

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 87-01  
(May 4, 1987)

**Role of Incumbent Judges in the Merit Selection  
Of Candidates for Judicial Office**

**Issues**

1. May an incumbent judge write a letter of support to a judicial nominating commission?

**Answer:** Yes.

2. May an incumbent judge respond either orally or in writing to inquiries directed to him by members of a judicial nominating commission?

**Answer:** Yes.

3. May a judge respond to the governor or communicate with the governor regarding a nominee for a judicial appointment?

**Answer:** Yes.

**Discussion**

Canons 2, 4 and 7 of the Code of Judicial Conduct have a bearing on the questions submitted for our consideration. Under Canon 2B, in avoiding impropriety or the appearance of impropriety, a judge "should not lend the prestige of his office to advance the private interests of others." We do not believe that this proscription is germane to the questions under consideration for the reason that the "private interests of others" referred to here do not directly refer to the judicial selection process nor does it reasonably suggest such process can be inferred.

Canon 4 permits a judge to engage in activities to improve the law and the legal system. Under 4A a judge is specifically permitted to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." In the isolated context of this canon, it could reasonably be argued that in communicating with the judicial nominating commission or the appointing authority, a judge is participating in an activity concerning the legal system. However, when the entire context of Canon 4 is considered, it does not appear that the activity under inquiry can truly be considered, other than tangentially, under Canon 4.

The Canon which most directly bears upon the questions presented is Canon 7. The language in the introductory paragraph of Canon 7 in and of itself strongly suggests that the questions submitted should be answered in the affirmative, that is:

## Advisory Opinion 87-01

A judge is entitled to entertain his personal views on political questions. He is not required to surrender his rights or opinions as a citizen. He should avoid political activity which may give rise to a suspicion of political bias or impropriety. *The term "political activity" should not be construed so narrowly to prevent private comment (emphasis supplied).*

In ABA Informal Opinion 1468 it was determined that it is not proper under the Code of Judicial Conduct for a judge to publicly support or oppose the election or reelection of another judge to a court in the same state. This same opinion further determined that the code does not prohibit a judge from encouraging attorneys to seek election to the bench. This activity was found to be permitted so long as it remained "private" as opposed to "public." In further qualifying what was "impermissible public" activity it was stated:

However, if solicitation and encouragement is part of a partisan or other organized group effort to recruit or oppose judicial candidates, or is an effort which is public, or likely to be public, it is impermissible for the same reasons that other public political activity is impermissible.

Informal opinion 1468 then specifically focused upon the overall underlying inquiry and concluded that the activity which is the subject of the instant opinion is permitted. It was thus stated:

This opinion does not, however, preclude judges from responding to requests for comments about colleagues or other judicial candidates from governors, judicial selection committees, judicial tenure and disability committees, and other similar official bodies.

It would therefore appear that the activity of an incumbent judge, whether in the form of writing a supporting letter to the judicial nominating commission or answering questions from such commission or the governor regarding a nominee, is permitted so long as it remains "private" and does not form a part and parcel of prohibited "public" political activity. It is assumed that the judge conveying such comments has personal knowledge about the person upon whom he is commenting.

Commenting on the qualifications of judges is specifically approved by the Rules of Procedure adopted in June and July of 1975 for the Judicial Nominating Commissions in Maricopa and Pima Counties, as well as the Judicial Nominating Commission on Appellate Court Appointments. Rule 6(c) of the Maricopa County rules provides:

*As soon as background information on each applicant has been compiled and forwarded to each Commissioner, the Commission shall meet for the purpose of deciding which applicants are to be interviewed and how. When the Commission has determined which applicants will be interviewed, it shall make the names of such applicants public and invite comment from the public, judiciary and Maricopa County Bar. The public release will state that final selection will be made from the applicants' names and any person*

## Advisory Opinion 87-01

*wishing to comment should do so within 15 days. Comments can be oral or written and can be made to the Chairman or any Commissioner. Such comments will be held in confidence by the Commission in accordance with Rule 3(d) (emphasis supplied).*

The foregoing is a clear expression of approval for a judge to submit comments, whether oral or in writing, regarding an applicant who is to be interviewed. Furthermore, since such comments are to "be held in confidence," this procedure comports with the requirement expressed in ABA Informal Opinion 1468 that such activity is permitted so long as it is "private."

In conclusion, the Judicial Ethics Advisory Committee is of the opinion that the three questions presented are to be answered in the affirmative. Such activity is permitted so long as it is conducted in a "private" manner and does not become a part or parcel of "public" political activity and so long as the judge making such comments has personal knowledge regarding the person upon whom comment is being made and his or her abilities to serve as a judge.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 2, 4 and 7 (1985).

### **Other References**

American Bar Association, Informal Opinion 1468 (Dec. 1, 1981).

Rule 6(c), Rules of Procedure for Judicial Nominating Commission on Maricopa County Superior Court Appointments.