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STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION: JE06-007

DISCUSSION

PROPRIETY OF A JUDGE ANSWERING A SUBPOENA TO TESTIFY AT HEARING OR TRIAL WHEN HE/SHE BELIEVES THE QUESTIONING MAY INCLUDE ISSUES DEALING WITH CHARACTER EVIDENCE.

ISSUE

Is a judge obligated to answer a subpoena commanding him/her to appear for a hearing or trial, when the judge has reason to believe he/she may be asked to provide character evidence?

ANSWER

Yes, the judge must answer the subpoena, while taking steps to avoid providing character evidence.

FACTS

The request letter asks whether a judge who had served as a court-appointed evaluator/therapist must answer a subpoena to testify at a hearing on a matter in which he/she performed services prior to taking the bench. The judge was concerned the nature of the services provided prior to his/her appointment would lead counsel to question him/her as if he/she were a character witness for one or the other, or both, of the litigants.

Canon 2B of the Nevada Supreme Court Rules provides:

A judge shall not testify voluntarily as a character witness.

The commentary to 2B expresses concern that a judge voluntarily testifying as a character witness would lend the prestige of the office to the litigant. The commentary also discusses the "awkward position" of the lawyer cross-examining a jurist in front of whom he/she may regularly appear and concludes that the subpoenaed judge should "discourage" a party from requiring that the judge testify as a character witness.

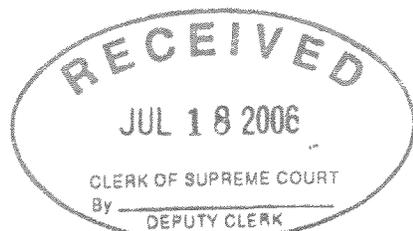
On the other hand, Canon 2A provides:

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.

The commentary to 2B also states:

A judge may, however, testify when properly summoned.

Reading these two subsections and their commentary together, and applying the case law of other states, while a judge is precluded from voluntarily testifying as a character witness, a judge has an obligation to comply with a lawful subpoena. The



Committee strongly urges any jurist who believes there is the possibility of being asked to provide character evidence when responding to a subpoena to seek the assistance of the Nevada Attorney general's office.¹ The jurist would ask the A.G. to move the presiding judge to quash the subpoena.

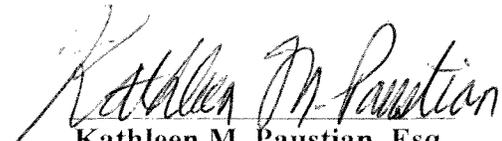
CONCLUSION

Canon 2A requires a jurist to answer to a lawful subpoena to give testimony at a judicial proceeding. However, Canon 2B precludes a judge from giving character evidence when serving as a witness. To avoid conflict between these provisions, a judge served with a subpoena which he/she believes may elicit character evidence should seek the assistance of the Attorney General in quashing such a subpoena. When, however, the jurist has no such concerns, he/she is obligated to testify at the trial or hearing as would any other citizen.

REFERENCES

Nevada Code of Judicial Conduct, Canon 2 A, B and Commentaries; *McComb v. Superior Court of San Francisco*, 68 Cal. App. 3d 89, 137 Cal. Rptr. 233 (CA 1977); *People of the State of Colorado v. Tippet*, 733 P.2d 1183, 1194 (Col. 1987).

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¹ Jurists in courts of limited jurisdiction can turn to their respective city or county attorneys office.