

Maryland Judicial Ethics Committee

Opinion Request Number: 2012-06¹

Date of Issue: April 18, 2012

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Testify as a Fact Witness

Issue: May a judge testify as a material fact witness in a court proceeding?

Answer: Yes.

Facts: Prior to becoming a judge, the requesting judge was a partner in a law firm. In 2002, while at the firm, one of the judge's clients died, at which point, he/she provided legal services to the client's estate until being appointed to the bench, in 2009. In the context of providing these services, the requesting judge frequently dealt with the estate's attorney and the personal representative. In 2011, the personal representative suffered a stroke and resigned. Thereafter, a legal dispute arose as to his commissions. The personal representative's attorney contacted the requesting judge and informed him/her that one of the issues in dispute was the scope and extent of the services rendered by the personal representative to the estate, and that, as a result of his stroke, the representative was having difficulties recalling the details of his activities on behalf of the estate. Accordingly, the attorney asked the requesting judge whether he/she would be willing to testify in court as a fact witness regarding his recollection of the personal representative's activities on behalf of the estate. The judge agreed to testify and was served with a subpoena.

Discussion: While the Maryland Code of Judicial Conduct ("Code"), Maryland Rule 16-813, does not expressly state that a judge may testify as a material fact witness in a proceeding, the Code clearly anticipates and authorizes such testimony. Rule 2.11 provides:

(a) A judge shall disqualify himself or herself in any proceeding in which the [judge] ...

...

(D) is likely to be a material witness in the proceeding[.]

Thus, by implication, Rule 2.11(a)(2)(D) assumes that a judge may testify in matters where he or she is not presiding.²

¹ Judge DiPietro did not participate in this opinion.

² See also Rule 5-605 ("The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.").

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In *Ginsberg v. McIntire*, 348 Md. 526 (1998), the Court of Appeals affirmed the trial court's decision to permit a Circuit Court judge to testify as a material witness in a case in which his testimony involved his activities as counsel for the plaintiff.³ On appeal, the appellants also contended that the trial court erred in allowing plaintiff's counsel to identify the witness as a sitting judge. As to the latter issue, the Court observed that counsel did not object at trial to the continued reference to "judge," thus waiving that issue. The Court thoroughly reviewed authority from sister states and the then existing judicial ethics canons as to the propriety of allowing a sitting judge to testify as a fact witness, and concluded it proper to allow the testimony. The Court opined that the evidence was material and relevant to the issue before the jury, and the Plaintiff was entitled to have the testimony considered in her case.

Similarly, pursuant to Rule 3.3, a judge is permitted to testify as a character witness. The Rule thus provides: "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, however, notes that a judge should discourage a party from calling the judge as a character witness; nevertheless, it concludes that the interests of justice may sometimes require such testimony and permits the same.⁴

When asked to testify as a material fact witness, a judge is being asked to provide relevant, probative evidence to allow the tribunal to reach a just result. In some cases, the evidence may not be available to the parties or the trier of fact by any other method. This is in clear contrast to a situation in which a judge is asked to render an expert opinion, or when summoned as a character witness, as discussed above.⁵ In those circumstances, parties have other methods to provide the necessary evidence to the trier of fact.

Maryland Rule 5-102 provides that the rules of evidence "shall be construed to ... promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Providing material and probative, relevant evidence is in accord with the letter and spirit of this Rule. Accordingly, it is the opinion of the Committee that, under the facts described in the inquiry, the requesting judge can testify as a fact witness.

³ The Court stated, in part, "In the instant matter, the testimony elicited from witness Thompson did not concern any judicial activity of Judge Thompson. His testimony was limited to factual matters that were relevant to the case that occurred while he was practicing law." *Id.* at 553.

⁴ Comment [1] states: "A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests 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."

⁵ For a discussion of a judge testifying as an expert witness, see [Opinion Request No. 2009-15], issued on November 16, 2009.

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Application: The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, to the extent of the requestor's compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.