

FILED

NOV 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

STANDING COMMITTEE ON JUDICIAL ETHICS
AND ELECTION PRACTICES

DATE ISSUED: November 22, 2010

OPINION NO.: JE10-013

PROPRIETY OF A RETIRING NEVADA JUSTICE OF THE PEACE SERVING ON A SCREENING PANEL FORMED BY AN APPOINTING AUTHORITY TO IDENTIFY CANDIDATES TO REPLACE THE JURIST FOR THE REMAINDER OF HIS OR HER UNEXPIRED TERM.

ISSUE

May an incumbent Justice of the Peace who is retiring from his or her judicial office prior to the expiration of the term of such office accept an appointment to serve on a committee or panel that will evaluate and recommend to the appointing authority a list of candidates for appointment to replace the retiring justice of the peace?

ANSWER

Yes.

FACTS

An incumbent Justice of the Peace has announced his or her intent to retire prior to the expiration of the term of the judicial office. The incumbent judge has been asked to serve on a panel with two county employees. The purpose of this panel is to formulate a list of

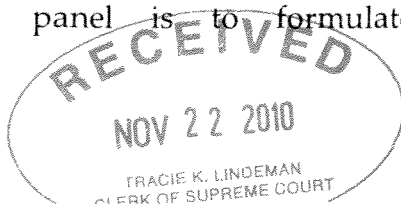
recommended candidates to the Board of County Commissioners from which the Board will appoint a person to replace the retiring judge for the remaining term of the office.

The panel will screen resumes, manage the process of collecting information from candidates through a questionnaire procedure and conduct private candidate interviews. From this process, the panel will prepare a priority list of candidates that will be submitted to the Board for consideration in appointing the retiring judge's replacement.

DISCUSSION

The Committee is authorized only to render an opinion that evaluates compliance with the requirements of the Nevada Code of Judicial Conduct (the "NCJC"). *Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.* Accordingly, this opinion is limited by the authority granted by Rule 5.

The question presented here requires our review of Canon 1 and Canon 3. Canon 1 states "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety



and the appearance of impropriety.” Nev. Code Jud. Conduct, Canon 1. In furtherance of the Canon, NCJC Rule 1.3 provides “[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.” Nev. Code Jud. Conduct, Canon 1, Rule 1.3. Under Rule 1.3, the subject of a judge participating in the judicial selection process has been addressed in a comment provided by the Supreme Court of Nevada. That comment explains:

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 or by submitting on official letterhead letters to such entities endorsing or opposing the person.

See Comment [3] to Nev. Code Jud. Conduct, Canon 1, Rule 1.3 (emphasis added). In this regard, the Committee notes that Comment 3 to Rule 1.3 could be interpreted narrowly to permit judges to only cooperate with a screening committee by responding to professional qualification inquiries on prospective candidates. We conclude that such a reading of that Comment omits consideration of the interaction

between Canon 1 and Canon 3 in this context.

Under Canon 3, judges must conduct “personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.” Nev. Code Jud. Conduct, Canon 3. Rule 3.2 and Rule 3.4 of the NCJC are implicated by the question here presented. The pertinent part of Rule 3.2 states “[a] judge shall not . . . otherwise consult with . . . an executive or a legislative body or official, except . . . in connection with matters concerning the law, the legal system, or the administration of justice.” Nev. Code Jud. Conduct, Canon , Rule 3.2(A). As to the question presented here, Rule 3.4 provides “[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.” Nev. Code Jud. Conduct, Canon 3, Rule 3.4.

The Nevada Supreme Court’s guidance on NCJC Rules 3.2 and 3.4 notes that judges are uniquely qualified to share their expertise and experience in matters related to the legal system and judicial administration. *See* Comment [1] & [2] to Nev. Code Jud. Conduct, Canon 3, Rule 3.2; Comment [1] to Nev. Code Jud. Conduct, Canon 3, Rule 3.4. Thus, jurists may accept appointments to a governmental committee, consult with government officials and support governmental

agencies and interests provided the subject matter is limited to "the law, the legal system, or the administration of justice." Nev. Code Jud. Conduct, Canon 3, Rule 3.4. In doing so, however, judges must be sensitive to the requirements of Rule 1.3 and "assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary." See Comment [1] to Nev. Code Jud. Conduct, Canon 3, Rule 3.4.

