

JUDICIAL ETHICS COMMITTEE

Advisory Opinion 93-JE-4

Issued July 21, 1993

JUL 29 REC'D

The following opinion is adopted as the formal response of the Judicial Ethics Committee.

Question: A party to a divorce filed a complaint with the Board of Overseers of the Bar against the party's attorney. Specifically, the party complained that her attorney had not pressed her claim for alimony. The divorce hearing was recorded. The judge did not grant alimony. An appeal is pending. The Board of Overseers is now asking the judge whether there was a request for alimony and for the judge's reasons in not granting alimony. Should the judge provide the Board of Overseers with the requested information?

Answer: In the situation set forth above, the judge is not prohibited from commenting on the case nor is the judge required to comment.

The only provision of the Code of Judicial Conduct presently in effect that appears to be relevant is Canon 3(A)(6) which provides that a "judge should abstain from public comment about a pending or impending proceeding in any court, . . ." Canon 3(B)(9) of the newly adopted Code of Judicial Conduct is the same except that it uses the term "shall" instead of "should." Neither Code defines the term "public comment." This provision of the newly adopted Code differs from the model ABA Code. The model Code states: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." The commentary to the newly adopted Maine Code shows that the difference from the model code was intentional and that the new Maine Code intended to prohibit all public comment.

The Maine Bar Rule that relates to this matter is Rule 7.3(k) which states that complaints to the Board of Overseers are confidential except for open hearings and unless the respondent attorney asks that the matter be made public. There are other exceptions to the confidentiality requirement as well. Nothing in the Rule would prevent a judge's response to the Board about a case from being made public if the case became public.

It is the opinion of the Committee that the rule prohibiting public comment does not govern this situation. The prohibition against public comment was not intended to prohibit a judge from

giving factual testimony requested by an authorized tribunal. For example, if a judge is a witness to an assault occurring in the judge's courtroom during a trial and if there are subsequent civil or criminal proceedings stemming from that assault, a party ought to be able to subpoena the judge who witnessed the incident to testify about it. The fact that the case that was being tried when the assault occurred is still a pending case should not matter. The Committee is of the opinion that the term "public comment" does not include a statement of fact when the judge is requested to make such statement by a duly authorized tribunal and when such statement could have been made by any other person who could hear and see what the judge heard and saw.

In the instant situation if the judge is asked by the Board of Overseers whether the party requested alimony, that is a question of fact, and the judge can answer whether the party did or did not make the request. However, insofar as the Board of Overseers wants to ask the judge why the judge did not grant alimony, that is not a question of fact but one that goes to the heart of the judicial determination. The Board of Overseers is certainly entitled to know whatever is a matter of public record, that is, the judge's oral or written opinion about why alimony was not granted, but the judge is not compelled to answer such question by the Board. In *United States v. Morgan*, 313 U.S. 409, 423 (1940), the Supreme Court stated that the examination of a judge as to why and how the judge made a decision in a case "would be destructive of judicial responsibility" and that judges should not be subjected to such scrutiny. The Committee concludes that while a judge is not prohibited from explaining the reasoning of his or her decision, the judge cannot be compelled to do so.