

JUDICIAL ETHICS COMMITTEE



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JUDICIAL ETHICS COMMITTEE
STATE OF VERMONT
OPINION NO. 2827-3

February 4, 1999

To:

The matter and issue which you presented to **the** Judicial Ethics Committee has been researched, reviewed and what follows is the Opinion of the Committee and a response to your inquiry.

Question Presented:

May a sitting judge properly testify regarding standards of **judicial conduct** at a hearing before the Judicial Conduct Board?

Short Answer:

Probably yes, although the strength of this affirmative response depends upon: (1) whether the testimony is sought by the board itself rather than by one of the adversarial parties (i.e., Special Counsel or the judge who is the subject of the proceeding); (2) whether the testimony is compelled by formal process rather than volunteered; and (3) the extent to which expert testimony is needed to decide the particular issue before the Board. Optimally, the testimony would be sought by the Board to minimize the appearance that a sitting judge is throwing the weight of his position and authority behind one of the adversarial parties. But even if the judge's expert testimony is presented by one of the adversarial parties, it should probably be allowed as long as it is compelled by **formal**

process and provides information necessary to the Board's decision-making process.

In any case, the judge's role should be confined to providing information to the decision makers to enable them to make their decision. While testimony regarding standards of conduct may inevitably involve the judge's opinions to some degree, that degree should be minimized, and the judge should not be asked his or her opinion on the ultimate question of whether the judge's conduct at issue violated the Code of Judicial Conduct.

Analysis

Although the Code of Judicial Conduct does not specifically address the propriety of judges testifying about judicial standards of conduct in judicial conduct hearings, the Code and case law do address the propriety of judges testifying in other contexts. From these, two relatively clear rules can be gleaned. First, a judge should not voluntarily testify as a character witness for a party. Vt. Code of Judicial Conduct, Admin. Order 10 ("A.O. 10") (Supp. P. 269), Canon-2B. And second,* a judge should not give expert testimony about a particular proceeding over which he presided. See In re Wilkinson, 165 Vt. 183 (1996).

Beyond these relatively clear rules, guiding principles must be derived from the general language of the Code, the commentary, and the reasoning of the case law. Canon 2 provides a good beginning: A judge shall avoid impropriety and the appearance of impropriety. A.O. 10 (Supp. 268-70). "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Commentary to the ABA Model Code of Judicial Conduct, Canon 2.¹

¹ See also Reporter's Notes, A.O. 10 (Supp. P. 262-63) (stating that since the Vermont Code of Judicial Conduct is based on the ABA Model Code, the ABA commentary, as[†] (continued..)

Under the general guidance provided by Canon 2 is the more specific admonition of Canon 2B: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others....A judge shall not testify voluntarily as a character witness.” The Commentary to Canon 2B explains the concerns involved: “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 testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned.” Additionally, the Commentary notes that, “Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for judgeship.” Canon 2B has been read to preclude a judge from voluntarily giving a character reference for an individual **being sentenced by another judge**, but to allow him to provide information in response to a formal request. See, e.g., In re Fogan, 646 So.2d 191 (Fla. 1994); Ill. Jud. Eth. Comm., Op. No. 95-12; N.Y. Adv. Comm. Jud. Eth., Op. No. 88-63.

The commentary and decisions discussing Canon 2 in general and 2B in particular reflect a balancing of concerns. On the one hand, there is the need to avoid the appearance that the judge is using his position to advance the interests of a party. But on the other is the realization that a judge may sometimes be uniquely situated to provide information that a decision maker needs. Where the judge’s testimony is compelled rather than volunteered, the concern that the judge will appear to be improperly using his position is lessened. And if the testimony is compelled or requested by **the**

(...continued)

well as decisions and advisory opinions from other jurisdictions that have adopted the **Model Code**, are authoritative sources of interpretation for the Vermont Code).

decision maker itself rather than a party to an adversarial proceeding, the concern about an appearance of impropriety is lessened further still. Thus, a judge can provide a character reference requested by a sentencing judge and respond to official inquiries regarding persons being considered for judgeship, and should be able to provide information in response to a formal request of the Judicial Conduct Board.

