

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

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OPINION 2011-3

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Abusing the Prestige of Judicial Office: Bar Association Elections

SYLLABUS: A judge may not recommend or endorse a candidate for a bar association elective office. By providing such recommendations and endorsements, a judge abuses the prestige of judicial office to advance the personal interests of another in violation of Jud.Cond.R. 1.3 and creates the appearance of impropriety in violation of Jud.Cond.R. 1.2. Opinion 91-29 is approved and followed.

QUESTION PRESENTED: May a judge recommend or endorse a candidate for election to a bar association office?

FACTS: Prior to taking the bench, a judge practiced law in a private firm. A lawyer in that firm is a candidate for an elective position in a bar association. The judge and the lawyer worked together at the firm for a period of time, and the judge has asked whether he may recommend the lawyer for the bar association position.

APPLICABLE RULES: Rules 1.2 and 1.3 of the Ohio Code of Judicial Conduct

OPINION: The Board has previously addressed a judge's recommendation of a candidate for a bar association elective office. In Opinion 91-29, the Board determined that a judge should not endorse a bar association candidate or allow the judge's name to be included on a list of the candidate's supporters. The Board concluded that "such endorsement lends the prestige of the judge's office to advance the private interests of others and creates an appearance of impropriety in violation of Canon 2 of the Code of Judicial Conduct." Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 91-29, at syllabus (Dec. 6, 1991).

When the Board issued Opinion 91-29, the December 20, 1973, version of the Code of Judicial Conduct was in effect. The Board relied primarily upon Canon 2B to conclude that endorsements of bar association candidates are improper. Canon 2B was part of the “appearance of impropriety” provisions in the 1973 Code and stated in pertinent part as follows:

A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not *lend the prestige of his office* to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him.

(Emphasis added.) Canon 2B of the Code of Judicial Conduct (1973) (superseded 1997).

The Supreme Court of Ohio (Court) adopted substantial revisions to the 1973 Code of Judicial Conduct effective May 1, 1997. In the 1997 Code, the “lending the prestige of office” language in former Canon 2B was relocated to Canon 4(A):

A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not *lend the prestige of judicial office to advance the private interests of the judge or others* and shall not convey or permit others to convey the impression that they are in a special position to influence the judge.

(Emphasis added.) Canon 4(A) of the Code of Judicial Conduct (1997) (superseded 2009).

The 1997 Code created a stricter “lending the prestige of office” standard than in the 1973 Code by substituting “shall” for “should.” The 1997 Code also made clear that a judge could not use the prestige of office to advance the judge’s own interests. Regarding references and recommendations, the commentary to Canon 4 stated as follows: “[a]lthough a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.” Commentary, Canon 4(A) of the Code of Judicial Conduct (1997) (superseded 2009).

The Court adopted the current Code of Judicial Conduct effective March 1, 2009, and incorporated the reference to “abuse” of the prestige of judicial office from the

Canon 4(A) Commentary into the Code itself. Specifically, the “prestige of office” provision of former Canons 2B (1973) and 4(A) (1997) is now found in Jud.Cond.R. 1.3:

A judge shall not *abuse the prestige of judicial office* to advance the personal or economic interests of the judge or others, or allow others to do so.

(Emphasis added.) Jud.Cond.R. 1.3.

At issue is whether Jud.Cond.R. 1.3, which prohibits a judge from “abusing” the prestige of office, rather than “lending” the prestige of office, requires the Board to withdraw its position on judicial endorsements of candidates for a bar association elective office. In other words, does a judge abuse the prestige of office when he or she recommends or endorses a bar association candidate?

Jud.Cond.R. 1.3 is identical to Rule 1.3 of the American Bar Association’s current Model Code of Judicial Conduct (Model Code). The Model Code is the product of the ABA’s Joint Commission to Evaluate the Model Code of Judicial Conduct (Commission), and was adopted by the ABA’s House of Delegates on February 12, 2007. The Reporters’ Notes to the Model Code detail the Commission’s reasons for replacing the “lending the prestige of office” standard with the “abusing the prestige of office” standard:

In the Commission’s view, the term “lend” created unnecessary confusion. For example, a judge who writes a letter of recommendation for a law clerk “lends” the prestige of the judge’s office to the recommendation in the ordinary sense of the term. Some judges told the Commission that they decline to write letters on their clerks’ behalf as a consequence. In the Commission’s view, the judge who uses the prestige of his or her office in this way has done nothing problematic. . . The problem that Rule 1.3 seeks to address is therefore more accurately characterized as the abuse of the prestige of judicial office.

Charles G. Geyh & W. William Hodes, Reporters’ Notes to the Model Code of Judicial Conduct 22 (ABA 2009). Consistent with the Commission’s rationale that judges should be able to write letters of recommendation, Comment [2] to Jud.Cond.R. 1.3 states that judges “may provide a reference or recommendation for an individual based upon the judge’s personal knowledge” and use official letterhead for this purpose. The Court added this comment during the 2009 Code revisions.

