

Opinion 07-04  
September 7, 2007

Topic: Testimony by Judge in a deposition for a Legal Malpractice claim

Digest: It is not improper for a Judge to testify in a collateral matter as to what s/he observed while presiding at a trial when subpoenaed to do so by a party. But the Judge should seek legal advice from the appropriate state agency and should not express an opinion regarding the quality of representation or performance of the attorney.

References: IJEC Opinion No. 04-03 (June 15, 2004); IJEC Opinion No. 05-06 (October 7, 2005); Illinois Code of Judicial Conduct, Rules 62 A & B and 63 A (6); ABA Model Code of Judicial Conduct (February 2007), Rule 3.3; Thomas v. Page, 361 Ill. App. 3d 484, 837 N.E.2d 483 (2<sup>nd</sup> Dist. 2005); People v. Willis, 349 Ill. App. 3d 1, 811 N.E.2d 202 (1<sup>st</sup> Dist. 2004).

#### FACTS

The trial judge in a mechanic's lien suit concerning construction of a strip mall entered a directed finding on a counterclaim for defective workmanship and judgment on the mechanic's lien. The counter claimant's expert initially assessed repair damages at approximately \$360,000. After the counter claimant was outraged by this figure, the expert changed his opinion to \$1.9 million, which the trial judge found unbelievable and, therefore, rejected that valuation without any criticism of counsel. The appellate court affirmed the trial court, and the Supreme Court denied the petition for leave to appeal. The attorney on the counterclaim was later sued for legal malpractice by the counter claimant's insurance company who then subpoenaed the trial judge for a scheduled deposition and sent the trial judge a transcript of his directed findings. The trial judge called the insurance company attorney to ask why the judge was subpoenaed and was told his deposition was wanted because of his strongly-worded directed findings.

#### QUESTION

May a trial judge receiving a subpoena testify in a deposition regarding a collateral matter relating to a proceeding over which s/he presided?

#### OPINION

There is no clear component of the Illinois Code of Judicial Conduct that directly addresses a judge testifying in a matter regarding events at a trial over which the judge previously presided.

Rule 63(A)(6) requires a judge to abstain from public comment on a pending or impending proceeding in any court. However, testifying in a deposition pursuant to a subpoena in a legal malpractice action is not public commentary on a pending case as this Rule was presumably intended to address.

The newly revised ABA Model Code of Judicial Conduct, Rule 3.3 addresses testimony in the context of the character witness:

"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 persona in a legal proceeding, except when duly summoned."

The Comment to Rule 3.3 philosophized that

[a] judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another....Except in unusual circumstances where the demands of justice required, a judge should discourage a party from requiring the judge to testify as a character witness.

ABA Model Code of Judicial Conduct, February 2007  
[http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf)

Several Illinois Judicial Ethics Opinions relating to character references provide some additional guidance akin to the new ABA Model.

Illinois Rule 62B provides that "[a] judge should not testify voluntarily as a character witness." IJEC Opinion No. 04-03 (June 15, 2004) applies that prohibition to a judge voluntarily writing a letter to the Illinois Courts Commission in support of a judge against whom disciplinary proceedings are pending. IJEC Opinion No. 05-06 (October 7, 2005) further clarifies by stating that, while voluntarily sending a character reference or opinion letter on behalf of an individual applying for executive clemency is improper, such reference or opinion letter may be appropriate if specifically requested from the Review Board.

Applying this logic to the facts of this question, it is reasonable to conclude that a parallel to such an ethical requirement would be to recommend that a judge not voluntarily

testify in any matter, but may testify if properly subpoenaed to do so.

The question of judicial testimony has been more directly addressed in an evidentiary context.

In Thomas v. Page, 361 Ill. App. 3d 484, 837 N.E.2d 483 (2<sup>nd</sup> Dist. 2005), the court, addressing certified questions on interlocutory appeal, recognized the "judicial deliberation privilege" protecting from disclosure in subsequent litigation confidential communications among judges and their staffs. The court identified strong public policy supporting protection of intra-court communications and avoidance of burdens on the judicial decision-making process which concern about potential disclosure would bring to the process. In so ruling, the court noted: "It is well-settled that a judge may not be asked to testify as to his or her mental impressions or processes in reaching a judicial decision." 361 Ill. App. 3d at 488.

In People v. Willis, 349 Ill. App. 3d 1, 811 N.E.2d 202 (1<sup>st</sup> Dist. 2004), the court was confronted with the appeal from a murder re-trial where the court allowed the prosecution to call the judge from the first trial as a witness. In reversing the conviction from the re-trial, the court held that the trial court failed to apply the "special witness doctrine":

[W]hen a party in a criminal case requests the appearance and testimony of a special witness, namely, a prosecutor, a judge, or a news reporter, that party is required to (1) specifically state the testimony the party expects to elicit from the witness; (2) state why that testimony is relevant and necessary to the party's case; and (3) state the efforts that party has made to secure the same evidence through alternative means.

349 Ill. App. 3d at 17.

Still outstanding is the question of whether the judge *must* testify if merely subpoenaed. In Willis, supra, the Appellate Court recognized an evidentiary "special witness doctrine" which is outside the control of the judicial witness and places a judge in a position beyond the scope of normal judicial duties. As such, when receiving a subpoena relating to one's judicial duties, a judge should contact the appropriate authorities within the Office of the Attorney General and/or the Administrative Office of the Illinois Courts to obtain legal advice and representation prior to any testimony.

In conclusion, a judge may not voluntarily testify regarding any matter over which a judge presided. If a judge is subpoenaed

to testify regarding a matter over which the judge presided, a judge may ethically testify regarding what the judge observed, but should seek legal counsel from the appropriate state authority to determine whether the judge must testify. Under Thomas, however, the judge may ethically exercise the judicial deliberation privilege to decline to answer any questions encompassed by the privilege.