If the judge's testimony is presented by a party rather than requested by the Board, the balancing of concerns presents a closer question. As a first step, the Board would **have to** determine whether it really needs the information the judge would **provide**.² But if the Board does conclude it needs the information the judge can provide, and the testimony is compelled rather than voluntary, the need for the information would probably outweigh the possible appearance of impropriety, and the testimony should probably be allowed. Viewing the question in the terms used by the Commentary to Canon 2, it is unlikely that a judge testifying regarding standards of conduct in response to a subpoena or formal request would cause a perception in reasonable minds that the judge was unable to carry out judicial responsibilities in an impartial manner.

In addressing the propriety of the judge's expert testimony in Wilkinson, the Vermont Supreme Court raised other concerns as well. The Wilkinson decision arose in the context of a post-

² Notably, the Connecticut Supreme Court has held that expert testimony on judicial standards of conduct in a disciplinary proceeding is not necessary unless the determination of the standard of care requires knowledge beyond the experience of the fact finders. In re Flanagan, 690 A.2d 865,876 (Ct. 1997). The Connecticut court reasoned that alleged violations of the Code of Judicial Conduct usually turn on how the judge's conduct appears to the public; and how conduct appears to the public is a question on which expert testimony from a judge may not be necessary or even particularly helpful. See id. at 877. "Although professional opinions may have been relevant to the review council's inquiry in this case and, therefore, admissible, such opinions are unnecessary to a determination of whether certain conduct has the effect of reducing public confidence in the integrity of the judiciary." Id. A footnote indicates that Judge Flanagan did provide expert testimony in that case, but it was from an "ethics expert," probably from academia, rather than another judge. See id. at 877 n. 2 1.

conviction relief proceeding in which the criminal defendant/petitioner argued that his trial counsel had been ineffective. The State called as its expert the judge who had presided over the petitioner's trial, and that judge opined that although the petitioner's trial counsel's performance had been substandard, counsel's error in failing to object to the testimony of the State's expert did not affect the outcome of the trial. The judge testified regarding the weight of the evidence at trial and the relative unimportance of the expert to the State's case, and he further noted that he gave a curative instruction to counterbalance counsel's failure to object. Although the petitioner presented expert testimony from a criminal defense attorney to the contrary, the superior court accepted the judge's assessment and concluded that the outcome of the trial would not have been different even if petitioner's counsel had performed competently and objected to the expert's testimony. See 165 *Vt.* at 184-86.

The Supreme Court in Wilkinson concluded that the judge's testimony was improper. The Court made a passing reference to Canon 2, but its analysis rested primarily on its concern that a judge, who is ultimately responsible for the fairness of any proceeding he presides over, should not be later called as an expert to evaluate the fairness of such a proceeding? This concern about the perception of possible self-interest on the part of the testifying judge would not be implicated with the testimony at issue here. But the Court also relied by analogy on Canon 3B(9), and this analogy might be pertinent. Canon 3B(9) 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

³ In Comett v. Johnson, 571 N.E.2d 572 (Ind. App. 5th Dist. 1991), a panel of the Indiana Court of Appeals reached a similar holding, concluding that the judge hearing the underlying action should not be allowed to testify as an expert in a subsequent legal malpractice action. Unlike the Court in Wilkinson, however, the Indiana Court of Appeals relied on Canon 2B, stating that by testifying as an expert with respect to matters that took place before him in his judicial capacity, the judge appeared to be improperly throwing the weight of his position behind one of two opposing litigants. *Id.* at 575..

with a fair trial or hearing.” While acknowledging that the judge’s expert testimony was not the type of “comment” this section was **meant to** address the Court in Wilkinson stated that “such testimony is certainly public, and is no more appropriate than the same comments expressed in a newspaper editorial or interview.” 165 Vt. at 187.

