

Nebraska Judicial Ethics Committee Opinion 20-1

Question Presented--

The Judges in one Judicial District have received a letter from groups seeking to assist tenants in evictions. The letter contains a number of suggestions and recommendations including, without limitation, that this court “1. Consolidate the evictions docket. ... 2. Stagger the hearings. ... 3. Inform pro se litigants of this service from the bench. ... 4. Liberally grant continuances to allow use of safe proceedings. ... (and) 5. Include information about legal services with the eviction summonses.” Id. at 2-3.

Upon our review of the subject correspondence from Mr. Mumgaard, Ms. Heer Dale, and Mr. Sullivan, we have identified the following concerns and questions:

- 1. In light of the fact that the court has been contacted by this group of Nebraska attorneys in this fashion, under the Nebraska Revised Code of Judicial Conduct, does the court have a duty to notify anyone (i.e. counsel for discipline, all opposing counsel) concerning the correspondence? In addition, if this correspondence is an ex parte communication on a pending matter or impending matter, is that sufficient to notify all opposing counsel/parties by a letter on counsel table?*
- 2. Does the Code permit the court to meet with this group of attorneys as they request?*
- 3. With regard to their requests that the court “1. Consolidate the evictions docket...(and) 2. Stagger the hearings” because “[i]t would be impossible to staff this project four days every week,” does “the Code permit the court to change its calendar and group and spread cases to be heard in order to accommodate a specific group of lawyers?”*
- 4. Is it a violation of the Code for the court to “[i]nform pro se litigants of this service from the bench,” thereby promoting the services of a specific group of attorneys?*
- 5. Recognizing that eviction hearings require evidence including live testimony and exhibits, and that the Uniform Residential Landlord Tenant Act, Neb. Rev. Stat. § 76-1401 et seq., contains certain time requirements, including that such actions be brought to trial within 10 to 14 days of issuance of summons (§ 76-1443), that continuances be granted only for “extraordinary cause,” and then only if the tenant posts a bond in the amount of his or her past due rent and*

additional rent that will accrue (§ 76-1443), is it a violation of the Code for the court to “[l]iberally grant continuances....” as these attorneys request?

6. Cognizant of Nebraska Judicial Ethics Opinion 06-2, wherein this committee concluded that “[a]dvertisements unrelated to the judicial process, of either an education or promotional nature, should not be displayed near the courtroom as they advance private interests and convey an impression of influence.” Does the Code permit this court to “[i]nclude information about legal services with the eviction summonses”?

Conclusion

The coalition’s letter is not an ex parte communication to the judges. The judges or their designee may, if they choose, meet with attorneys to discuss scheduling matters at any time.

The judges are prohibited from referring litigants to specific attorneys or groups. The judges may not promise to grant liberal continuances, but retain the authority to grant continuances as provided by law.

The judges may not order documents promoting any specific services to be included with summonses, but may allow informational flyers to be posted prominently in the area of the courtrooms.

Statement of Facts

The county judges who seek this opinion have received written correspondence from a coalition of agencies that provide free legal services to low-income residents of the state. The coalition has been formed to provide low-income tenants in eviction cases with representation in light of the current COVID-19 pandemic. Correspondence from the coalition seeks a meeting with the judges, certain modifications of the court’s calendaring procedure, and substantive procedural changes.

Applicable Code Sections

Neb. Rev. Code of Judicial Conduct, § 5-302.9(A)

Neb. Rev. Code of Judicial Conduct, § 5-302.2

Neb. Rev. Code of Judicial Conduct, § 5-302.3(A)

Neb. Rev. Code of Judicial Conduct, § 5-302.6

Neb. Rev. Code of Judicial Conduct, § 5-302.4(C)

Neb. Rev. Code of Judicial Conduct, § 5-303.7(B) and (C)

Neb. Rev. Code of Judicial Conduct, § 5-302.10

References in Addition to Nebraska Revised Code of Judicial Conduct

State v. Thomas, 268 Neb. 570, 685 N.W.2d 69 (2004)

Nebraska Judicial Ethics Opinion 06-2

Discussion

The judges are concerned that the communication from the coalition is an ex parte communication requiring notification of “opposing counsel” and perhaps the Counsel for

Discipline. They question if leaving copies of the letter at counsel table is sufficient notice to parties and opposing counsel. It is the Committee's view that the communication is not an ex parte communication on a pending or impending matter.

