

## ADVISORY OPINION

### Code of Judicial Conduct Canon 2B

#3-98

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

### ISSUE

At issue is Canon 2B of the Code of Judicial Conduct which provides in part that, "A judge shall not testify voluntarily as a character witness." The general import of Canon 2B is that judges may not use the power and prestige of the judicial office to "advance the private interests of the judge or others."

### ANALYSIS

The rule that a judge must not testify voluntarily as a character witness generally is taken to mean a judge may testify as a character witness only pursuant to a subpoena; the Commentary to Canon 2B states that "A judge may...testify [as a character witness] when properly summoned."

Nonetheless, the Commission recently cautioned an Indiana judge, who testified as a character witness pursuant to a subpoena, that the judge's conduct violated Canon 2B; it is the opinion of the Commission members that the fact that a judge receives a subpoena to testify as a character witness does not establish necessarily that the judge's appearance as a character witness is appropriate under Canon 2B. In fact, the Commentary to Canon 2B goes on to provide, "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...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."

The Commission suggests that this language from the Commentary is a better description of the appropriate rule than is the brief statement in Canon 2B. A judge's approach to the question of appearing as a character witness should begin with the presumption that the

judge should not do so except where the demands of justice require. A judge should discourage a party or lawyer from issuing a subpoena to the judge for character testimony and, if subpoenaed, should encourage its withdrawal or should move the court to quash it unless the circumstances indicate that the ends of justice would not be served without the judge's testimony.

Whether or not the demands of justice indicate the judge should testify depends on the nature and depth of the judge's actual awareness of the character of the party for whom the judge would testify. It also depends upon the actual necessity that it be the judge, as opposed to another possible witness, who is called to testify. Only if the judge is in a unique position to offer meaningful testimony about the individual should the judge testify. In the case recently considered by the Commission, the judge was a member of a circle of friends and associates of the party, and any number of individuals within the group could have offered similar, if not better-founded, testimony about the person's reputation for truth and veracity; that is, it appeared to the Commission that the judge's testimony was requested simply because he was a judge. This constitutes an abuse of the power of the office.

Furthermore, this judge testified in a court within the same county of the judge's jurisdiction. Had the demands of justice required the judge's testimony, the fact that the testimony was in a close colleague's court likely would not be cause for concern. However, coupled with the fact that the judge's presence appears to have been not in response to the demands of justice, the fact that the testimony was offered in a colleague's court implicated even further issues about the proper use of the office. The opposing parties justifiably might predict that the presiding judge in a bench trial would place undue weight on the judge's testimony, or that the zeal or their attorney possibly would be compromised, especially if that attorney practices also in the judge's court. As the Commentary also provides, "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." Furthermore, when a judge unnecessarily appears as a character witness in a colleague's courtroom, he or she may needlessly interject into the proceedings issues about the presiding judge's recusal.

## **CONCLUSION**

A judge should avoid testifying as a character witness unless the judge's testimony is necessary and the judge is confident the prestige of the judicial office is not exploited.