

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2021-01
(Finalized and effective September 16, 2021)

BACKGROUND:

Before becoming a judge, the requesting judge was the lead prosecutor in a case in which a defendant was sentenced to life in prison. The defendant has been incarcerated for several decades and recently applied for clemency. The inquiring judge received a request from the Office of Executive Clemency seeking comment on the clemency application pursuant to section 16-17-102(1), C.R.S. (2021). The statute requires the governor to solicit comments on a clemency application from the current district attorney of the district in which the applicant was convicted, the judge who sentenced the applicant, and the attorney who prosecuted the applicant at trial. The solicited parties are not required to respond, but if they do respond, they are asked to provide “such comment as they may deem proper concerning the merits of the application as to provide the governor with information upon which to base the governor’s action.” *Id.* The governor then considers the applicant’s “[g]ood character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys . . . and any other material concerning the merits of the application” which are given “such weight as seems just and proper to the governor, in view of the circumstances of each particular case, with due regard for the reformation of the accused.” *Id.*

The requesting judge feels a duty to comment on the clemency application as the former prosecutor. The judge would not use judicial letterhead and would not identify himself or herself as a judge; rather, the judge would comment only as the attorney who prosecuted the clemency applicant several years ago.

ISSUE PRESENTED:

Whether, under the Code of Judicial Conduct (Code), a sitting judge may reply to an application for clemency if the judge prosecuted the applicant while employed by the district attorney’s office.

SUMMARY:

Rule 3.3 of the Code prohibits a judge from “testifying as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.” Rule 3.3 does not explain what it means to be “duly summoned,” but the commentary provides that “[a] judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another.” Although a subpoena is one way of being duly summoned, the CJEAB concludes that it is not the only way a judge may be summoned. A judge is also summoned if, as the former prosecutor, the judge is requested to comment in that capacity by a formal authority,

such as the Office of Executive Clemency. If, after being summoned, the judge decides to comment on the applicant's character, there is no concern of impropriety or of abuse of judicial office because the character testimony was not given sua sponte. Thus, the CJEAB concludes that the requesting judge may comment on the clemency application.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Several Code provisions apply to the requesting judge's inquiry, including Rule 1.2, which requires judges to abstain from impropriety and the appearance of impropriety, and Rule 1.3, which prevents judges from abusing the prestige of judicial office.¹

Although a judge responding as a former prosecutor to a request for comment on a clemency application could simply discuss the judge's experience participating in the underlying criminal case, because section 16-17-102(1) emphasizes the applicant's character, it is likely that any comments would touch on the applicant's character. Assuming the judge's comments would discuss the applicant's character, the most applicable Code provision is Rule 3.3 which provides that "[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." The prohibition on character testimony exists so that judges do not voluntarily testify favorably on one's character. As explained in the comments, "[a] judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another." C.J.C. Rule 3.3 cmt. [1]. "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." *Id.*

The CJEAB has not yet addressed Rule 3.3, but in Advisory Opinion 2006-03, the CJEAB addressed Canon 2B, the precursor to Rule 3.3.² In Advisory Opinion 2006-03, the requesting judge asked if he could testify as a character witness for a former client and friend during an enforcement proceeding before the Securities and Exchange Commission. The CJEAB determined that, unless subpoenaed, the judge could not voluntarily testify. It also determined that even if the judge was subpoenaed, he should consider whether the interests of justice required his testimony. If the interests of justice weighed against providing character testimony, the CJEAB advised the judge to discourage the subpoenaing party from requiring his testimony.

¹ Rule 1.2 requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." Rule 1.3 prohibits a judge from abusing "the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

² The last sentence of Canon 2B of Colorado's 1990 Code of Judicial Conduct provided, in relevant part, that "[a] judge should not testify voluntarily as a character witness." The Commentary stated that Canon 2B "does not afford a judge the privilege against testifying in response to an official summons."

If a judge voluntarily provides character testimony, the assumption is that the testimony will be favorable and will inject the prestige of the judge's office into the proceeding. For this reason, the *commentary* to Rule 3.3 indicates that a judge must be subpoenaed before testifying as a character witness, but the rule itself does not go to such extremes—it only notes that a judge is prohibited from vouching for a person's character in a legal proceeding, “except when duly summoned.” As the Code recognizes, comments are intended to be illustrations—they “neither add to nor subtract from the binding obligations set forth in the Rules.” C.J.C. Scope, cmt. [3]. While a subpoena would certainly summon a judge, it is not the only way in which a judge may be duly summoned. We conclude that a formal request from a decision-making body for a judge, who prosecuted the applicant, to comment pursuant to a statute serves the same function as a subpoena because the concern of impropriety or abuse of judicial office does not exist in the same way it would if the judge were commenting on the applicant's character *sua sponte*.

The ethics advisory opinions of most jurisdictions have concluded the same. *See, e.g.*, Ala. Jud. Inquiry Comm'n Ad. Op. 06-866 (Mar. 17, 2006) (judge who prosecuted defendant for murder twelve years earlier could write letter to parole board as permitted by statute seeking input from prosecuting attorney); Fla. Jud. Eth. Adv. Comm. Op. 2004-13 (Apr. 5, 2004) (judge could respond to parole commission's request for input on defendant's clemency petition because the judge was being asked for “any information or recommendation” she had on the matter as the judge who presided over defendant's trial but later recused herself). *But see* N.Y. Jud. Adv. Op. 16-27 (Mar. 16, 2016) (retired judicial hearing officer who formerly presided over criminal cases could not *voluntarily* write a letter to the authorities concerning application for clemency because judge was not subpoenaed or asked to provide comment and was not involved with inmate's case).

CONCLUSION:

Although Rule 3.3 prohibits a judge from testifying as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouching for the character of a person in a legal proceeding except when duly summoned, in the context of clemency applications, a judge who was the prosecutor in the applicant's case may comment on the application and on the applicant's character if requested to do so by the body making the clemency decision; the concern of impropriety or abuse of judicial office does not exist as it would if the judge were voluntarily commenting on the applicant's character. To eliminate any vestige of impropriety, the requesting judge should respond solely in his or her capacity as the former prosecutor who tried the applicant and should refrain from identifying as a judge or using judicial letterhead.

FINALIZED AND EFFECTIVE this 16th day of September, 2021.