



Commission on Judicial Conduct | Komikina Lawena Luna Kānāwai

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FORMAL ADVISORY OPINION #26-01 **August 12, 2026**

ACTIVITIES RELATED TO CANDIDATES FOR JUDICIAL OFFICE

INTRODUCTION

This Formal Advisory Opinion addresses whether a judge can serve as a reference, write letters of recommendation or respond to inquiries concerning the professional qualifications of a candidate for judicial office to the Judicial Selection Commission, the Chief Justice, the Governor and/or the Senate. Based on changes made to the Hawai'i Revised Code of Judicial Conduct (Code), this Formal Advisory Opinion reviews and replaces four prior advisory opinions¹.

REQUEST FOR ADVICE

The Commission on Judicial Conduct (Commission) has been asked to provide guidance on the subject of judges making recommendations or responding to inquiries concerning the professional qualifications of a candidate for judicial office to the Judicial Selection Commission (JSC), the Chief Justice, the Governor and/or the Senate concerning candidates for judicial office. The Commission was asked to review its prior advisory opinions and to consider provisions of the Code that allow judges to make recommendations or respond to such inquiries based on personal knowledge.

¹ This Formal Advisory Opinion (FAO) #26-01 supersedes four prior advisory opinions (FAO #02-93 (1993), Addendum to FAO #02-93 (1994), FAO #01-00 (2000), and FAO #01-02 (2002)).

PRIOR FORMAL ADVISORY OPINIONS

The Commission previously issued four Formal Advisory Opinions (FAO) dealing with this issue. Each of these FAOs was written under a prior version of the Code. The current Code (Exhibit B to the Rules of the Supreme Court of the State of Hawai'i) was adopted in 2008, replacing former Exhibit B which was adopted in September 1992. This is noteworthy as explained below.

The first FAO #02-93 (1993), relied on then Canon 2B, which it quoted as follows: "A judge shall not testify voluntarily as a character witness." Notably, the conclusions of the FAO addressed whether character testimony is permissible before the JSC, the Senate, a court or in public. However, the current Code's treatment of character testimony is not so broad. Rule 3.3 now provides that "[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." Hence the current Rule concerning character testimony does not apply either to submissions or testimony to the JSC or the Senate as their proceedings are not adjudicatory.

The second FAO #02-93 (1994) is an addendum to the first FAO. The FAO continued to rely on Canon 2B (relating to character testimony) and concluded that while judges may testify at Senate confirmation hearings, such participation is discouraged and is permitted only with special caution. FAO #02-93 cautioned that a judge should not give the appearance of involvement in political activities and should not give the impression of lending the prestige of judicial office to a political appointment.

The third FAO #01-00 (2000) considered whether a per diem judge may express opinions regarding judicial candidates by writing to the Chief Justice or the Governor. This opinion again relied on Canon 2B (relating to character testimony) and concluded that a per diem judge should not initiate communications with the Chief Justice or the Governor. FAO #01-00 opined that even when invited to comment, "a judge must be sensitive to possible abuse of the prestige of office."

Finally, the fourth FAO #01-02 (2002) considered whether judges may communicate with the JSC with recommendations relating to selection or retention. The 2002 FAO summarizes the prior three FAOs. It then notes the Commentary to Canon 2B which then provided:

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.” (Emphasis in original.)

FAO #01-02 does not conclude that it is a violation of the Code for a judge to communicate with the JSC with recommendations for selection or retention. Rather the FAO is cautionary:

Although the code does not prohibit unsolicited communications it seems to permit or urge response only when it is invited. Accordingly, this Commission generally discourages judges from communicating with authorities in the selection and retention process unless requested to do so.

Given the change in the rule that is the underpinning of the four FAOs, this FAO #26-01 supersedes them and provides guidance under the current Code.

APPLICABLE RULES UNDER THE CURRENT CODE

First, Rule 1.3, Avoiding Misuse of the Prestige of Judicial Office, provides that “[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”

Comments [2] and [3] to Rule 1.3 are pertinent here:

[2] A judge may provide a reference or recommendation for an individual based upon the judge’s personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

Second, Rule 3.2, Appearances before Governmental Bodies and Consultation with Government Officials, provides that:

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(a) in connection with matters concerning the law, the legal system, or the administration of justice;

(b) in connection with matters about which the judge acquired knowledge or expertise in the course of the performance of the duties of judicial office; or

(c) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

Comment [2] to Rule 3.2 is pertinent here:

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(c), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to materially impair the judge's independence, integrity, impartiality, temperament, or fitness to fulfill the duties of judicial office.

Finally, Rule 3.3, Testifying as a Character Witness, provides that:

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned. Unless there are unusual circumstances under which the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Comment 1 to Rule 3.3 is pertinent here:

[1] A judge who, without being subpoenaed, testifies as a character witness lends or misuses the prestige of judicial office to advance the interests of another. See Rule 1.3.

ANALYSIS AND CONCLUSIONS

We address separately whether a judge can serve as a reference, write letters of recommendation or respond to inquiries concerning the professional qualifications of a candidate for judicial office to the Judicial Selection Commission, the Chief Justice, the Governor and/or the Senate.

