

Nebraska Ethics Advisory Opinion 96-2

Question Presented

Can a retired judge serve as an expert witness?

Statement of Facts

A retired judge, who has agreed to accept judicial assignments, has been requested to be an expert witness in a legal malpractice case. The judge requests an opinion as to the propriety thereof.

Applicable Code Sections

Canon 5E "Application of the Code of Judicial Conduct" B(1); Canon 2A and 2B; Canon 4A (1), (2), and (3), and Canon 4D (1)(a) and (b).

Discussion

Canon 5E "Application of the Code of Judicial Conduct" - B.(1) provides:

"A retired judge who consents to be recalled for temporary service shall comply with this code. However, such judge is not required to comply with Sections 4(C) (2), 4E, 4F, 4H, or 4I. . . ."

This committee has addressed a similar question in Advisory Opinion 93-1. The question addressed in 93-1 involved a full-time judge testifying as an expert in the State of Alaska.

The code does not specifically address the issue of an expert witness, but it does deal with the issue of testifying voluntarily as a character witness.

Canon 2 - A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. Nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. **A judge shall not testify voluntarily as a character witness.**

Commentary to canon 2B - 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 testified. Moreover, 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. A judge may, however, testify when properly subpoenaed. 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.

Canon 4 - A judge shall so conduct all extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

D. Financial Activities.

- (1) A judge shall not engage in financial and business dealings that
 - (a) reasonably may be perceived to exploit the judge's judicial position, or
 - (b) involve the frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

The facts in this request and the applicable code sections raise four ethical considerations. They are:

1. Will testifying furnish an appearance of impropriety by
 - (a) lending the prestige of the judge's office in support of one party in litigation?
 - (b) placing lawyers in an awkward position?
2. Will testifying damage public confidence in the integrity and impartiality of the judiciary?
3. Will testifying conflict with the judge's performance by
 - (a) casting doubt on the judge's impartiality?
 - (b) demeaning the judicial office?
 - (c) interfering with performance of judicial duties?
4. Is testifying a business dealing that could be perceived to exploit the judicial position?

In the previous opinion, we advised that considerations 3 and 4 above were not applicable. Since in this opinion we are dealing with a retired judge serving on a part-time basis, considerations 3 and 4 would be even less of a consideration, and we will not again address those issues.

However, the analysis of considerations 1 and 2 would apply, and we again quote in part:

THE FIRST CONSIDERATION is the reason that judges may not voluntarily testify as character witnesses. The practice creates two problems. It may look like the judge is lending the prestige of the office to someone in litigation, and it also places those directly involved in the administration of justice in an awkward position. However, being a witness is something that everyone is obliged to do when properly summoned. Therefore, the commentary to canon 2B stresses that testifying as a character witness is allowed "when properly subpoenaed".

In order to protect against abuses, the commentary further suggests that the practice of summoning judges as witnesses is generally to be discouraged.

There is little difference between being a character witness and being an expert witness. Both are generally done voluntarily. When choice is involved, the code recommends discouragement, and requires compelled testimony.

THE SECOND CONSIDERATION becomes an ethical problem when a judge becomes a witness for pay. One tenet of the judicial office is staffing with judges who are impartial. Becoming a partisan is the antithesis of an attitude of impartiality, and taking a position in the adversity of

litigation for pay does cause the judge to become a partisan.

The result of becoming an expert witness for pay places the credibility, character, and reputation of the witness (in this instance a judge) into issue. Doing so unnecessarily can only do damage to the public perception of judges because those issues will be resolved adversely as often as they are favorably. This consideration also tends to support the policy that judges should become paid experts only when it is made necessary by compelling the testimony.

Conclusion

The Nebraska Code of Judicial Conduct prohibits a judge from voluntarily becoming an expert witness. However, testifying with expert opinions, so long as the testimony is compelled and the judge discourages parties from requiring the judge to appear and testify, is not prohibited. When a judge must testify and renders expert opinions, there are conditions the code requires and that we advise:

- Compelled testimony must be required, and the practice of summoning judges as expert witnesses should be discouraged.
- While testifying, the judge should not volunteer the fact that he or she is a judge.
- Other considerations should be taken into account such as the lawyers involved, the courts testified in, and the nature of the litigation.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Committee chairperson: Honorable Darvid D. Quist, District Judge.

APPROVED AND ADOPTED
BY THE COMMITTEE ON MARCH 19, 1996

DARVID D. QUIST, CHAIR