
ISSUE

Must a judge testify when subpoenaed?

ANSWER

Yes.

FACTS

The judge was subpoenaed for a deposition in a pending Federal sexual harassment case. The judge may be asked to testify as to facts and character. The judge is not hearing the case.

DISCUSSION

This issue concerns the provisions of SCR 60.03(2) governing conduct which is improper or creates the appearance of impropriety and a judge's obligations with respect to testifying as a character witness.

SCR 60.03(2)

SCR 60.03(2) states:

A judge may not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge may not lend the prestige of judicial office to advance the private interests of the judge or of others or convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may not testify voluntarily as a character witness.

The Committee concludes that SCR 60.03(2) does not prohibit a judge from testifying as a fact witness. The Rule prohibits a judge from voluntarily testifying as a character witness. Nonetheless, the Comment to this section directs that "a judge should discourage a party from requiring the judge to testify as a character witness." The Committee therefore concludes that the judge should seek to discourage the party from using the judge as a character witness. The Preamble to the Code defines "should" as follows:

The use of “should” or “should not” in the rules is intended to encourage or discourage specific conduct and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

However, if the judge’s efforts are unsuccessful, the judge is under the same obligation as any other subpoenaed witness to respond.

CONCLUSION

The Committee concludes that SCR 60.03(2) means that a judge shall not **voluntarily** testify as a character witness. In addition, a judge should discourage a party from requiring the judge to testify as a character witness. The term “should” is not mandatory. However, the judge is under the same obligation as any other subpoenaed witness to respond.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60--Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 97-3 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this ____ day of _____, 1997.

Thomas H. Barland
Chair