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**FORMAL ADVISORY OPINION #01-00
November 28, 2000**

QUESTIONS PRESENTED

May a per diem judge express opinions regarding political issues by: (1) writing a letter to the editor of a newspaper endorsing a specific legislative proposal; (2) lobby the legislature in support of such proposal; and (3) testify in support of such proposal? May a per diem judge express opinions regarding judicial candidates by writing to the Chief Justice or the Governor?

ANALYSIS

The Code treats writing to the editor, lobbying, and testifying in support of a specific legislative proposal as political activities. Full-time judges are prohibited by Canon 5B of the Code from engaging in such political activities. Per diem judges are not prohibited from writing such a letter to the editor, or lobbying the members of the legislature. However, all judges, including per diem judges, must comply with Canon 2B of the Code which provides in part:

...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.

Therefore, while activities (1) and (2) are not prohibited, care must be taken not to use or appear to use the prestige of the judicial office. While engaging in these political activities on behalf of a specific proposal, per diem judges must be mindful of their positions as per diem judges, avoiding any reference to their per diem judge status, and must discourage others from doing so as well.

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However, testifying at a legislative hearing on a proposal, is prohibited by Canon 4C of the Code. Canon 4C(1) provides:

A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

This Canon prohibits appearances at public, legislative, or executive hearings except on matters concerning the legal system or the administration of justice. The Commission opines that **testifying on a proposal is not a permitted exception to this Canon.**

Second, regarding any limitations on writing to the Chief Justice or the Governor to provide input as to the qualifications of judicial candidates, Canon 2B applies:

A judge shall not testify voluntarily as a character witness.

The Commentary to Canon 2B provides:

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.

The Commission opines that a per diem judge should not initiate communications with the Chief Justice or the Governor regarding the qualifications of an applicant unless the judge is specifically requested to do so. Even when specifically invited to comment, a judge must be sensitive to possible abuse of the prestige of office, and thus any information given should be objective, evenhanded, succinct, discreet, and limited to the judge's personal knowledge and experience, addressing only factors relevant to the candidate's performance of judicial office, and should not endorse one candidate over another.

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Publication of a "short list" of candidates or general announcements in the media inviting the public to comment about applicants are general requests and are not considered specific requests for information that the Canon contemplates. These types of invitations for comment are not "official inquiries" within the exceptions identified in the Commentary to Canon 2B.

There is widespread support for this position. The Alaska Commission on Judicial Conduct advised, sending an unsolicited letter to the Governor is improper because the "Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political." *Alaska Advisory Opinion 97-1*. A judge may submit a letter of reference or recommendation for a candidate for appointment to judicial office only if the judge is formally requested to do so by the appointing authority. *Nevada Advisory Opinion 98-6*. A judge may respond to inquiries from the executive or legislative branches about attorneys being considered for judicial posts if the inquirer has official responsibilities in the matter. *New Jersey Memorandum (June 8, 1982)*. Unless specifically requested to do so, a judge may not write a reference letter concerning a judicial candidate to the judicial nominating committee or the appointing committee. *North Dakota Advisory Opinion 92-1*. A judge may communicate evaluations of candidates when requested to do so by the appointing authority, which includes the President, Senators, and their selection committees or commissions. *U. S. Advisory Opinion 59 (1979, revised 1998)*. Because providing references and information fall within Canon 2, per diem judges are not exempt and must comply with this prohibition.

With regard to testifying on a candidate's behalf, 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. However, the Commentary to Canon 2B states, "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."

This Commission has opined in the past that while judges may testify at Senate confirmation hearings, such participation is strongly discouraged and is appropriate only with special caution. A Senate confirmation hearing is clearly that part of the judicial selection process which involves the legislature and, to the extent that such hearing is used for public endorsement, is considered political. A judge testifying at such a hearing is particularly susceptible to giving an appearance of personal and voluntary involvement in political activities which are generally prohibited. Such an appearance is also susceptible to creating an impression that a judge is inappropriately lending the prestige of judicial office to a political appointment. Considering these factors, although it is not prohibited, a judge should not freely testify at Senate confirmation hearings. Such testimony is discouraged, and special caution should be exercised when a judge decides to testify at a Senate confirmation hearing. (See Formal Advisory Opinion #02-93 and the Addendum dated March 31, 1994).

CONCLUSION

While per diem judges may write to the editor of a newspaper endorsing a specific proposal, and lobby the legislature on such proposal, the judge must be mindful of the judge's status, avoiding any reference to that status, and must discourage others from doing so as well. **A per diem judge is prohibited from testifying at the legislature on anything other than a matter concerning the law, the legal system, or the administration of justice.** A per diem judge should not initiate communications with the Chief Justice or Governor to comment on judicial

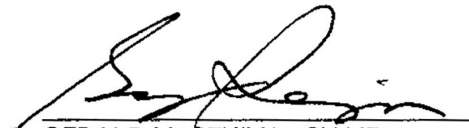
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candidates, unless specifically invited to do so. Finally, a per diem judge is discouraged from testifying on behalf of a judicial candidate and in any event, special caution should be exercised when a judge decides to testify at a Senate confirmation hearing.

FOR THE COMMISSION
ON JUDICIAL CONDUCT



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