

Wyoming Supreme Court Judicial Ethics Advisory Committee W.S.C.J.E.A.C. Advisory Opinion 2018-01

QUESTION PRESENTED

Under the Canons of Judicial Conduct, including, but not limited to Rules 2.15, 2.16, and Rule 3.3, may a judge testify at a Wyoming Bar disciplinary proceeding concerning his personal knowledge of the lawyer subject to the disciplinary action?

If so, must the judge be formally subpoenaed in accordance with the Rules of Civil Procedure or the rules of the presiding tribunal?

RESPONSE

The Committee answers yes, the judge may testify under facts contained in the question presented; however, the judge must be formally subpoenaed to permit such testimony.

BACKGROUND

The judge requesting the advisory opinion was contacted by counsel for an attorney who is scheduled for a disciplinary hearing before the Board of Professional Responsibility. Counsel for the attorney facing disciplinary action indicated that he seeks to elicit testimony regarding the judge's professional experience with the accused attorney. The judge anticipates being asked questions about the accused attorney's demeanor toward the court, his honesty and candor with the court, and whether the lawyer competently represents his clients. Accordingly, the judge anticipates being asked questions seeking "character" evidence based upon the judge's dealings with the accused. Counsel for the accused has indicated that he will subpoena the judge, if necessary.

APPLICABLE RULES OF THE WYOMING CODE OF JUDICIAL CONDUCT

Canon 1 of the Wyoming Code of Judicial Conduct states:

A judge shall uphold and promote the independence, integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Rule 1.3 states:

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or knowingly allow others to do so.

Canon 2 of the Wyoming Code of Judicial Conduct states:

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 2.16(A) states:

A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

Canon 3 of the Wyoming Code of Judicial Conduct states:

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.3 states:

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.

DISCUSSION

Facts the Committee find to be relevant when issuing this formal opinion include that the judge had been requested to testify at a confidential hearing, likely before the Board of Professional Responsibility.

The portion of Rule 2.16 of the Wyoming Code of Judicial Conduct (WCJC) that is relevant for this opinion reads as follows:

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

Although Rule 2.16(A) of the Wyoming Code of Judicial Conduct (WCJC) is clear on its face by requiring a judge to "cooperate and be candid and honest with judicial and lawyer disciplinary agencies," the concern is whether a subpoena is required by Rule 3.3, WCJC.

Canon 3 of the WCJC speaks to the conduct of the judge's personal and extrajudicial activities. That Canon reads as follows:

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.3, WCJC reads as follows:

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 wording of Rule 3.3 of Wyoming's Code of Judicial Conduct is the same as the wording of the 2007 Model Code of Judicial Conduct. The Reporters' Notes to Rule 3.3 of the Model Code of Judicial Conduct read as follows:

Rule 3.3 is essentially the same as the last sentence of Canon 2B of the 1990 Code; the thrust of both provisions is that a judge is prohibited from testifying voluntarily as a character witness. If the judge testifies in response to a subpoena or as a percipient witness (or both), Rule 3.3 raises no bar. The Rule more directly addresses this concept by using the phrase "except when duly summoned."

The reach of the Rule was extended slightly in two ways. First, Rule 3.3 applies not only to testifying as a character witness, but also to "otherwise vouch[ing] for the character of a person in a legal proceeding." This language was added because testifying under oath is not the only circumstance in which judges might be invited to comment when a person's character is in issue in a legal proceeding. Second, the new Rule specifies that it applies in all proceedings that are judicial, administrative, or otherwise adjudicatory in nature, and not simply in civil or criminal trials. Such a broad application of the 1990 Code provision was not necessarily inferred from Canon 2B's simpler prohibition against "testify[ing] voluntarily as a character witness."

The language about "vouching" was added because testimony under oath is not the only mode in which judges might abuse the prestige of judicial office when the character of a person is at issue in a legal proceeding. The second addition simply serves as a reminder that Rule 3.3 is not limited to civil or criminal trials in courts, but applies whenever testimony is taken on a formal record.

It has always been understood that judges should not encourage a party to issue a sham subpoena simply to legitimize what was in essence the judge's voluntary testimony. Comment [1] addresses that practice indirectly, and seeks to prohibit it, by suggesting that judges actively discourage parties from compelling their testimony as character witnesses in most situations.

Additional relevant facts for the Committee's consideration include that the requesting judge anticipates being asked about the accused's demeanor toward the court, the attorney's honesty and forthrightness with the court, and whether the lawyer competently represents his/her clients. It is reasonable to anticipate that when a judge is asked questions in those areas, some of those questions may call for "character" evidence or an opinion based upon that judge's dealings with the lawyer as to his/her trait for honesty and candor with the tribunal.

The Committee finds that Rule 2.16(A) and Rule 3.3 do not conflict with each other. It is reasonable for a judge to cooperate and be candid and honest with a lawyer disciplinary agency without testifying as a character witness or otherwise vouching for the character of an attorney who is the subject of a disciplinary proceeding. An example of that would be providing nothing beyond facts of a specific instance.

When the testimony is beyond facts as to what happened when and who said what, especially if it includes the judge testifying about an attorney's demeanor toward the court, the attorney's honesty and forthrightness with the court, and the judge's conclusion or opinion of whether a lawyer competently represents his or her clients, the judge is placed in the position of testifying as a character witness or otherwise vouching for the character of that lawyer. Whenever a judge vouches for someone, especially when the character of a person is at issue in a legal proceeding, that may be an abuse of the prestige of judicial office. To ensure, or at least protect against that abuse, Rule 3.3 requires the judge to not testify as a character witness except when duly summoned. Duly summoned requires the judge be formally summoned or subpoenaed in accordance with the Rules of Civil Procedure or the rules of the presiding tribunal.

The circumstances giving rise to the requesting judge's question and this opinion merit a cautionary note worth emphasis. Wyoming has adopted the language of Rule 3.3 of the 2007 Model Code of Judicial Conduct. The Model Code is accompanied by the following comment¹:

A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interest of another. See Rule 1.3. 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.* (Emphasis added.)

Thus, it is important for judges to resist the temptation to offer, or voluntarily appear, to testify as a character witness. Mere reliance on a subpoena to comply with the rules is not enough. The comment clearly suggests that a judge must actively and affirmatively discourage the giving of such testimony. In doing so, the intent of Rule 1.3's bar to judges using their position to advance the interests of another is observed.

CONCLUSION

We believe that judges cannot testify regarding a person's character at disciplinary proceedings, or in any other judicial, administrative, or otherwise adjudicatory proceeding, unless formally summoned or subpoenaed in accordance with the Rules of Civil Procedure or the rules of the presiding tribunal.

FINALIZED AND EFFECTIVE this 9th day of February, 2018 by the Wyoming Supreme Court Judicial Ethics Advisory Committee.

¹ This is Comment [1] as noted in the Reporters' Notes to Rule 3.3.