

JUDICIAL ETHICS COMMITTEE

---



(802) 828-3278

---

JUDICIAL ETHICS COMMITTEE  
STATE OF VERMONT  
Opinion No. 2827-4  
October 19, 1999

109 State Street  
Pavilion Office Building  
Montpelier, Vermont 056094

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:

When a regulatory agency has brought administrative charges against a bail bondsman, should a sitting district court judge provide expert testimony at an administrative hearing on those charges at the bail bondsman's request?

Short Answer and Recommendation:

Under the circumstances presented, probably not.

A judge should not voluntarily provide expert testimony for a party in an adjudicatory proceeding because doing so gives the appearance that he is improperly throwing the weight of his position and authority behind one of the adversarial parties. The appearance of impropriety is lessened but not eliminated if the **testimony** is compelled by formal process. Thus, a judge may testify if properly summoned; but because of the judge's position and the weight it lends his views, considerations of the dignity of the office as well as **fairness** to the parties suggest that a judge should be summoned only if (1) the information the judge can provide is truly necessary to the decision making process, and (2) the judge is uniquely situated to provide this information.

It does not appear that either of these requirements would be met in this case. Under In re Wilkinson, 165 Vt. 183 (1996), the requesting party could not elicit expert testimony about what happened or might have happened in a particular case the judge handled.

Thus, the requesting party would have to limit its questioning to general bail procedures; and it is hard to see how testimony about general bail procedures would be either critical to the issues presented or exclusively within the knowledge of the judge.

It is therefore recommended that the judge explain these concerns to the requesting party, and that if he is subpoenaed, he challenge the subpoena and get a ruling from the hearing officer. If the hearing officer upholds the subpoena, the judge can and should testify, as long as the testimony is not about a particular proceeding.

Legal Analysis:

Although the Code of judicial Conduct does not specifically address the propriety of judges providing expert testimony in an administrative hearing, 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.**<sup>1</sup>

Under the **general guidance** provided by Canon 2 is the more specific **admonition** Of **Canon 2B: "A judge shall not** lead 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 concern<sup>8</sup> 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." 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**

---

<sup>1</sup> 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 well as decisions and advisory opinions from other jurisdictions that have adopted the Model Code, are authoritative sources of interpretation for the Vermont Code).

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 decision maker itself rather than a party to an adversarial proceeding, the concern about an appearance of impropriety is lessened further still. Thus, if a hearing officer decides he needs the judge's testimony to aid in the decision making process, the need for the information will outweigh the possible appearance of impropriety. The determination that the information is necessary should be made by a judicial officer, however, rather than one of the adversarial parties.

The possibility of the appearance of impropriety will depend somewhat on the exact nature of the expert testimony, of course. Under Wilkinson, the judge would not be able to testify about what happened or might have happened in a particular proceeding. But even beyond this, a distinction should be made between fact testimony and opinion testimony. The greater the extent the judge is asked to give opinions rather than purely factual information, the greater is the possibility that the evidence, like the character evidence explicitly referred to in Canon 2B,

---

\* It is not totally eliminated, however, since even if a judge testifies under subpoena, it may appear to the public that he is appearing as a witness "for" a particular party.

may be seen as improper support for one of the adversarial parties.<sup>3</sup>

If the judge does testify, there is a Utah case which may be helpful in ascertaining the scope of permissible testimony: 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 provided the affidavit 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, he or she should provide **only factual information which will help the decision maker**, and should not give his **or her opinio on** ultimate **legal** issues before the tribunal.

Dated at Springfield, in the County of Windsor and State of Vermont this 19<sup>th</sup> day of October

1999.

Sincerely,



Douglas Richards, Esquire, Chairman  
For The Judicial Ethics Committee

---

<sup>3</sup> Of course, there is a paradoxical flip side to this concern: the greater the extent the judge is asked to impart purely factual information, the greater is the likelihood that there are other potential witnesses who could provide the same information. And if there are other potential witnesses for the same information, it seems reasonable to infer that the party would like to call the judge for the improper purpose of benefitting from his position.