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COMMISSION ON JUDICIAL CONDUCT
SUPREME COURT, STATE OF HAWAII

FORMAL ADVISORY OPINION #02-93
DECEMBER 8, 1993

QUESTION PRESENTED

When, if ever, a judge may act as a character witness or comment about a person's character (1) at a judicial selection committee hearing; (2) at a Senate confirmation hearing; (3) at a court hearing; and (4) in general public comment.

ANALYSIS

In general, the Code of Judicial Conduct discourages and at times prohibits a judge from voluntarily testifying as a character witness. Canon 2B expressly provides:

A judge shall not testify voluntarily as a character witness.

The Commentary to Canon 2B explains the rationale for that prohibition.

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.

However, the Commentary also provides that, "A judge may. . .testify when properly summoned," while cautioning that "[e]xcept 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."

According to the reporter for the American Bar Association (ABA) committee that drafted the 1990 ABA Model Code of Judicial Conduct, on which the Hawaii Code is based, that condition was added because "some persons had criticized the 1972 Code's prohibition against testifying voluntarily as a character witness as subject to circumvention through the 'friendly subpoena'. . ." Lisa L. Milord, The Development of the ABA Judicial Code at 14 (1992).

In addition to the specific prohibition on voluntarily giving character testimony, the general prohibition in Canon 2B against lending the prestige of judicial office to advance another's private interest would prohibit sworn testimony or other public comment about a person's character under most other circumstances as well.

However, the Commentary to Canon 2B recognizes an exception for the judicial selection process:

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

Cooperating with the judicial selection process "might involve the judge's initiating a letter of recommendation regarding a person proposed for consideration." Lisa L. Milord, The Development of the ABA Judicial Code at 14 (1992).

The rationale for the judicial selection process exception is that judges frequently have relevant knowledge of a potential nominee's qualifications that could be extremely helpful to a nominating committee or appointing authority. The Advisory Committee on Judicial Activities of the United States Judicial Conference has explained:

[J]udges have a responsibility to communicate their recommendations and evaluations to the appointive authorities. . . and their selection committees or commissions. In other words, the cautions of Canon 2B are entirely consistent with a positive duty of judges to communicate their evaluations based on experience to the end that the public interest in judiciary of quality and integrity be realized.

U.S. Advisory Opinion No. 59 (April 16, 1979).

However, even in the judicial selection process, a judge must be sensitive to possible abuse of the prestige of office. Thus, a judge should only give information based on the judge's personal knowledge and experience, should be confident that it is the judge's personal opinion that is being sought, not the backing of the judicial position, and should not endorse one candidate over another. As the U.S. Judicial Conference has stated:

[A]ny opinion [should] be and appear to be directed only to factors relevant to performance of the judicial office, . . . the judge's views should be objective and informative and avoid pleading for or endorsing the final choice and appointment of the candidate he may be recommending as opposed to all others, and. . .the judge should not lend his name to any publicity campaign for any candidate.

U.S. Advisory Opinion No. 59 (April 16, 1979). Moreover, judges should use caution because the judicial selection process is at times related to the political process, and a judge's involvement could give the appearance of involvement in political activity prohibited by Canon 5B:

A judge shall not engage in any political activity except (i) as authorized under any other section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

Finally, although the Commentary to Canon 2B does suggest that "a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation," commenting on a person's character in general public comment does not fall within any exception to the general prohibition.

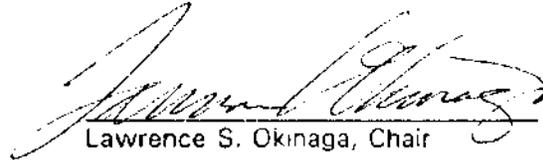
CONCLUSION

Unless testimony is related to a judicial selection, if a judge is requested to testify about a person's character, a judge must refuse to do so voluntarily and should discourage the party from subpoenaing the judge. A judge may respond to any inquiry about a person's character made by the appointing or confirming bodies in the judicial selection process but should exercise caution, particularly against giving an appearance of partisanship or other involvement in political activity. Other public comment on a person's character is prohibited.

THEREFORE, more particularly, the Commission renders the following advisory opinions:

1. At a judicial selection committee hearing - Character testimony is permissible, but a judge must be sensitive to possible misuse of the prestige of office and involvement in the political process.
2. At a Senate confirmation hearing - Character testimony is permissible, but a judge must be sensitive to possible misuse of the prestige of office and involvement in the political process.
3. At a court hearing - Character testimony is permissible only if required by subpoena or similar court process, and the judge must discourage a party from requesting the subpoena.
4. In general public comment - Comment about a person's character is prohibited.

FOR THE COMMISSION ON
JUDICIAL CONDUCT:


Lawrence S. Okinaga, Chair

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Rules 8.2(a)(7) and 8.15 of the Supreme Court of the State of Hawaii (amended April 26, 1993) authorize the Commission on Judicial Conduct to issue advisory opinions concerning proper interpretations of the Code of Judicial Conduct at the request of a judge, the Administrative Director of Courts, and the Commission itself. Rule 8.15(b) provides that "[i]f the Commission finds the opinion of limited significance, it may provide an informal written opinion to the questioner," but that if "the Commission finds the opinion of sufficient general interest and importance, it shall render a formal written opinion, which shall be published and disseminated to all judges and to whomever the Commission deems advisable." Rule 8.15(c) provides that "an advisory opinion rendered by the Commission shall be admissible in any disciplinary proceeding involving a judge to whom the opinion is directed. It shall be a complete defense to any complaint under these rules that the judge complained against acted in accordance with and in reliance on an advisory opinion issued to the judge that certain specified conduct by the judge would not constitute a violation of the Code of Judicial Conduct. In addition, it shall be a mitigating factor in the consideration of any complaint under these rules that the judge complained against acted reasonably in reliance on any formal or informal advisory opinion not directed at the judge."