organizations that enforce gender-based membership, watch out! Some may accuse you of sexism by association, and that may amount to a violation of Canon 2.

## CONCURRENCE TO OPINION 91-2

I, too, agree with the advice given in the majority opinion and I agree completely with the other concurring opinion, as far as they go.

Neither opinion admonishes the inquiring judge to refrain from any form of fundraising on behalf of the organization involved. Perhaps the inquiring judge's status as an inactive member indicates fundraising is not a concern, but giving explicit advice is always the better course in giving advice. The majority opinion makes clear this organization engages in fundraising on a grand scale.

The other concurrence concludes that a judge's membership in an organization which systematically excludes women may lead to a reasonable inference that the judge member's impartiality in affairs relating to gender is impaired. I conclude, in addition, that a judge's membership in an advocacy organization which advocates a particular philosophy or public policy position may lead to a reasonable inference that the judge member's impartiality in affairs relating to that position is impaired. The majority opinion makes clear this organization is an also advocacy organization on a grand scale in favor of a particular public policy position.

Canon 5B(1) is the canon specifically applicable to this question. Canon 2A is generally applicable, but only strengthens the application of 5B(1). Canon 3C(1) is also specifically applicable and provides the majority with its route to the middle ground. Canon 5B(1) provides, in relevant part: "A judge may participate . . . in activities that do not reflect adversely on his or her impartiality."

The Traynor Committee, drafters of the Code of Judicial Conduct, looked at the aspect of Canon 5B(1) we are considering in this way: "judges should be allowed, with a few specific limitations, to be not only members but officers and directors of civic, charitable, and other similar organizations. If participation as a member, officer, or director of the organization will raise valid questions about a judge's impartiality . . . , a judge is precluded from such extrajudicial activity." E.W. Thode, Reporter's Notes to the Code of Judicial Conduct 79 (1973) (emphasis added).

Recognizing that people generally do not join organizations whose values they do not share, at least in some minimal degree, the Committee on Codes of Judicial Conduct of the United States Judicial Conference, in its Opinion 82 (September 14, 1987), offered this guidance:

If the judge believes that his or her personal, direct advocacy to the public of the policy positions advanced by the organization might reasonably be seen as impairing

the judge's capacity to decide impartially any issue that might come before the judge, and the [judge's] affiliation [with the organization] may reasonably be seen as indirect advocacy of these policy positions, the judge should not be a member of the organization. . . .

In determining whether the general public may reasonably view the judge's affiliation as an endorsement of the views and activities of the organization, it should be kept in mind that the public will normally be [uninformed] of any restriction that the judge may have placed on that affiliation.

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 track specific special interest issues, may be justified in believing the judges who join advocacy groups support the policy positions of the organizations 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.

There are only two relevant questions presented here. Might the judge member's personal, direct advocacy to the public of the policy positions advanced by this organization reasonably be seen as impairing the judge member's capacity to decide impartially any issue that might come before the judge? May the judge member's affiliation with this organization be seen reasonably as indirect advocacy of the organization's policy positions? If those two questions are answered affirmatively, the judge should not be a member.

The inquiring judge must answer those questions, not this committee. 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).