

NEBRASKA JUDICIAL ETHICS COMMITTEE

ADVISORY OPINION 93-1

FACTS

A member of the Nebraska Judiciary asks advise about appearing as an expert witness at a trial in Alaska. The judge teaches oil and gas law, has expertise in that area, was asked to render expert opinions about interpreting terms in an oil and gas lease by a former law student, and expects to be compensated. This is the only time the judge has been asked to be an expert witness.

QUESTION

MAY A SITTING NEBRASKA JUDGE VOLUNTARILY RENDER EXPERT OPINIONS ON OIL AND GAS LAW AT A TRIAL IN ALASKA AND BE COMPENSATED FOR THE SERVICES WHEN THE OPINIONS RELATE TO EXPERTISE GAINED BECAUSE OF LAW TEACHING AND NOT FROM BEING A JUDGE?

ANSWER

No.

NEBRASKA CODE OF JUDICIAL CONDUCT SECTIONS

"Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. 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.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. 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. A judge shall not testify voluntarily as a character witness. (emphasis added)

Commentary

. . . .A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testified. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly subpoenaed. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

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.

D. Financial Activities.

- (1) A judge shall not engage in financial and business dealings that
 - (a) reasonably may be perceived to exploit the judge's judicial position, or
 - (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

H. Compensation, Reimbursement and Reporting.

- (1) **Compensation and Reimbursement.** A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this code, if the source of such payment does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.
 - (a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
 - (b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.
- (2) **Public Reports.** A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public

document in the office of the Clerk of the Nebraska Supreme Court on forms furnished by that court."

DISCUSSION

The facts in this request and the applicable code sections raise four ethical considerations. They are:

1. Will testifying furnish an appearance of impropriety by:
 - a. Lending the prestige of the judge's office in support of one party in litigation?
 - b. Placing lawyers in an awkward position?
2. Will testifying damage public confidence in the integrity and impartiality of the judiciary?
3. Will testifying conflict with the judge's judicial performance by:
 - a. Casting doubt on the judge's impartiality?
 - b. Demeaning the judicial office?
 - c. -Interfering with performance of judicial duties?
4. Is testifying a business dealing that may be perceived to exploit the judicial position?

The first consideration is the reason judges may not voluntarily testify as character witnesses. The practice creates two problems. It may look like the judge is lending the prestige of office to someone in litigation, and it also places those directly involved in the administration of justice in an awkward position. However, being a witness is something everyone is obliged to do when properly summoned. Therefore, the commentary stresses that testifying as a character witness is allowed "when properly subpoenaed". In order to protect against abuses, the commentary further suggests that the practice of summoning judges as witnesses is generally to be discouraged.

There is little difference between being a character witness and being an expert witness. Both are generally done voluntarily. When choice is involved, the code recommends discouragement, and requires compelled testimony. With a Nebraska judge testifying in an Alaska trial, that would probably only allow testimony by deposition with the judge forced to attend by a Nebraska subpoena.

The second consideration becomes an ethical problem when a judge becomes a witness for pay. One tenet of the judicial office is staffing with judges who are impartial. Becoming a partisan is the antithesis of an attitude of impartiality, and taking a position in the adversity of litigation for pay does cause the judge to become a partisan.

The result of becoming an expert witness for pay places the credibility, character, and reputation of the witness (in this instance a judge) into issue. Doing so unnecessarily can only do damage to the public perception of judges because those issues will be resolved adversely as often as they are favorably. This consideration also tends to support the policy that judges should become paid experts only when it is made necessary by compelling

the testimony.

The third consideration protects against any non-judicial activity interfering with being a judge. Three things can pose an interference: compromising impartiality, demeaning the office, or taking too much time off at the expense of judicial duties.

In this instance, impartiality is not compromised because the judge is not testifying about something common in cases in the judge's own court. The opinions relate to matters the judge has expertise in because of teaching, not an expertise gained from judging.

Being a witness (once it is assumed the witness is subpoenaed) is not a demeaning activity. It is something required because the witness has unique opinions or knowledge. However, being a witness for pay, and being insincere about it, would demean the judicial office. There is no indication of insincerity in this request.

The requesting judge had planned to take time off work that is otherwise available for vacations in order to perform this task. There are no considerations of emergency dockets, overly busy schedules, or other factors that would cause testifying to conflict with the judges' other duties.

The fourth consideration asks whether the judge is engaging in a business dealing that will exploit the judicial position. In this instance, we think not because the judge's expertise relates to the practice of being an oil and gas law teacher, not to the vocation of being a judge. Since this case only involves testifying as an expert on one occasion, and being selected by a previous law student because of the judge's expertise on limited points unrelated to being a judge, it doesn't appear to exploit the judges position.

In addition, there is substantial question whether this activity is a business or financial dealing described in Section 4 (D). The commentary indicates that these dealings imply relationships such as joint ventures and traditional investments that will affect the need for disqualification and the potential of showing favoritism. This activity will involve payment for services and expenses, but seems questionable as a "business dealing" within the meaning of that section. Whether it is or not, we have concluded it does not exploit the judicial position in the previous paragraph.

CONCLUSIONS

The Nebraska Code of Judicial Conduct prohibits a judge from voluntarily becoming an expert witness. However, testifying with expert opinions, so long as the testimony is compelled and the judge discourages parties from requiring the judge to appear and testify, is not prohibited. When a judge must testify and renders expert opinions, there are conditions the code requires and that we advise:

- Compelled testimony must be required, and the practice of summoning judges as expert witnesses should be discouraged.

- While testifying, the judge should not volunteer the fact that he or she is a judge.
- If requests or subpoenas to serve as an expert witness occur more commonly than once, other considerations must be taken into account such as: time consumed, lawyers involved, attention to judicial duties, and courts testified in.
- The judge must follow the compensation rules listed in § 4-H.

APPROVED AND ADOPTED BY THE COMMITTEE on July 30, 1993.

Harold Myzner Chair

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