The Committee views as important that the Nevada Supreme Court comments specifically recognize as permissible a judge's participation in and cooperation with appointing authorities and screening committees in the judicial selection process. Likewise helpful in our interpretation is the Court's cross-reference in the comment between Rule 1.3 and Rule 3.4 of the NCJC. The Committee, therefore, concludes that a retiring judge may properly serve on a screening committee formed by an appointing authority to identify candidates to replace the jurist for the remainder of his or her unexpired term.

The Committee observes, however, that our opinion was vigorously debated in another respect. We

discussed that the endorsement clause of NCJC Rule 4.1(A)(3) can be interpreted to proscribe this type of activity. That Rule states "a judge or a judicial candidate shall not . . . publicly endorse . . . a candidate for any public office" Nev. Code Jud. Conduct, Canon 4, Rule 4.1(A)(3). The phrase "candidate for any public office" in Rule 4.1(A)(3) necessarily includes a judicial candidate. The NCJC defines in relevant part "judicial candidate" to mean "any person . . . who is seeking selection for judicial office . . . by election. A person becomes a candidate for judicial office as soon as he or she . . . files as a candidate with the . . . appointment authority . . ." Nev. Code Jud. Conduct, Terminology, "Judicial candidate." This definition suggests that a person that applies for appointment to the unexpired term of an elective judicial office may be considered a "judicial candidate." If this is correct, then the endorsement clause could be seen as a bar to a jurist participating as the member of a panel that recommends the appointment of prospective "candidates."

On balance, the Committee rejects that interpretation of the endorsement clause for two reasons. First, given the potential to interfere with political speech, the Committee concludes that in cases of ambiguity, the endorsement clause generally should be narrowly interpreted. Second, Comment 3 to Rule 1.3 allows a judge to submit "on official letterhead letters to [appointing authorities and screening committees]

endorsing or opposing the person [being considered for judicial office]." See Comment [3] to Nev. Code Jud. Conduct, Canon 1, Rule 1.3. Because the Nevada Supreme Court views in Comment 3 to Rule 1.3 formal endorsement letters as permissible, the Committee likewise concludes that Rule 4.1(A)(3) may not be interpreted inconsistently to prevent a judge from participating in an act of "endorsement" by serving on a screening or selection panel. The Committee also observes that the Nevada Constitution provides for the direct involvement of certain judges in the selection of persons to fill term vacancies in the Nevada Supreme Court and the district courts. See NEV. CONST. Art. 6, § 20.

CONCLUSION

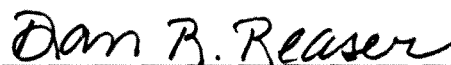
An incumbent Justice of the Peace who is retiring from office before the expiration of the term of such office may accept an appointment to serve on a screening panel that will evaluate and recommend to the appointing authority a list of candidates for appointment to replace the retiring justice of the peace

REFERENCES

NEV. CONST. Art. 6, § 20; Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.; Nev. Code Jud. Conduct, Canon 1, 3 & 4; Nev. Code Jud. Conduct Nev. Code Jud. Conduct Rule 1.3, Rule 3.2(A), Rule 3.4 & Rule 4.1(A)(3); Comment [3] to Nev. Code

Jud. Conduct, Canon 1, Rule 1.3; Comment [1] & [2] to Nev. Code Jud. Conduct, Canon 3, Rule 3.2; Comment [1] to Nev. Code Jud. Conduct, Canon 3, Rule 3.4; Nev. Code Jud. Conduct, Terminology, "Judicial candidate."

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



Dan R. Reaser, Chairperson