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TRACIE K. LINDEMAN OLERK OF SUPPLEME COUNT

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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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PROPRIETY OF A PRO TEM JUDGE TESTIFYING AS EXPERT WITNESS

ISSUE

May a Justice of the Peace pro tempore testify as an expert witness based on the judge's background in law enforcement and corporate security?

ANSWER

Yes. The Nevada Code of Judicial Conduct excludes pro tempore judges from the limitations on testifying as a character witness in Rule 3.3, which exclusion the Committee believes extends equally to testifying as an expert. However, the Committee concludes that the judge's position as a pro tempore judge should not be used to establish credentials or qualifications to testify as an expert.

FACTS

A Justice of the Pease pro tempore has inquired whether the Code permits a pro tem judge to testify as an expert in federal court based on his background in law enforcement and corporate security. In the hypothetical presented, the judge has extensive experience as a former law enforcement officer and director of corporate security for a large corporate entity.

Committee notes that this advisory opinion
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

is limited to applicability of the Nevada Code of Judicial Conduct (the "NCJC"). The Committee notes that it does not pass on the admissibility of evidence in a judicial proceeding, and is constrained not to act on a request for an opinion when there is litigation concerning the subject of the request. Rule 5 Governing the Standing Committee On Judicial Ethics & Election Practices

ADVISORY OPINION: JE11-012

A judge's ability to testify is governed by Canons 1 and Rule 3.3 of the NCJC. Canon 1 provides that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Specifically, Rule 1.2 provides that a judge shall "act at all times in a manner that public confidence promotes independence, integrity, and impartiality of the judiciary . . ." NCJC Rule 1.2. Rule 1.3 further provides that a "judge shall not lend the prestige of judicial office to advance the private interest of the judge or others..." Rule 1.3. Finally, Rule specifically prohibits a judge from testifying as a character witness except when duly summoned. NCJC Rule 3.3; see also Advisory Opinion 11-008.

In previous opinions, the Committee has recognized that the foregoing limitations in the NCJC prohibit a judge from testifying as an expert witness in a malpractice action or from voluntarily appearing before a Parole Board to provide comments on the release of a prisoner based on the judge's experience as the prosecuting attorney See Advisory Opinion JE 06-01; Advisory Opinion JE 11-008. Other jurisdictions have

reached similar conclusions, recognizing that judges are prohibited from testifying as expert witnesses voluntarily, citing judicial canons similar to Canon 1 and Rule 3.3 of the NCJC. See State of Washington, Ethics Advisory Committee, Opinion 85-04; Texas Committee on Judicial Ethics, Opinion 139 (1991); Florida Judicial Ethics Advisory Committee, Opinion 2005-10.

While the outcome from the foregoing limitations appears clear for most judges, it is not as clear for pro tempore judges. Nevada's Code of Judicial Conduct applies to all judges except as otherwise provided in Parts II through IV of the Application section of the Code. NCJC Application Part I. Application Part IV(B)(1)(d)specifically provides that, except while serving as a judge, a pro tempore judge is not required to comply limitations with the in Rule Application Part IV further exempts pro tempore judges from numerous other provisions of the Canons, including several related to testifying. See Application Part IV(B)(3).

Rule 3.3 expressly prohibits a judge from testifying as a character witness voluntarily. The commentary with respect to Rule 3.3 recognizes the rationale underlying the prohibition against a judge providing character testimony is that in doing so a judge "abuses the prestige of judicial office to advance the interests of another," by testifying voluntarily, conduct otherwise proscribed by Canon 1. Comment [1], Rule 3.3. This Committee has previously recognized that such rationale applies with equal force to a judge testifying as an expert witness. Advisory Opinion JE 06-001.

Given that the Supreme Court specifically exempted pro tempore judges from the limitations in Rule 3.3, and that

such limitations are founded upon principles set forth in Canon 1 and apply equally to expert testimony, the Committee concludes the Supreme Court did not intend the limitations under Rule 3.3 or Canon 1 to preclude a pro tempore judge from testifying as an expert witness so long as the protempore judge is not serving as a judge at the time of the testimony. While the Committee concludes that a pro tempore judge may testify as an expert in another court, a pro tempore judge must not use or allow others to use his position as a pro tempore judge as a foundation for his qualifications or expertise to provide testimony, or otherwise refer to the fact that the judge serves as a pro tempore judge, as such would constitute abuse the prestige of iudicial office to advance the interests of others.

CONCLUSION

A pro tempore judge may testify as an expert witness in a matter pending before another court provided that the judge's position as a pro tempore judge is not used to establish credentials or qualifications of the judge to testify as an expert.

REFERENCES

Rule 5 Governing the Standing Committee On Judicial Ethics & Election Practices; Nev. Code Jud. Conduct, Application Part I and Application Part IV; Nev. Code Jud. Conduct, Canon 1, Rule 1.2, Rule 1.3 & Rule 3.3; Commentary [1] to Rule 3.3; Advisory Opinion JE06-001; Advisory Opinion JE11-008; State of Washington, Ethics Advisory Committee, Opinion 85-04; Texas Committee on Judicial Ethics, Opinion 139 (1991); Florida Judicial Ethics Advisory Committee, Opinion 2005-10.

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Michael A.T. Pagn

Vice-Chairman