

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-5

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Withdrawn by Adv. Op. 2021-12

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

[Not Current- subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997]

SYLLABUS: A judge may give a recommendation on behalf of an individual applying to law school if the judge has firsthand knowledge of the capabilities and character of the applicant. A judge may give a recommendation on behalf of a judicial law clerk applying for employment as an attorney if the judge has personal, day to day, knowledge of the professional and intellectual capabilities of the clerk. A judge may write a letter on behalf of an individual seeking appointment to a federal judgeship if the recommendation is based on factual knowledge of the ability and suitability of the individual. A judge should make such recommendations only on an individual basis upon determination that the recommendation is not sought or based solely to lend prestige of the office to advance the interests of the individual.

OPINION: Judges are held in high esteem. Thus, they are asked to give recommendations on behalf of others. This opinion addresses whether the Ohio Code of Judicial Conduct permits a judge to give recommendations on behalf of individuals applying to law school, judicial law clerks seeking employment as attorneys, and individuals seeking appointment to federal judgeships. The questions are as follows:

1. May a judge give a recommendation on behalf of an individual applying to law school;
2. May a judge give a recommendation on behalf of a judicial law clerk seeking employment as an attorney;
3. May a judge write a letter of recommendation on behalf of an individual seeking appointment to a federal judgeship?

Introduction

Canon 2B of the Ohio Code of Judicial Conduct states that

[a] judge should not allow his [her] family, social, or other relationships to influence his [her] judicial conduct or judgment. He [she] should not lend the prestige of his [her] office to advance the private interests of others; nor should he [she] convey or permit others to convey the impression that they are in a special position to influence him [her]. He [she] should not testify voluntarily as a character witness.

Under Canon 2, the ethical concerns regarding recommendations by judges would be as follows: judges may be perceived as voluntarily acting as a character witness; judges may be perceived as lending prestige of the office to advance the private interests of others; and judges may be creating an appearance of impropriety.

Question One

May a judge give a recommendation on behalf of an individual applying to law school?

The Board begins by dismissing the concern that recommendations by judges on behalf of an individual applying to law school might be perceived as a judge improperly, acting as a character witness. The Commentary to Canon 2B of the Code of Judicial Conduct implies that the prohibition against acting as a character witness applies to court proceedings. As stated within the Commentary,

[t]he testimony of a judge as a character witness injects the prestige of his [her] office into the proceeding in which he [she] testifies and may be misunderstood to be an official testimonial. This Canon [Canon 2B.], however, does not afford him [her] a privilege against testifying in response to an official summons. (Emphasis added).

The Reporter's notes to the 1972 ABA Code of Judicial Conduct also imply that the prohibition applies to testimony in court. "The committee finally concluded that the proper standard would preclude a judge from being a volunteer character witness, but would not grant him a privilege to refuse to testify if a party has taken steps to summon him officially." E. Thode, Reporter's Notes to Code of Judicial Conduct 49 (1973). Thus, this Board interprets the prohibition regarding a judge acting as a character witness as applying to testimony in court proceedings. This concern will not be addressed further with regard to Questions One, Two, or Three.

Turning to other ethical concerns, it is undeniable that recommendations on behalf of persons applying to law school may be perceived as conduct that advances the individual candidacy of an applicant. It is also a reality that individuals may attempt to use the prestige of a judge's office to advance their own interest.

Yet, other states have not found these ethical concerns insurmountable. For example, in Pennsylvania, Florida, New York, and Kentucky a judge may write letters of recommendation for applicants seeking admission to law school. See Pennsylvania Judicial Ethics Committee, Op. 86-5, (1986)

(requiring personal knowledge of the applicant and satisfaction that it will not be perceived as partisan political conduct, coercion, or use of judicial office for private advantage); Florida SupCt, Comm. on Standards of Conduct Governing Judges, Ops. 75-18 (1975) (permitting letter regarding background and character of law school applicant as long as the prestige of the judicial office is not used to advance the person's interests) and 79-3 (1979) (permitting judge to write recommendations for law school applicants, with minority of committee advising that recommendation be written only if requested by the law school); New York, Advisory Comm. on Judicial Ethics, Op. 88-10 (1988) (permitting letter that reflects applicant's history or character if not written merely to lend the prestige of the office to the applicant); Kentucky SupCt, Judicial Ethics Comm., Op. JE-74 (undated) (advising that public confidence in the integrity, independence, and impartiality of the judiciary would not be impaired by such recommendations).

