

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2018-16

**Date of Issue:** May 18, 2018

■ Published Opinion   □ Unpublished Opinion   □ Unpublished Letter of Advice

### **When May a Judge Testify as a Character Witness?**

#### **May a Judge Provide a Testimonial Letter as to an Individual's Good Character?**

**Issues:** May a judge provide a written testimonial or testify as a character witness on behalf of a party in a pending civil lawsuit and a possible criminal prosecution?

**Answer:** A judge may not provide a testimonial. A judge should testify as a character witness only after being subpoenaed. A judge should discourage a person from issuing a subpoena for his or her testimony as a character witness unless there are unusual circumstances and the demands of justice require the judge to testify.

**Facts:** Requestor is a judge who poses the following inquiry, which we have re-worded slightly:

I was a patient of a physician (the "Physician") who is a principal in a medical practice (the "Practice"), which was recently named as a defendant in a civil lawsuit. Co-defendants in this action include the manufacturers and distributors of certain prescription medications. I have learned through news reports that the Physician and the other principals of the Practice are also the subjects of a federal criminal investigation.

I have received a written request for a testimonial letter regarding the Physician's medical treatment and good character. I have also been asked to testify in both the civil litigation and any possible criminal prosecution. My testimony would be character testimony. Further, I could testify that, from my perspective, the Physician is a skilled practitioner. Otherwise, my testimony would be much the same as numerous other patients.

### **Discussion**

The Maryland Code of Judicial Conduct (the "Code") Rule 18-103.3 states:

#### **Testifying as a Character Witness**

Except when duly subpoenaed, 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.

Comment [1] to the rule explains that:

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 18-101.3.<sup>[1]</sup> 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.

When the rule and the comment are read together, as they should be,<sup>2</sup> several important considerations become clear: (1) a judge should never provide character witness testimony without being subpoenaed; (2) a judge who is asked to testify as a character witness should discourage the party seeking the judicial appointee's testimony "unless the demands of justice require"; and (3) only "unusual circumstances" will satisfy the "demands of justice" requirement.

Turning to the specifics of the Requestor's situation, the Requestor has been asked to provide a testimonial letter for the Physician's use in an ongoing civil and a possible criminal proceeding. In the view of the Committee, providing such a letter would allow the Physician to use the prestige of the Requestor's judicial office for the Physician's personal benefit. Such an action is improper and is prohibited by Rule 18-101.3. The Requestor should refuse to write such a letter.

As for testifying as a character witness, a judge should testify as a character witness only in unusual circumstances, and when the interests of justice require the judge to testify. There is nothing unusual about a defendant in a civil or criminal action seeking evidence of his or her good character. The Requestor is not uniquely equipped to testify as to the Physician's good character or skills as a physician because other patients, and the Physician has many other patients, will be able to testify about their assessment of the Physician's good character and diagnostic abilities. Therefore, it is very difficult to conceive how the Requestor's character testimony would be necessitated by the demands of justice. The Requestor should discourage the Physician from obtaining a subpoena for the Requestor's testimony.

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<sup>1</sup> Rule 18-101.3 states:

Avoiding Lending The Prestige Of Judicial Office

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

<sup>2</sup> Comments "neither add to nor subtract from the binding obligations set forth in the Rules." Rule 18-100.1(b)(2)(B). Instead, they generally serve two functions. Comments may "contain explanatory material, and, in some instances, provide examples of permitted or prohibited conduct." Rule 18-100.1(b)(2)(A). Additionally, Comments "may identify aspirational goals for judges. To implement fully the principles of this Code, judges should hold themselves to the highest ethical standards and seek to achieve those aspirational goals[.]" Rule 18-100.1(b)(2)(C).

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Page 3 of 3

While judges must comply with court orders, a judge is not required to accede supinely to a party's desire to have the judge testify if the judge believes that doing so would be inappropriate. Accordingly, and although the Code does not require such an action, the Requestor may take lawful steps to quash the subpoena if the Physician subpoenas the Requestor even after the Requestor discourages the Physician from doing so.

**Application:** The Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, 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 the request for advice involves a continuing course of conduct, the Requestor 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.