Based upon the legislative history of Model Rule 1.3 detailed in the Reporters' Notes, it is the Board's view that the primary purpose for substituting the term "abuse" for "lend" in regard to the prestige of judicial office was to make clear that judges may provide references and letters of recommendation based upon personal knowledge. Even prior to the adoption of Jud.Cond.R. 1.3, and consistent with the Commentary to former Canon 4(A), the Board had determined that judges may provide references and recommendations for law school applicants, law clerks seeking employment, lawyers being considered for federal judgeships, and lawyers pursuing certification as specialists. See Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 98-4 (Apr. 3, 1998); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 95-5 (Apr. 7, 1995). The vast majority of states allow judges to provide recommendations in the areas of education, employment, and bar admission. See Cynthia Gray, *Recommendations by Judges*, American Judicature Society (Nov. 2009). However, the legislative history, current Code of Judicial Conduct, and the comments in the Code all fail to reference recommendations in the setting of a bar association election.¹

Neither the Board nor equivalent authorities in other states have rendered an opinion interpreting the "abusing the prestige of office" language of Jud.Cond.R. 1.3 under the 2007 Model Code.² The plain meaning of "abuse" is to "use improperly" or "misuse." *Black's Law Dictionary* 10 (9th Ed.2009); *Oxford English Dictionary*, <http://www.oed.com/view/Entry/822> (online version Sept. 2011). "Lend," the former prestige of office term, means "to allow the temporary use of (something)." *Black's* at 985; *Oxford* at <http://www.oed.com/view/Entry/107229>. As stated in the comments following Jud.Cond.R. 1.3, "the test for a violation [of the prestige of office standard] may be less restrictive under the [former] Ohio Code." Jud.Cond.R. 1.3, Comment, Comparison to Ohio Code of Judicial Conduct. Despite the possible loosening of the "prestige of office" standard, the plain meaning of the term "abuse" indicates that if the Board finds a use of judicial office to be improper, the use will violate Jud.Cond.R. 1.3.

Upon reviewing recommendations and endorsements in bar association elections within the abuse of judicial office boundary, the Board again concludes that such recommendations and endorsements violate the Code of Judicial Conduct. With recommendations in education, employment, bar admission, federal judgeships, and

¹ Jud.Cond.R. 4.1 does prohibit the public endorsement or opposition of a candidate for "another public office." A bar association is a private, voluntary membership organization. The Board cannot conclude that an elective position in a bar association is "another public office." *Accord* Op. 91-29 at 2.

² Prior to the adoption of the "abusing the prestige" standard in 2007, at least three judicial ethics opinions concluded that bar association endorsements violate the Code of Judicial Conduct. See Ok. Jud. Eth. Adv. Pan., Op. 2002-3 (Feb. 27, 2002); Fla. Sup. Ct., Jud. Eth. Adv. Comm. Op. 2001-01 (Feb. 19, 2001); Md. Jud. Eth. Comm. Op. 1997-04 (March 31, 1997).

lawyer specialization, a judge provides a private evaluation of a lawyer to an individual or group of individuals responsible for selection. Although the judge is recommending the lawyer or law student for a particular position, the judge is not favoring or actively promoting one lawyer or student over another. A judge providing these recommendations also has a reasonable expectation that his or her views of the lawyer or law student will not be widely distributed or used in a public advertising campaign.

In contrast, the recommendation or endorsement of a lawyer for a bar association elective office is neither submitted for private consideration nor neutral as to other candidates. These recommendations and endorsements are part of an election campaign in a voluntary membership organization by which a judge communicates that one lawyer in the organization is preferred over others in the race. In fact, it is likely the influence of the judicial office itself that causes judges to be asked to provide recommendations and endorsements in bar association elections. Unlike education, employment, bar admission, federal judgeship, and lawyer specialization recommendations, to have any effect the recommendation of a bar association candidate must be disseminated to the voting members of the organization. A judge who makes a bar association recommendation or endorsement would have to reasonably expect that the judge's views of the candidate would be used in campaign advertising and lists of supporters and shared generally with bar association members. For all of these reasons, the Board finds that judicial recommendations and endorsements of bar association candidates violate Jud.Cond.R. 1.3 as an improper use, and therefore an "abuse," of the prestige of office to advance the personal interests of a third person.

The prestige of office standard in Jud.Cond.R. 1.3 must also be read in conjunction with Jud.Cond.R. 1.2. That rule requires judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and "avoid impropriety and the appearance of impropriety." Jud.Cond.R. 1.2. Bar associations are composed of lawyers and judges in a particular geographic or practice community. Identifying one candidate in a bar association election as the better candidate shows favoritism and does not promote confidence in the judge's ability to remain impartial. This may imply that the candidate has the ability to influence the judge or that the judge is seeking advantage in his or her reelection campaign. The judge may also be faced with frequent disqualification. *See* Jud.Cond.R. 3.1. Conduct that undermines a judge's impartiality constitutes impropriety. *See* Ohio Code of Judicial Conduct, Terminology, definition of "impropriety." The Board therefore further concludes that judicial recommendations and endorsements of candidates for a bar association elective office create the appearance of impropriety and are prohibited by Jud.Cond.R. 1.2.

CONCLUSION: Although Jud.Cond.R. 1.3 now prohibits a judge from “abusing” the prestige of judicial office to advance the personal interests of others, rather than “lending” the prestige of judicial office to advance such interests, the Board hereby approves and follows Opinion 91-29. Judicial recommendations and endorsements of candidates for a bar association elective office indicate that one lawyer is preferred over other lawyers, are subject to public dissemination, and targeted to a specific community of lawyers and judges. Such recommendations and endorsements are an improper use of the prestige of judicial office to advance the personal interests of another and call into question a judge’s ability to act impartially in the performance of judicial duties. Accordingly, these recommendations and endorsements violate Jud.Cond.R. 1.2 (Promoting confidence in the judiciary) and Jud.Cond.R. 1.3 (Avoiding abuse of the prestige of judicial office).

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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.