

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: FEBRUARY 11, 2000

ADVISORY OPINION 00-744

COMMUNICATING AS A CHARACTER WITNESS IN SENTENCE PROCEEDINGS

ISSUE

May a judge voluntarily communicate with another judge or a probation officer as a character witness in connection with a pending sentence proceeding? **Answer:** No, but the judge may testify if summoned or respond to a request for information made by an appropriate agency.

FACTS

A circuit judge has been asked to speak to a municipal judge on behalf of an acquaintance about the sentencing by the municipal judge of the acquaintance.

DISCUSSION

Canon 2C contains the following provisions pertinent to this inquiry: “[A judge] should not lend the prestige of his office to advance the private interests of others. . . [A judge] should not testify voluntarily as a character witness at any hearing before any court, or judicial or governmental commission.” The Commentary to Canon 2C provides the following explanation:

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however does not exempt a judge from testifying if he is officially summoned.

The Commission assumes that an ex parte communication with the sentencing judge is not contemplated. Such a communication would, of course, be prohibited by Canon 3A(4).

The Commission has not previously considered the question whether a judge may voluntarily act as a character witness in a sentence proceeding pending before another judge. However, it did decide in Advisory Opinion 78-44 that a judge may not, as a private citizen, request that favorable consideration be given an inmate by the Board of Pardons and Paroles because such a request would be in the nature of voluntary testimony, which is specifically prohibited under Canon 2C.

Judicial ethics advisory bodies in other jurisdictions addressing this question have held, without exception, that a judge may not write a letter to another judge, the prosecutor, or the probation officer in connection with the sentencing of a defendant in a criminal matter, absent an official request for such a letter. *See, e. g.*, Illinois Advisory Opinion 95-12; Indiana Advisory Opinion 5-91; Nebraska Advisory Opinion 89-2; New York Advisory Opinion 89-04; Washington Advisory Opinion 92-17; West Virginia Advisory Opinion (November 5, 1990); and U. S. Advisory Opinion 62.

Even if not under oath, such a communication amounts to voluntary testimony as a character witness when it is made with the understanding that it may be used in some fashion in an adjudicatory proceeding. A letter or other communication from a judge on

behalf of a person awaiting sentencing may also be viewed as an improper implied request by the judge for favorable treatment of the defendant.

When a judge is summoned to testify, a judge is obligated, like everyone else, to comply. However, judges must not act on their own initiative, especially in judicial proceedings, to lend the prestige of their office for the private benefit of another. This practice and its appearance undermines the very prestige and respect that is being traded upon and, inevitably, erodes public confidence in the judiciary.

Inquiry Concerning Fogan, 646 So.2d 191, 194 (Fla. 1994).

As already noted, Canon 2C does not prohibit a judge from testifying as a character witness if he or she is officially summoned. The Commission is in agreement with other judicial conduct organizations that have concluded that Canon 2C also does not prohibit a judge from responding to a request for information made by an appropriate agency with respect to a sentencing proceeding. *See, e. g.*, Florida Advisory Opinion 75-22 (responding to a request for information from a parole and probation officer); and New York Advisory Opinion 91-46 (responding to a request for a reference from the probation department). However, a judge may not on his or her own initiative or at the request of a defendant or defense counsel communicate with another judge or the probation officer concerning a pending sentence proceeding.

REFERENCES

Alabama Advisory Opinion 78-44.

Alabama Canons of Judicial Ethics, Canons 2C and 3A(4).

Florida Advisory Opinion 75-22.

Illinois Advisory Opinion 95-12.

Indiana Advisory Opinion 5-91.

Inquiry Concerning Fogan, 646 So.2d 191 (Fla. 1994).

Nebraska Advisory Opinion 89-2.

New York Advisory Opinions 89-04 and 91-46.

Washington Advisory Opinion 92-17.

West Virginia Advisory Opinion (November 5, 1990).

U. S. Advisory Opinion 62.

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; e-mail: jic@alalinc.net.