An ex parte communication is one which occurs "when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party." *In re Interest of Chad S.*, 263 Neb. 184, 187, 639 N.W.2d 84, 87 (2002). See, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The Nebraska Revised Code of Judicial Conduct defines a pending matter as "a matter that has commenced" and defines an impending matter as "a matter that is imminent or expected to occur in the near future."

While the coalition seeks a meeting on a specific type of cases and in anticipation of specific issues, the correspondence does not refer to any specific pending matter nor to any specific matter that may be filed in the future and is therefore not an ex parte communication as defined and notice is not required. While the judges are not obligated to provide notice of the meeting to anticipated parties or counsel, they may provide notice in any manner they choose.

Even if the request for the meeting was to be considered an ex parte communication, it would not be necessarily improper to meet with the coalition. The Nebraska Revised Code of Judicial Conduct does not prohibit a meeting with the coalition on scheduling eviction cases subject to the provisions of Neb. Rev. Code of Judicial Conduct § 5-302.9(A)(2); and § 5-302.9. The provisions of the Code permit ex parte communications regarding a pending or impending matter "for scheduling, administrative, or emergency purposes, which does not address substantive matters." § 5-302.9(1)(A). The coalition's correspondence indicates that they wish to discuss scheduling and public health risks regarding eviction proceedings. Scheduling of future cases and public health issues associated with the hearings are appropriate matters for discussion given that no advantage can be reasonably assumed to adhere to the coalition or its potential clients from the conversations. The meeting must, however, comply with the other provisions of the Code, specifically the other provisions of § 5-302.9, and no substantive matters regarding pending or impending matters may be discussed.

While there are no other parties to notify of the meeting as required by § 5-302.9(A)(2), it is apparent from the judges' correspondence that there may be attorneys or other parties who might be interested in the discussion. As the comment to § 5-302.9 states:

"To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge."

It would be appropriate, efficient, and in keeping with the spirit of the Nebraska Revised Code of Judicial Conduct to encourage other attorneys or interested parties to participate in the meeting.

The Committee believes that the courts may consider scheduling requests from attorneys without violating the Code if granting the request, or its denial, does not confer an unfair advantage to any party. In making scheduling decisions at the request of a potential party, the provisions of § 5-302.6(A) and § 5-302.2 must be considered.

The coalition has requested that the judges consider informing "pro se litigants of this service from the bench." Judges may not refer persons to a specific organization for legal assistance. A judge may, however, indicate to an unrepresented litigant that he or she has a general right to seek the assistance of counsel and that there are organizations which may be able to assist on a reduced or a no-fee basis.

Judges are required to be impartial and must convey to parties, attorneys, and the general public that they are impartial. In the Committee's view, a judge informing a litigant or suggesting to a litigant that they seek assistance from a specific attorney or a group of attorneys would risk litigants and attorneys inferring that the recommended attorneys are favored by the court and that perceived favoritism would render a reasonable person to question the impartiality of the judge's ultimate decisions.

The coalition also seeks from the judges consideration to "liberally granting continuances." Any such promise or consideration by the court would be improper. All continuances are subject to objection and controlled by rules of law. It is inappropriate to have a blanket rule that all continuances should be either granted or denied in any type of case. See § 5-302.2 and § 5-302.10(C).

The judges seek advice as to whether they may include information about legal services with the eviction summonses. The Committee believes that the documents provided to a party with summonses are controlled by the statutes governing various types of cases. It would therefore be inappropriate for the reasons provided above to include extraneous materials promoting one specific group of service providers with the summonses.

Nothing in the Nebraska Judicial Ethics Opinion 06-2 or the Rules of Ethics would prohibit the posting of information concerning the coalition's activities in a highly visible position near the courtrooms and in other locations throughout the courthouse. Posting the information regarding the coalition is directly related to the court's business and would assist the court in fulfilling its duties under § 5-303.7(B) and (C) and § 5-302.6.

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 JUNE 17, 2020.

*Judge J Russell Derr
Judge James C. Stecker
Judge Jeffrey M. Wightman
Judge Michael W. Pirtle
Judge Matthew L. Acton (not participating)
Judge Mark J. Young
Judge Reggie L. Ryder*