In this Board's view, there is no ethical basis for banning a judge from recommending an applicant for law school when the judge has firsthand knowledge of an applicant's capabilities and character. Nevertheless, a judge should use discretion. Factors to consider are whether a judge has a personal acquaintance with and a firsthand knowledge of the background of the applicant. Other factors are the motive of the applicant and the motive of the judge.

In deciding whether to recommend an applicant for admission to law school, a judge must decide whether the recommendation is sought because of the judge's acquaintance with and knowledge of the applicant or whether it is sought solely because of the prestige of the judge's office. The judge must be vigilant against recommendations that are made solely for the purpose of personal or political gain.

In conclusion, this Board advises that a judge may give a recommendation on behalf of an individual applying to law school if the judge has firsthand knowledge of the capabilities and character of the applicant. These recommendations should be given sparingly. A judge should make such recommendations only on an individual basis upon determination that the recommendation is not sought or based solely to lend prestige of the office to advance the interests of the individual.

Question Two

May a judge give a recommendation on behalf of a law clerk seeking employment as an attorney?

This question raises two ethical concerns. One concern is that a recommendation given by a judge on behalf of a judicial law clerk may be perceived as lending the prestige of the office to

advance the interest of the judicial law clerk. The other concern is that there may be an appearance of impropriety if a judge recommends a judicial law clerk for employment with a law firm when the firm's attorneys are serving as counsel in a pending case before the judge.

Yet, there is value in permitting such recommendations. A judge is in a position to have unique insight regarding the professional and intellectual capabilities of a judicial law clerk. Thus, many states permit recommendations of judicial clerks, albeit within certain limitations. For example, in California, a judge may give a recommendation for his or her law clerk since knowledge of the clerk gained in the course of official duties does not inject the prestige of office simply for private advantage. See California Comm. on Judicial Ethics, Op. 40 (1988). In Georgia, a judge may write a letter of recommendation for employment if the character and capabilities of the clerk are well known to the judge; however, the recommendation might be improper if the letter is directed to an employer who has a case pending before the judge or if the prestige of the office is the important factor. Georgia, Judicial Qualifications Comm'n, Op. 9 (1977). In Louisiana, judges may write letters of recommendation for employment on behalf of their law clerks only in response to requests from employers. Louisiana SupCt, Comm. on Judicial Ethics, Op. 71, (1986). In Ohio, an ethics committee advised that a lawyer may use a federal magistrate as an employment reference when the lawyer's experience with the magistrate was job related--such reference does not lend the prestige of the office to advance the private interests of others. Columbus Bar Ass'n, Op. 3 (1986).

It is this Board's view that the value of the judge's firsthand knowledge of the judicial clerk's professional and intellectual capabilities outweighs the potential concern of lending the prestige of the office to advance the interests of the clerk and creating an appearance of impropriety. These potential concerns can be avoided. The judge should make recommendations based only on firsthand knowledge of the clerk's work performance. Further, if a judge is recommending a judicial clerk for employment, the judge should screen that clerk from participating in any case being advocated by the prospective employer.

In conclusion, it is the Board's opinion that a judge may give a recommendation on behalf of a judicial law clerk for employment as an attorney if the judge has personal, day to day knowledge of the professional and intellectual capabilities of the clerk. A judge should make such recommendations only on an individual basis upon determination that the recommendation is not sought or based solely to lend prestige of the office to advance the interests of the clerk.

