

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)
C.J.E.A.B. ADVISORY OPINION 2006-03
(Finalized and effective February 28, 2006)**

ISSUE PRESENTED

The requesting judge has been asked to testify under subpoena as a character witness for a former client, a registered representative in the securities industry, whose employer is now the subject of a United States Securities and Exchange Commission (SEC) enforcement proceeding based on allegations involving the representative. During his tenure in private practice, the judge worked closely with the former client, whom he knows very well, holds in high esteem, uses to manage some investments, and now counts as a personal friend. The judge would not be expected to testify concerning the merits of the enforcement proceeding and would not offer any opinions, expert or otherwise, concerning the merits of the employer's defense. May the judge provide character testimony?

CONCLUSIONS

The judge may not testify as a character witness on a voluntary basis, but he is obligated to comply with a subpoena if one is issued. Where a judge has been asked to provide such testimony, the judge should consider whether the interests of justice require his or her testimony, and if not should then consider attempting to discourage the subpoenaing party or lawyer from requiring the testimony, because of the possibility that the testimony is being sought to trade on the judge's position. Whether the interests of justice require the testimony depends on three factors related to the specifics of the particular case in which the judge would be asked to testify.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 2B provides that a judge should not lend the prestige of his or her office to advance the private interests of others and it specifies that "[a] judge should not testify voluntarily as a character witness." The commentary to Canon 2B states that a judge's testimony as a character witness "injects the prestige of the judge's office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial." However, the commentary goes on to note that the Canon "does not afford a judge the privilege against testifying in response to an official summons."

DISCUSSION

Canon 2B makes clear that a judge should not testify voluntarily as a character witness. As the commentary to the Canon explains, the general rule against voluntary testimony reflects concern that the judge's testimony might lend the prestige of the judicial office in support of the private interests of the party for whom the judge testifies. The

commentary nevertheless recognizes that judges are obligated to comply with a subpoena to testify.

Ethical advisory opinions from other jurisdictions discuss a requirement that a judge discourage a subpoenaing party from subpoenaing the judge. The basis for this requirement is language in the Code of Judicial Conduct as adopted in those jurisdictions: the commentary to Canon 2 explicitly states "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." *E.g.* Nevada Ad. Op. JE05-005; Indiana Ad. Op. 3-98. The Indiana opinion was particularly concerned with the fact that parties generally seek character testimony only from those witnesses whom they expect will provide favorable testimony, making the threat to subpoena a judge as an "unwilling" character witness somewhat illusory. Thus, the Indiana opinion requires that judges not rely on the prospect of being subpoenaed to legitimize what is, in effect, improper voluntary testimony. This requirement also recognizes that service of a subpoena is not determinative of the subpoenaing party's intent, which could be to trade on the prestige of the judicial office.

Colorado's Canon and commentary do not include language explicitly requiring the judge to discourage the subpoenaing party. Nevertheless, our supreme court has agreed with the statement that the "practice of judges appearing as character witnesses should be discouraged, but we agree that, if subpoenaed, a judge must respond to the subpoena." *People v. Tippett*, 733 P.2d 1183, 1194 (Colo. 1987). Further, the Board believes that eliciting character testimony from a judge risks misuse of the judicial office. Accordingly, the Board concludes that, as an aspirational goal, a judge should consider attempting to discourage, to the extent reasonable, a party or lawyer from subpoenaing the judge as a character witness, unless the interests of justice require the judge's testimony.

In evaluating whether the interests of justice require the testimony, the judge should consider and make reasonable inquiry into three factors related to the specifics of the particular case in which the judge's testimony is being sought. First, the judge should assess the nature and depth of his actual awareness of the character of the party for whom he would testify. Second, the judge should weigh whether he or she is in a unique position to offer singular and meaningful testimony. Third, the judge should consider the forum in which the testimony will be given. If the judge is being asked to testify in a colleague's court, the opposing party might justifiably fear that the presiding judge in a bench trial would place undue weight on the judge's testimony. The opposing party might also have justifiable concerns about his or her own attorney's zeal, particularly if the attorney also practices in the testifying judge's court; when a judge testifies as a witness, lawyers who regularly practice in front of that judge may be placed in the awkward position of cross-examining the judge. When a judge unnecessarily appears as a character witness in a colleague's courtroom, that testimony may raise an issue of the presiding judge's recusal. Further, in those forums where the judge's testimony would carry more weight, such as before a jury, the judge would more likely need to discourage

the subpoenaing attorney than in those forums where the judge's position would carry less weight, such as in a proceeding before a regulatory agency.

In this case, the Board lacks sufficient factual information to conclude that the judge should attempt to discourage the subpoenaing attorney from calling him as a character witness. The judge seems to possess intimate knowledge of the former client's character and could speak meaningfully in the enforcement proceeding, which suggests that the interests of justice would be served by his anticipated testimony. But whether he alone is equipped to provide such character testimony is unknown. The judge would be testifying before a regulatory agency that lacks any connection with the judge's own court, which suggests that the subpoenaing attorney is not seeking to trade on the judge's office.

In sum, the requesting judge should consider seeking to dissuade the former client's attorney from subpoenaing him if he determines, through reasonable inquiry of the attorney or from other credible sources, that comparable character evidence is available from another source.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 28th day of February, 2006.