Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2016-07 (Emergency Staff Opinion Issued April 22, 2016)
Character Witness; Advancing Private Interests; Appearance of Impropriety
Rules 1.2, 1.3, 2.10 & 3.3

Issue: May a Judicial Official provide an affidavit to a family member who is involved in an out-of-state lawsuit?

Additional Facts: The affidavit would not be a character reference but rather would be limited to factual matters based upon the Judicial Official's personal observations. The Judicial Official indicated that he or she has unique knowledge about some of these matters in that the Judicial Official is the only competent witness to certain matters and is the only competent witness who is not a party to the suit as to other matters.

Discussion: Rule 1.2 of the Code of Judicial Conduct states that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 1.3 of the Code states that "a judge shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so." The Commentary to Rule 1.3 states that "[a] judge may provide a reference or recommendation for an individual based on the judge's personal knowledge." Rule 1.3, cmt. (2).

Rule 2.10 (a) of the Code states that a judge "shall not make any public statement that

might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any non-public statement that might substantially interfere with a fair trial or hearing."

Rule 3.3 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 Comment to Rule 3.3 states that a judge who testifies as a character witness without being duly summoned abuses the prestige of judicial office. It is important to note that neither Rule 3.3 nor its commentary address the issue of a judge testifying as a fact witness.

This Committee has previously advised a Judicial Official that he or she may provide an acknowledgment or equivalent affidavit with respect to a witness' signature on an instrument that the Judicial Official prepared when in private practice (JE 2009-26), and also advised a Judicial Official who was the victim of a crime that he or she could provide a statement or affidavit and testify, if necessary, provided that the Judicial Official does not refer to his or her position unless the crime was related to the Judicial position, and the Judicial Official should be aware that disqualification issues may arise if the police department or prosecutor handling the matter were to appear before the Judicial Official (JE 2012-20). This Committee has advised Judicial Officials on several occasions that they may not provide a letter of reference on behalf of an individual with respect to an adversary proceeding when not subpoenaed. For example, in JE 2013-30 the Judicial Official was told that he or she could not provide a voluntary letter of reference in connection with a criminal sentencing. Similarly, the Judicial Official in JE 2014-09 was advised that he or she could not provide a voluntary character reference for an attorney who was the subject of a pending grievance proceeding. See also JE 2008-15 (a Judicial Official should not provide a letter of reference in the context of an adversarial character and fitness proceeding stemming from concern that the candidate cheated on a college exam). This Committee did, however, advise the Judicial Official in JE 2012-31 that he or she could testify at an administrative hearing to which the Judicial Official had been duly subpoenaed and for which the Judicial Official had unique knowledge of facts based upon personal observation.

Other committees that have considered the propriety of a Judicial Official testifying as to factual matters have concluded that is not included in the prohibition against testifying as a character witness. For example, in Wisconsin Opinion 09-2, the Committee answered "no" to the question "Does the State of Wisconsin Code of Judicial Conduct require a sitting judge to be subpoenaed to appear as a fact witness?" In explaining its conclusion, the Wisconsin Committee stated "Since the Rule only limits a judge from testifying as a character witness voluntarily, that is, without being subpoenaed (or summoned), it is our opinion that a judge does not violate the Rule by voluntarily agreeing to testify as a fact witness if, in so agreeing, the judge does not act in a way that may lend the prestige of judicial office to advance the private interests of the judge or of others or convey or permit others to convey the impression that they are in a special position to influence the judge." Similarly, in New York Opinion 07-153, the New York Committee stated, in relevant part, "While a judge may only provide a character reference pursuant to a subpoena or in response to an official request from an entity such as a court, district attorney, probation or parole department [citations omitted], no such mandate is required for a judge to testify as a fact witness (*see* Opinions 98-118 [Col. XVII]; 90-26 [Vol V]; 89-76 [Vol IV]. Nevertheless, it is preferable that a judge do so pursuant to a subpoena (*id*). And, in the absence of a subpoena, a judge may decline to provide an affidavit or to testify (*see* Opinion 95-148 [Vol XIII])." See also New York Opinion 98-118 (a judge may provide an affidavit and testify as a fact witness regarding an accident that the judge witnessed. "While it is preferable that a judge who is asked to be a fact witness appear pursuant to a subpoena, there is no requirement that the judge be subpoenaed in order to testify as a fact witness. [Citations omitted.]") and New York Opinion 89-76 (a judge whose spouse proposes to contest the probate of a will of the spouse's deceased parent may testify as a witness in a Surrogate's Court proceeding as to the judge's conversations with the decedent and the judge's observations of the decedent's demeanor).

Based upon the facts provided, the Judicial Official was advised that he or she may provide an affidavit subject to the following conditions:

1. The affidavit is not a character reference;

2. The affidavit is limited to factual matters that the Judicial Official personally observed;
3. The affidavit does not allude to the fact that the affiant is a Judicial Official or otherwise seek to lend the prestige of judicial office to advance the private interests of the judge or of others or convey or permit others to convey the impression that they are in a special position to influence the judge; and
4. The Judicial Official requests that the party soliciting the affidavit not volunteer that the affiant is a Judicial Official.

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