



STATE OF VERMONT
JUDICIAL ETHICS COMMITTEE

Opinion No.: 28
Date: May 28, 2024
To: [name redacted in posted version pursuant to A.O. 35, ¶ 6]

The Committee has considered the matter you presented to it. The following is the opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Questions Presented

Prior to appointment to the bench, the inquiring judge served as a prosecutor in a criminal matter that resulted in a jury verdict of guilty. The case was appealed to the Vermont Supreme Court. During the appeal, numerous portions of the trial record were discovered to be inaudible. The Supreme Court recently remanded the matter to the trial court to reconstruct the record pursuant to V.R.A.P. 10(f) because of the inaudible portions. Defendant's trial counsel has contacted the judge and inquired if the judge would be available to coordinate with counsel to reconstruct the bench conferences. The judge has requested an opinion on whether: (1) the judge may assist defendant's counsel in reconstructing the record as requested; and (2) if the judge may assist, are there any restrictions or limitations on their involvement?

Short Answer

Yes, the judge may assist in reconstruction of the record. That assistance must be limited to factual matters and must avoid any advocacy or opinions.

Relevant Canons of Judicial Conduct

The relevant provisions of the Vermont Code of Judicial Conduct 2019 ("the Code" or "VCJC") include the following rules and guidance:

- Canon 1, Rule 1.2: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

- Canon 1, Rule 1.3: A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so.
- Canon 3, Rule 3.3: 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.
- Canon 3, Rule 3.10: A judge shall not practice law. A judge may be self-represented and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.

Analysis

Prior to appointment to the bench, the judge served as a prosecutor in a criminal matter that was appealed to the Vermont Supreme Court after a guilty verdict. Following the judge's appointment, the Supreme Court remanded the case pursuant to V.R.A.P. 10(e), which provides for correction or modification of the record "if anything material to either party is omitted by error or accident from, or misstated in, the record." At issue in this question are bench conferences, so the judge's participation is necessary to provide the trial court, and ultimately the Supreme Court, with an accurate reconstruction of the record of these conferences.

Generally, a judge is not prohibited, under Rule 3.3, from testifying about factual matters about which the judge has personal knowledge, only from testifying as a character witness. Rule 3.3. Even when providing testimony that does not relate to character, however, the judge must take care not to "abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so," Rule 1.3, or to undermine "confidence in the independence, integrity, and impartiality of the judiciary," Rule 1.2.

A judge may not provide testimony as an expert about a proceeding over which the judge presided. In *re Wilkinson*, 165 Vt. 183, 188 (1996). In that case, the Vermont Supreme Court concluded that a trial judge who had presided over a criminal defendant's trial could not testify in a post-conviction relief proceeding about the performance of trial counsel or the effect of that performance on the outcome of the trial. *Id.* at 184-86. Similarly, this Committee has issued an opinion on the question of a sitting judge's testifying as an expert about standards of judicial conduct before the Judicial Conduct Board, and that opinion provides some further guidance. Judicial Ethics Committee Opinion No. 2827-3, 1999 WL 35129930 (VT Jud. Eth. Comm. 1999). The Committee considered that "[o]n the one hand, there is the need to avoid any appearance that the judge is using his position to advance the interests of a party. But on the other is the realization that a judge may sometimes be uniquely situated to provide information that a decision maker needs." *Id.* at *2. The Committee also noted that a judge in Utah had been

reprimanded because after responding to a request for factual information about the role and function of a guardian ad litem in juvenile court, the judge went on to comment on the ultimate legal issues before the court. *Id.* at *4. Providing factual information is permissible, drawing conclusions or offering opinions raises the concerns of Rules 1.2 and 1.3.

A Nevada judicial ethics committee advised a judge who formerly served as prosecutor to refrain from discussing his illegible notes regarding a case with the current prosecutor but permitted the judge to provide “a written verbatim transcription of otherwise illegible notes.” *Propriety of a District Court Judge Assisting In Trial Preparation of a Case Originally Prosecuted By the Judge Prior To Taking the Bench*, Op. JE98-003, 1998 WL 35417555, at *2 (NV Std. Comm. Jud. Eth 1998). This decision seems consistent with the prevailing view that a judge may assist in purely factual matters—what the notes say verbatim—but not in interpreting or explaining the facts, which may implicate the concerns of Rules 1.2 and 1.3.

Another ethics committee opined that a judge signing an affidavit regarding facts within the judge’s knowledge to be used in a former client’s request for a new trial was permissible; this committee cautioned that the affidavit must contain “factual, material information about which a judge has percipient knowledge,” but concluded that signing the affidavit did not improperly aid private interests or constitute practicing law. *Signing Affidavit Supporting New Trial Motion*, CJE Opinion No. 2001-2, 2001 WL 36383667, at *1 (MA Sup. Jud. Ct. Comm. Jud. Eth.). Most recently, the New York Advisory Committee on Judicial Ethics stated that a judge may provide a family-tree affidavit based on the judge’s years-long professional knowledge of a now-deceased individual. *NY Jud. Adv. Op. 21-96*, 2021 WL 3812264 (N.Y. Adv. Comm. Jud. Eth. 2021).

It is not clear from the question presented whether the judge is being asked to provide a written statement, affidavit, or testimony of the judge’s recollection of what the participants said in a bench conference, or to discuss the judge’s recollections of the bench conference with counsel for the defendant and jointly submit a proposed transcript to the trial court. Any of those methodologies is likely permissible, but the judge’s involvement should be limited to factual, material matters, and not stray to opinion or advocacy for any position. Additionally, the judge should keep in mind the concerns of Rules 1.2 and 1.3.

Conclusion

The judge who served as a prosecutor prior to appointment to the bench may assist defense counsel in the reconstruction of an inaudible trial record following remand from the Vermont Supreme Court. The judge’s participation in reconstructing the record should remain strictly factual, recounting the judge’s recollection of what was said, and should refrain from providing legal advice, assistance, advocacy, or opinion to any party or to the trial court.

Eileen M Blackwood

Eileen M. Blackwood, Esq., Chair

Signed by:

Thomas Zonay, Chief Superior Judge

Honorable Thomas A. Zonay

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Signed by:

James Mahoney

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