Assuming the sitting judge’s testimony is presented after formal charges are filed, when the proceedings are public, it is arguable that this language would apply to make the judge’s testimony inappropriate in the context of a Board hearing as well. Reading Wilkinson so broadly **would** render any testimony from a sitting judge in a public proceeding inappropriate, however, and this would be inconsistent with provisions of the Code of Judicial Conduct which clearly contemplate that judges can and should testify under some circumstances. See, e.g., Canon **3E(1)(d)(iv)** (Supp. p. **273-74**)(**judge** should disqualify himself if he **knows he** is likely to be a material witness in a case); Commentary to ABA Model Code of Judicial Conduct, Canon 2B (judge may testify as character witness when properly summoned).

There is one last case which may be helpful in ascertaining the scope of permissible testimony from a judge: In re McCully, 942 P.2d 327 (Utah 1997). Judge McCully, a juvenile court judge, was asked to submit an affidavit in a proceeding in another court. The issue in that proceeding was whether the records of a guardian ad **litem** were privileged, and Judge McCully was asked to explain in her affidavit the role and function of a guardian ad **litem** in juvenile court. Judge McCully did so and was reprimanded. She was reprimanded not for responding to the request for information, however, but for going beyond the request to address the ultimate legal issues before the court. **Id.** at 329. Thus, if a judge does testify before the Board, he or she should provide only information which will help the decision makers, and should not be asked his or her opinion on the ultimate issue of whether the conduct in question was improper.


There is a significant difference between a judge giving opinion testimony about the **events** of a trial he or she conducted, and opinion testimony **about standards** of judicial practice in the State of

Vermont. In our view, we are a small State with our own standards of practice both in law practice and **judicial** practice. (Many times these informal standards of practice might be **higher than the** national standards.) Sometimes the standards of practice are not clearly governed by codes of conduct. Well-recognized standards of practice for trial judges, magistrates, probate judges, or assistant judges may differ. It seems to us that it may be very useful to the board which weighs the appropriateness of judicial conduct, to know the Vermont standard of practice, if one exists. We agree with the memo that such opinions should be given only when compelled by subpoena, but we believe that the rule of Wilkinson should not be read so **broadly** as to limit the testimony which is at **issue** here.

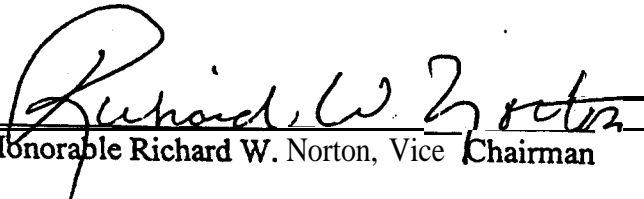
Dated at Springfield, in the County of Windsor and State of Vermont this 5th day of
February, 1999.

Sincerely,

JUDICIAL ETHICS COMMITTEE



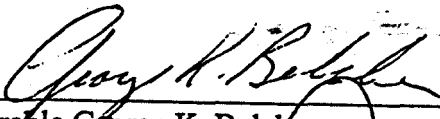
Douglas Richards, Esquire, Chairman



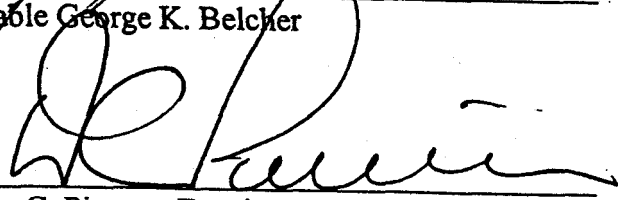
Honorable Richard W. Norton, Vice Chairman



Honorable Theresa S. DiMauro



Honorable George K. Belcher



Douglas C. Pierson, Esquire