Question Three

May a judge give a recommendation on behalf of an individual seeking appointment to a federal judgeship?

The last issue in this opinion is whether it is proper for a judge to recommend an individual for appointment to a federal judgeship. Once again, there are several ethical concerns that must be considered. One ethical concern is whether a letter of recommendation constitutes a public endorsement under Canon 7. The broad mandate of Canon 7 is that "A Judge Should Refrain From Political Activity Inappropriate to Judicial Office." Canon 7 (A) (1) (b) specifically prohibits an incumbent judge or a candidate for judicial office from publicly endorsing a candidate for public office. The prohibition in Canon 7 (A) (1) (b) extends to public endorsements of candidates for all public offices, including judicial office. E. Thode, Reporter's Notes to Code of Judicial Conduct 95 (1973).

In this Board's view, a state court judge's recommendation to a nominating committee regarding an individual seeking a federal judgeship is distinct from a judge's recommendation to the public to support an individual seeking elective office within the state. Thus, a state court judge's communication with a judicial screening committee regarding a judicial federal appointment is not considered a prohibited public endorsement within the meaning of Canon 7.

The other ethical concern to be addressed is whether such recommendation creates an appearance of impropriety or the improper lending of the prestige of a judicial office to advance private interests under Canon 2. As discussed in Questions One and Two, these concerns can be eliminated if the judge has sufficient knowledge of the individual on which to base the recommendation and the judge is satisfied that the recommendation is not sought solely to use the judge's office to advance interests of the individual. A recommendation should not be a blanket endorsement, but should be based upon individual knowledge of the individual.

Thus, in answer to Question Three, this Board advises that a judge may write a letter on behalf of a individual seeking appointment to a federal judgeship if the recommendation is based on factual knowledge of the ability and suitability of the individual and it is not sought or based solely to lend prestige of the office to advance the interests of the individual. In addition, the recommendation should not involve a political quid pro quo.

In so concluding, this Board joins with other states in permitting such recommendations. See e.g., Florida, Sup.Ct, Comm. on Standards of Judicial Conduct, Ops. 86-2 (1986) (advising that communication with a judicial nominating

commission regarding a person whose application is pending does not constitute a public endorsement, has no bearing on the promotion of public conscience or the integrity and impartiality of the judiciary, and does not involve undue influence, but should be limited to factual statement of the person so that the commission may be allowed to draw its own conclusion); Georgia, Judicial Qualifications Comm'n, Op. 63(1984) (permitting a judge to write letters of recommendation to a screening committee for judicial appointment, if the letters only involve the judge's knowledge of the applicant); Missouri, Comm'n on Retirement, Removal & Discipline, Op. 133 (1987) (permitting a judge to write a letter to a screening committee for judicial appointment). See also, Maryland, Judicial Ethics Comm., Op. 28 (1975) (advising that a judge may not write a voluntary letter of recommendation on behalf of a candidate to be considered for judicial appointment to the district court since it is analogous to the judge's support of a candidate for election to judicial office, but may write a letter if asked for by the Judicial Selection Commission); and Nebraska, Ethics Advisory Comm., Op. 90-2 (1990) (permitting a judge to furnish a requested letter of recommendation and or answer any questions from any governmental agency responsible for recommending judicial appointments if the communication is not revealed to the applicant).

Summary of conclusions

In conclusion, this Board advises that a judge may give a recommendation on behalf of an individual applying to law school if the judge has firsthand knowledge of the capabilities and character of the applicant. A judge may give a recommendation on behalf of a judicial law clerk applying for employment as an attorney if the judge has personal, day to day, knowledge of the professional and intellectual capabilities of the clerk. A judge may write a letter on behalf of an individual seeking appointment to a federal judgeship if the recommendation is based on factual knowledge of the ability and suitability of the individual. A judge should make such recommendations only on an individual basis upon determination that the recommendation is not sought or based solely to lend prestige of the office to advance the interests of the individual.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.