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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

BY _____
CLERK

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: January 7, 2015

ADVISORY OPINION: JE14-006

PROPRIETY OF COURT EMPLOYEE OR
EMPLOYEE'S SPOUSE PROVIDING
COURT ORDERED DOMESTIC
VIOLENCE COUNSELING SERVICES

FACTS

A limited jurisdiction judge has inquired whether the Nevada Code of Judicial Conduct ("NCJC") permits a court employee and/or the employee's spouse to provide court-ordered counseling services mandated under NRS 200.485 where they operate the sole domestic violence treatment program certified under NAC 228.165 in the community, and where the loss of the only certified provider in this rural area would make it impractical or nearly impossible for offenders to complete the mandatory counseling.

ISSUES

May a court employee who, prior to acceptance of employment with the court, was a facilitator of domestic battery treatment counseling in the community along with the employee's spouse (pursuant to NRS 200.485(3)), continue to provide said counseling services after accepting employment with the court?

If a court employee is prohibited from continuing to provide these counseling services, may the court employee's spouse continue providing said counseling services so long as the court employee is removed from involvement in the counseling services?

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope and applicability of the NCJC. *Rule 5 of the Rules Governing the Standing Committee on Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

ANSWER

No, a court employee may not provide domestic battery treatment counseling ordered under NRS 200.485, unless the court employee's official duties or position with the court are such that providing such counseling services would not result in a conflict of interest or an appearance of impropriety. Although the Code of Judicial Conduct is inapplicable to a court employee's spouse, the Committee advises the parties to act with caution and to keep the precepts of Canon 1 in mind.

The NCJC governs the conduct of Nevada judges, including "anyone who is authorized to perform judicial functions." *See Application, Section I*. The request for advisory opinion before the Committee concerns the conduct of a court employee, but does not identify the employee as a judicial officer or describe the employee's official duties. Although the NCJC directly applies only to judges and judicial officers, the Committee notes that Rule 2.12 obligates a judge to "require court staff, court officials, and others subject to the judge's direction and control to act in a



manner consistent with the judge's obligations under this Code." *See Nev. Code Jud. Conduct Rule 2.12*. The Canons relevant to this issue thus apply to the judge's conduct and should inform the actions of the court employee who is the subject of the question.

Canon 1 of the NCJC states "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Rule 1.2 requires a judge to "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." The Commentary to Rule 1.2 sets forth the test for determining appearance of impropriety as "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." *See Nev. Code Jud. Conduct Rule 1.2, Comment [5]*. In addition, Canon 3 of the NCJC states: [a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."

The Committee is concerned that the court employee's continuation as the sole provider of mandatory domestic violence counseling services in the community may create an appearance of impropriety, impair impartiality, or give rise to an actual conflict of interest. In two prior opinions, the Committee examined similar situations concerning whether a court employee could serve the court in a dual capacity. The Committee's analysis focused on the working relationship between the judge and the court employee and also on the court

employee's official duties in each role. *See Advisory Opinion JE06-018* (impermissible for District Court staff attorney to serve as temporary Family Court Master where judge who supervises staff attorney reviews the Master's findings and recommendations); *see also Advisory Opinion JE13-004* (appointment of court employees as pro tempore part-time judges should be avoided where unnecessary).

As in these prior cases, in determining whether the NCJC would permit a court employee to provide court-ordered counseling services the Committee must examine several factors, including the employee's working relationship with the judge, the employee's official court duties, and the employee's responsibilities to both the court and the defendant as a domestic violence treatment provider. Absent specific information concerning the employee's position or official duties with the court, the Committee is hesitant to provide a definitive answer to the question before it. The Committee nonetheless advises that a court employee's provision of domestic violence treatment services to offenders convicted in the court for which the employee works will likely create an appearance of impropriety and may adversely affect the public's perception of the judiciary.

The penalties imposed under NRS 200.485 upon conviction of battery constituting domestic violence include mandatory weekly counseling sessions in a certified program for the treatment of persons who commit domestic violence. *See NRS 200.485(3)*. Where, as here, a court employee operates the only certified program in the community, when the judge orders an offender to complete domestic violence treatment it is in effect an order to attend the court employee's own treatment program. Depending on the judge's working

relationship with this employee and the employee's official duties, this could create a reasonable perception that the judge is favoring the employee-provider and thereby has engaged in conduct reflecting adversely on the judge's impartiality. Also, in certain situations domestic violence treatment providers must report directly to the court concerning a defendant's behavior, including observations on the offender's propensity to commit further violence. *See NAC 228.195(2) and (3)*. In assessing such a report, the judge could be required to judge the court employee's credibility against that of the defendant. Depending on the closeness of the employee's relationship with the judge and the authority of the employee's position in the court, this may create the impression that neither can carry out their duties impartially. Finally, the working relationship of the judge and court employee has the potential to create issues arising from *ex parte* communications and may require more frequent disqualification of the judge.

With respect to the question of whether the court employee's spouse may continue to provide court-ordered domestic violence treatment, the Committee observes that the NCJC does not control a spouse's behavior. The Committee nonetheless advises the parties to act with caution, keeping the precepts of Canon 1 in mind requiring a judge to "uphold and promote the independence, integrity, and impartiality of the judiciary." The Committee also suggests consulting the Model Code of Conduct for Judicial Employees in the State of Nevada for further guidance regarding the conduct of Judicial Branch employees. *See Model Code of Conduct for Judicial Employees (approved Dec. 6, 2013)*.

The Committee is mindful that the loss of the sole certified domestic violence

treatment provider can have devastating effects in Nevada's rural communities. Given that the limited jurisdiction courts' criminal caseload is predominantly misdemeanors involving domestic violence, the Committee believes that allowing a court employee to continue as the sole certified provider of court-ordered domestic violence treatment has great potential to undermine the public's confidence in the judiciary. Although the Committee is reluctant to conclude that the NCJC prohibits such conduct without knowledge of the court employee's specific situation, the Committee urges the court to prohibit the court employee from continuing to provide these services unless it concludes that to do so would not result in a conflict of interest, the impairment of impartiality, or the appearance of impropriety.

CONCLUSION

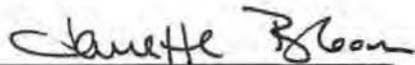
The Committee observes that permitting a court employee who provides the sole certified domestic violence treatment program in the community to continue to provide court-ordered counseling is very likely to create an appearance of impropriety and adversely affect the public's perception of the judiciary. Under the limited facts presented, the Committee concludes that the court employee may no longer provide said counseling services unless the employing court concludes that the employee's official duties or position with the court would not result in a conflict of interest or appearance of impropriety.

REFERENCES

Nev. Code Jud. Conduct, Application Section I; Canon 1; Canon 3; Rule 1.2 Comment [5]; Rule 2.12; Nevada Standing Committee on Judicial Ethics Opinion JE06-

018 (Nov. 30, 2006); JE13-004 (as amended, Nov. 19, 2013); Model Code of Conduct for Judicial Employees (approved Dec. 6, 2013); NRS 200.485; NAC 228.195(2) and (3); *Rule 5 Governing the Standing Committee On Judicial Ethics.*

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Janette Bloom
Vice-Chairman