

NEBRASKA JUDICIAL ETHICS ADVISORY COMMITTEE

Advisory Opinion No. 90-2

A. Question

A member of the Nebraska judiciary has inquired whether a judge may write letters of recommendation and/or answer questions about the qualifications of a lawyer who has applied to a judicial nominating commission for submission of the lawyer's name to the governor for judicial appointment.

B. Answer

It is the opinion of the committee that a judge may always furnish letters of recommendation and answer questions whenever the letters and/or questions are requested by any agency of government responsible for making or recommending judicial appointments. The communications of the judge should not be revealed to the applicant.

C. Code of Judicial Conduct Provisions

Canon 2 of the Code of Judicial Conduct provides: "A judge should avoid impropriety and the appearance of impropriety in all activities." It goes on as follows:

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

B. 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 or as a character witness. (emphasis added)

In addition, Canon 3 (B)(1) provides:

A judge should diligently discharge his or her administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials. (emphasis added)

D. Discussion

Thus, there is some conflict in the code. On the one hand, the judge must be careful not to lend the prestige of judicial office to advance private interests, or let people act like they have a special influence on the judge.

On the other hand, a judge is a citizen and has public responsibilities. Judges must, for example, obey a subpoena even if they may be asked about a person's character; and must (as a part of the judge's express administrative responsibilities) facilitate the performance of administrative responsibilities of other judges and court officials.

It is obvious that a judge may well have important information to furnish to government officials or agencies that are responsible for judicial appointment. Nowhere is this more evident than the responsibilities of judges to respond to the call of the senate, the attorney general, or the American Bar Association screening committees in federal judicial appointments. Judges have varied in their response to these calls from near-total silence, as are the cases with Justices O'Connor and Scalia, to complete openness and candor in the case of presidential nominee Bork.

It is the opinion of the committee that the evils sought to be corrected by the rule prohibiting voluntary character references is to see that judges do not improperly use the prestige of the office for the benefit of others, or question that someone has excessive influence over the judge. These evils are not furthered when the judge restricts his or her opinions on such matters to the requests of a legitimate body's need and request for such information. In fact, this is precisely the approach taken in proposed draft revisions to the ABA Code of Judicial Conduct which are being deliberated by the American Bar Association at the present time. In an effort to explain the provisions of the rule, the commentary on the draft of those revisions reads as follows:

A judge should not provide a letter of recommendation for a lawyer on the request of the individual who will benefit, except for a member of the judge's family or an employee or former employee of the court. A judge may, however, permit the use of the judge's name as a reference or respond to a request for a personal recommendation or reference when solicited by a selection authority such as a prospective employer, judicial selection committee, or law school admissions office. A judge also is permitted to provide substantive factual evidence in response to a request from a sentencing judge or probation officer.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, as well as by responding to official inquiries concerning the person being considered for a judgeship. However, a judge must not directly or indirectly furnish to a candidate a copy of the recommendation written by the judge or disclose its content to the candidate. See also Canon 5 regarding use of a judge's name in political activities.

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 testifies. 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 summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify.

It is the opinion of the committee that responding to a legitimate inquiry of someone who needs the information does not subject a judge to criticism for being a character witness in the circumstances posed by the question. It is the opinion of the committee that an unequivocal yes to the question violates neither the letter nor the spirit of any provisions in the Code of Judicial Conduct.

Other advisory opinions seem consistent with this view. For example, an Opinion 88-10, Advisory Commission on Judicial Ethics (New York, March 14, 1988), recognizes that recommendations made by judges in ordinary employment and appointive circumstances are necessary and should be encouraged.

Another opinion indicates that judges do not violate the Code of Judicial Conduct by writing letters of recommendation for people they know who are applying to law school or for employment. Judicial Ethics Opinion JE-74,

Ethics Committee of the Kentucky Judiciary; Opinion 133, Commission on Retirement, Removal, and Discipline (Missouri, April 6, 1987). Two Florida opinions found no impropriety in writing a character reference on behalf of a county supervisor of youth services applying for a district supervisor position in the same division, or writing a letter to the U.S. Army JAG Corps to advise them on the character and qualifications of a attorney practicing in the judge's circuit where the corps required at least three letters from disinterested judges in the community regarding the reputation and professional standing of the attorney. Opinion 75-30, Commission on the Standards of Judicial Conduct (Florida, November 10, 1975); Opinion 77-10, Commission on the Standards of Conduct governing judges (Florida, April 21, 1977).


Of course, the practice must be regulated and proprieties respected. In one opinion, a recommendation written to an employer who had a case pending in the judge's court calls into serious question the loan of the prestige of the office by the judge. Opinion 133, Commission on Retirement, Removal and Discipline (Missouri, April 6, 1987).

Another example of abuse is found in In re R.W. Anatasia, 76 N.J. 510, 388 A.2d 620 (1978). In that case, a judge received a public reprimand because he sent a letter on official court stationary to the New Jersey Racing Commission on behalf of a client and good friend who had been denied a racing license because of his prior criminal record. It is important to point out that the judge did so voluntarily, and this was not in response to the commission subpoena or directed to the judge to furnish information regarding the applicant. Further, the committee that heard the case had found that the judge had intended to use the prestige and authority of his judicial office to accomplish a personal and private purpose unrelated to his judicial duties.

E. SUMMARY

The committee believes judges may respond to inquiries of judicial nominating commissions concerning qualifications of lawyers who have applied for judgeships. We believe the judge's response should be restricted to circumstances where *the commission* has requested the information, and we believe the response of the judge should not be furnished to the applicant.

Adopted by Committee this 3 day of July, 1990.



William D. Blue
Chairman

Approved by the Board of Directors of the City of New York



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