

# Nebraska Ethics Advisory Opinion 02-2

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## ***Question Presented--***

*May a judge, pursuant to a request from an attorney, submit either a letter or affidavit to a referee in a disciplinary proceeding conducted by the Nebraska State Bar Association regarding the attorney's fitness to continue to practice law in Nebraska?*

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## **Conclusion**

A judge is absolutely precluded from voluntarily sending an affidavit as requested by the attorney. The judge may, however, testify as to the attorney's character and other matters requested if subpoenaed, but should discourage the attorney from using the judge as a witness unless the attorney is convinced the demands of justice require the judge's testimony. The judge may, however, provide a letter if requested by the referee.

## **Statement of Facts**

An attorney who is the subject of a disciplinary proceeding conducted by the Nebraska State Bar Association has requested a judge to provide an affidavit attesting to his good character, competence, and service to the bar and his clients. Following a hearing, a referee appointed by the Nebraska Supreme Court found the attorney had violated the canons in two separate cases. The attorney has requested the affidavit to use at the hearing to determine the sanction to be imposed. The judge would feel more comfortable submitting a letter. The referee, who has not requested the letter, has advised the judge that it is quite common for judges to submit a letter, since judges are in a unique position to comment upon an attorney's fitness to practice law. The judge has requested an opinion on whether it is appropriate to respond to such a request at the disposition stage of disciplinary proceedings.

## **Applicable Code Sections**

Neb. Code of Jud. Cond., Canon 2B

## **References in Addition to Nebraska Code of Judicial Conduct**

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4:13 (3d ed. 2000)

Donald R. Fretz et al., *Ethics for Judges*, The National Judicial College (1982)

Commonwealth of Virginia Advisory Opinion 00-8

Nebraska Ethics Advisory Opinions 89-2, 90-2, 91-1, and 94-2

## **Discussion**

The following canon of the Nebraska Code of Judicial Conduct applies to the above described situation:

## CANON 2

### A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities

....

B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. Judges shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

In this case, the attorney is asking the judge to voluntarily testify as a character witness through an affidavit. It is the committee's opinion that this would be a voluntary opinion by the judge and is clearly prohibited by the Code. The commentary to Canon 2B clearly dictates, "A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testified." However, should the judge receive a subpoena, the judge could testify as to the attorney's character. In *Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979), the court held there was no impropriety under Canon 2B involving a judge testifying under subpoena. The commentary to Canon 2B also notes, "A judge may, however, testify when properly subpoenaed. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness." In summary, the Code and case law make it clear that the judge cannot voluntarily submit an affidavit as requested by the attorney but the judge could testify if subpoenaed, which testimony is discouraged under most circumstances.

The question of whether the judge can submit a letter is not as clear. The Commonwealth of Virginia Judicial Ethics Advisory Committee Opinion 00-8 would suggest that to do so would be improper. In that opinion, the Judicial Inquiry and Review Commission concluded a judge may not write a letter to the Virginia State Bar supporting the petition for reinstatement of an attorney who had surrendered his or her license to practice law. The Virginia committee concluded that because of Canon 2B, "That by voluntarily writing or telephoning an official of the Virginia State Bar in a reinstatement proceeding or disciplinary proceeding involving a private attorney, the judge is, in effect, testifying as a character witness. This action creates the potential of lending the prestige of his or her judicial office in support of the private interest of the attorney. Accordingly, the committee concludes that both actions would be prohibited conduct under the Canons."

One Nebraska Judicial Ethics Opinion, although not directly on point, would support the reasoning in the Virginia decision. Advisory Opinion 89-2 concludes that for a judge to write a letter on behalf of a lawyer to be included in a presentence report being prepared for the lawyer as a defendant, would violate Canon 2B because the judge would be voluntarily testifying as a character witness. Advisory Opinion 89-2 was issued prior to the present Nebraska Code of Judicial Conduct adopted by Nebraska Supreme Court May 28, 1992. The commentary to Canon 2B now states as follows:

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, 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 or to correct errors in the report whether requested to do so or not.

It therefore would appear that 89-2 has been modified by the commentary to the 1992 code.\* Consequently, it is clear that if the referee in this case instead of the attorney would initiate the request, it would be permissible to write the letter.

Several other Nebraska advisory opinions arguably could be used in support of the judge in this case sending a letter. Nebraska Advisory Opinions 90-2 allows a judge to furnish letter of recommendation to Judicial Nominating Commissions. Opinion 91-1 permits judges to respond to Martindale-Hubbell for a rating. Finally, Opinion 94-2 allows a judge to be a reference in the process of certification by the National Board of Trial Advocacy. The committee concludes that each of those situations also require that the requests to the judge are initiated by the agency or commission involved and their confidentiality is assured; therefore, the ethical prohibition against lending the prestige of the office to advance the interest of a particular attorney is not a concern.

\* Opinions 89-1 through 92-6 arose under a form of the Nebraska Code of Judicial Conduct readopted by the Nebraska Supreme Court on May 20, 1987; opinions from and after 92-7 arose under the revised version of the Nebraska Code of Judicial Conduct adopted by the Nebraska Supreme Court on May 28, 1992, which became effective on September 1, 1992.

### **Disclaimer**

*This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.*

APPROVED AND ADOPTED  
BY THE COMMITTEE ON FEBRUARY 18, 2002

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