1. Providing information to the Judicial Selection Commission.

Consistent with Rule 1.3 and Comments [2] and [3] thereto, judges may serve as a reference or write a letter of recommendation for a candidate for judicial office based upon the judge's personal knowledge to the JSC. The reference or recommendation may be unsolicited. Judges may participate in the process of judicial selection by cooperating with the JSC and responding to its inquiries.

The Commission notes that information provided to the JSC is confidential. In providing information to the JSC, the judge should take care to note that the reference or recommendation is a personal one and is not made on behalf of the Judiciary. A judge should support the process of judicial evaluation rather than advance the personal interests of a candidate, which would be contrary to Rule 1.3. As Comment [3] provides: "Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office." (Emphasis added.) In responding to inquiries, the information provided must be based on personal knowledge and should pertain only to those factors that are relevant to the performance of judicial office. When the information provided is so limited, it is unlikely to appear to a reasonable person that the judge's independence, integrity or impartiality has been impaired.

The judge may be asked by the JSC to comment on candidates for judicial office. In such circumstances the judge may provide information concerning the professional qualifications of the candidates where that information is based on the judge's personal knowledge. It is not appropriate for the judge to advise the JSC as to which candidates it should include on the list of nominees. Such comments could reasonably be perceived as an attempt to exert pressure by reason of judicial office.

2. Providing information to the Chief Justice.

Comment [3] to Rule 1.3 allows cooperation with "appointing authorities" and responses "to inquiries from such entities." The Commission finds that the Governor and the Chief Justice are "appointing authorities." While there is no legal requirement that information provided to the Chief Justice concerning nominees for judicial office be kept confidential, it has been the practice of the Chief Justice to request comments on district court nominees and to state that all comments will be kept confidential.

Consistent with Rule 1.3 and Comments [2] and [3] thereto, a judge may submit comments concerning nominees for the district court in response to a request for comments from the Chief Justice. The information provided must be based on personal knowledge and should pertain only to "the professional qualifications of a person being considered for judicial office." When the information provided is so limited, it is unlikely to appear to a reasonable person that the judge's independence, integrity or impartiality has been impaired. A judge should support the process of judicial evaluation rather than advance the personal interests of a nominee. It is not appropriate for the judge to advise the Chief Justice as to which nominee should be selected. Such comments could reasonably be perceived as an attempt to exert pressure by reason of judicial office.

3. Providing information to the Governor.

In contrast to information provided to the JSC, information provided to the Governor may be made public as there is no legal requirement that such information be kept confidential. As noted above, Comment [3] to Rule 1.3 allows cooperation with

“appointing authorities” and responses “to inquiries from such entities.” The Governor and the Chief Justice are “appointing authorities.”

There is a tension between Rule 1.3 and Rule 3.2, which provides that a “judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official” except under limited circumstances. Comment [2] to Rule 3.2 refers judges to the obligations of Rules 1.3, 2.10 and 3.1(c). Taken together, the Commission advises that a judge may serve as a reference, provide a letter of recommendation, or provide information to the Governor as part of the judicial selection process. However, it is not permissible to advance the personal interests of a nominee which would constitute the misuse of the prestige of judicial office.

In addition, as the information provided may be made public, the judge should take care to note that the reference or recommendation is a personal one and is not made on behalf of the Judiciary. In accordance with Rule 1.3, Comments [2] and [3], a judge should provide only information based on personal knowledge “concerning the professional qualifications of a person being considered for judicial office.” It is not appropriate for the judge to advise the Governor as to which nominee should be selected. Such comments could reasonably be perceived as an attempt to exert pressure by reason of judicial office. When the information provided is so limited, it is unlikely to appear to a reasonable person that the judge’s independence, integrity or impartiality has been impaired.

4. Providing information to the Legislature.

In contrast to information provided to the JSC, information provided to the Legislature may be made public. The Commission finds that the Legislature and its committees are not “appointing authorities” under Rule 1.3, and hence the cooperation contemplated by Comments [2] and [3] to Rule 1.3 does not apply. Rule 3.2 does apply (a “judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official” except under limited circumstances).

The Commission cautions against appearing before the Legislature unless requested by the Legislature to do so. Canon 4 provides that a “judge shall not engage in political activity that is inconsistent with the independence, integrity, or impartiality of the Judiciary.” In the event a judge appears before the Legislature, Comment [2] to Rule 3.2 reminds judges of the obligations of Rules 1.3, 2.10 and 3.1(c). It is not permissible to advance the personal interests of an applicant which would constitute the misuse of the prestige of judicial office. The information provided should be based on personal knowledge concerning the professional qualifications of the person being considered for judicial office. When the information provided is so limited, it is unlikely to appear to a reasonable person that the judge’s independence, integrity or impartiality has been impaired.

The Commission further reminds judges that pursuant to Rule 2.12(a), Supervisory Duties, “[a] judge shall 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.” While court staff, officers and others are not prohibited from providing information to the JSC, the Governor and/or the Senate, they must not give the appearance that they speak in an official capacity or that they speak on behalf of a judge or the Judiciary.

Finally, the Commission concludes that Rule 3.3, Testifying as a Character Witness, does not apply as the above judicial selection process is not adjudicative.

FOR THE COMMISSION ON JUDICIAL CONDUCT

/s/ Lisa W. Munger

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