STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: July 22, 2011 **ADVISORY OPINION: JE11-008**

PROPRIETY OF A JUDGE VOLUNTARILY SUBMITTING COMMENTS TO THE PAROLE BOARD REGARDING THE RELEASE OF A PRISONER

ISSUE

May a judge voluntarily provide written comments to the Parole Board regarding the release of a prisoner where the judge, prior to taking the bench, served as the district attorney that prosecuted the prisoner?

ANSWER

The Committee believes that unless duly summoned, it is not appropriate for a judge to voluntarily provide written comments to a parole board regarding the release of a prisoner on a matter in which the judge did not preside.

FACTS

A Justice of the Peace has presented a hypothetical question inquiring whether it is appropriate for a judge to submit written comments to the Parole Board and/or attend a parole hearing where the Parole Board solicits comments from the judge regarding the release of a prisoner. In the hypothetical, the judge formerly served as the district attorney which prosecuted the prisoner, prior to appointment to the bench. The judge inquires whether it would make a difference if the judge were concerned for his/her personal safety because of the defendant's actions and behavior during the trial and other behaviors that lead to the defendant's conviction.

DISCUSSION

Canon 3 states "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." *Nev. Code Jud. Conduct, Canon 3.* In furtherance of this Canon, Rule 3.3 prohibits a judge from "testify[ing] as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch[ing] for the character of a person in a legal proceeding, except when duly summoned." Comment [1] to Rule 3.3 expands on this limitation, and citing Rule 1.3 states that "a judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another." *See Rule 1.3*

A number of other jurisdictions have addressed similar questions under their respective codes of judicial conduct, which decisions the Committee finds instructive. These jurisdictions have noted distinctions under codes of conduct similar to Nevada's between providing information voluntarily and responding to a formal request or subpoena, recognizing the former is generally not permitted while the latter is

allowed. *See Kentucky Ethics Committee Judicial Ethics Opinion JE 104* ("a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request."); *New York State Advisory Committee on Judicial Ethics Opinion 07-104* (judge may not, at the request of a person involved in a criminal proceeding, voluntarily submit a letter or affidavit recommending a course of action). On facts similar to the hypothetical presented here, the Massachusetts Commission on Judicial Ethics concluded that a judge could testify before a parole board on factual matters involving a former client where such testimony was provided in response to a subpoena. *Massachusetts Commission on Judicial Ethics Opinion 2006-2.* However, Massachusetts concluded even where testimony is made in response to a subpoena care should be exercised not to abuse the prestige of office, advising the judge should inquire whether the information might be obtained from another source and in all events should limit testimony to factual information.

The Committee recognizes that the Parole Board guide states that views of judges and district attorneys "are welcomed by the Board." However, the desires of the Parole Board cannot, in themselves, overcome the obligations imposed on judges under the Canons. The Committee is concerned that voluntarily offering testimony appears akin to advocating for the advancement of the personal interests of another, conduct proscribed by Rule 1.3. Moreover, the Committee recognizes that if the Parole Board believes the testimony of a judge, whether in her capacity as a judge or former district attorney, is critical to its evaluation of a prisoner, a judge may still offer such factual testimony in response to a formal request from the Parole Board.

The Committee concludes that a judge may offer factual testimony in response to a formal request from the Parole Board, but a judge is precluded by Rules 1.3 and 3.3 of the Code of Judicial Conduct from voluntarily providing testimony regarding the release of a prisoner. The Committee also cautions that a judge should limit any testimony to factual information, not character testimony. While not presented by the hypothetical in this case, the Committee notes that such limitations may not apply where the judge is a victim of a criminal act and provides factual information based on the judge's personal involvement in the crime.

CONCLUSION

A Nevada judge may provide factual testimony to the Parole Board regarding the release or detention of a prisoner where given in response to a formal request. However, with the exception of cases in which the judge is a victim of a criminal act, he/she may not voluntarily offer testimony to the Parole Board.

REFERENCES

Nev. Code Jud. Conduct, Rule 1.3 & Rule 3.3; Commentary [1] to Rule 3.3; *Kentucky Judicial Ethics Opinion JE 104; New York State Advisory Committee on Judicial Ethics Opinion 07-104; Massachusetts Commission on Judicial Ethics Opinion 2006-2.*

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.

Michael A.T. Pagni
Vice-Chairman