

## Judicial Ethics Opinions from the Advisory Committee on Judicial Ethics

*[From time to time, NYPRR will publish an Opinion of the Advisory Committee on Judicial Ethics. The Opinions published are those selected by Justice George D. Marlow, Committee Chair, and Jeremy R. Feinberg, who serves among the Committee's Counsel. Permission to reprint the Opinion below was requested by NYPRR because of its significance to New York lawyers who appear before the Courts.]*

The Advisory Committee on Judicial Ethics ([www.nycourts.gov/ip/acje](http://www.nycourts.gov/ip/acje)) responds to written inquiries from New York State's full- and part-time judges, candidates for elective judicial office, and quasi-judicial officials such as support magistrates, court attorney-referees, and judicial hearing officers. The committee's opinions interpret the Rules Governing Judicial Conduct (22 NYCRR Part 100), the Code of Judicial Conduct and Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Justice George D. Marlow chairs the committee of 26 judges, and Maryrita Dobiela, Esq. is its Chief Counsel.

### Opinion 08-223

December 4, 2008

**Digest:** (1) A judge who is subpoenaed to provide an affidavit in a lawsuit that the judge commenced prior to assuming the bench must respond as required by law. (2) A judge may voluntarily testify as an expert witness in a lawsuit that the judge commenced prior to assuming the bench, where the judge will receive no compensation for doing so and the judge's expert testimony is ancillary to other permissible testimony the judge will provide.

**Rules:** CPLR Art. 23; §2301; §2304; §2308; §4503; 22 NYCRR 101.1; 100.2; 100.2(A); 100.4(D)(3); Opinions 07-153; 04-67; 98-118 (Vol. XVII); 96-128 (Vol. XV); 91-137 (Vol. VIII); 90-26 (Vol. V); 89-76 (Vol. IV); 88-155 (Vol. III).

#### Opinion:

A judge expects to be subpoenaed to provide an affidavit in a matter that the judge commenced on a client's behalf prior to assuming the bench. The judge also was asked to testify as an expert witness as to the custom and usage in the industry involved in the matter, as the judge also operated a business in that industry before assuming the bench. While the judge will not be compensated for providing the affidavit or for his/her expert testimony, he/she may share quantum meruit in any contingent fee paid at the conclusion of the case. The judge asks whether he/she may provide the affidavit and expert testimony.

A judge must avoid impropriety and the appearance of impropriety in all his/her activities (see 22 NYCRR 100.2). A judge shall respect and comply with the law and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]). A judge may engage in certain extra-judicial activities, but fulltime judges are prohibited from actively engaging in any extrajudicial business activity (see 22 NYCRR 100.4[D][3]).

The Committee previously has determined that a judge may provide an affidavit or declaration concerning a matter the judge handled as a private attorney prior to assuming the bench (see Opinion 04-67; 96-128 [Vol. XV]; 91-137 [Vol. VIII]). And, with respect to subpoenaed testimony, the Committee has advised that (Opinion 88-155 [Vol. III]):

[a] judge as a witness is no different from any other witness and enjoys all of the rights, duties and obligations as set forth in CPLR Article 23. The judge must respond to the subpoena (CPLR section 2301) and is subject to sanctions for disobeying such a mandate (CPLR section 230[8]). If the judge feels that the subpoena should be quashed, modified or conditioned, CPLR 2304 provides the means for relief.

Therefore, the judge in the present inquiry must respond to the subpoena concerning the lawsuit he/she commenced prior to assuming the bench as required by law.

The Committee also has advised that a judge is permitted to testify as a fact witness, even in the absence of a subpoena (see Opinion 07-153). Therefore, a judge may provide an affidavit and testify as a fact witness regarding an accident that the judge witnessed (see Opinion 98-118 [Vol. XVII]); may testify as a witness in a trial where the judge's daughter is a party (see Opinion 90-26 [Vol. V]); and may testify as a witness in a Surrogate's Court proceeding as to the judge's conversations with the decedent and his/her observations of the decedent's demeanor (see 89-76 [Vol. IV]).

With respect to a judge providing expert testimony, the Committee notes that, in general, experts who provide such testimony do so as an income producing business activity. While full-time judges are prohibited from actively engaging in most extra-judicial business activities (see 22 NYCRR 100.4[D] [3]), the judge's expert testimony in the present inquiry will be ancillary to otherwise permissible testimony and will be uncompensated. Therefore, under these circumstances, the inquiring judge also may testify as an expert witness. While it is proper to do so voluntarily, it is preferable that he/she do so pursuant to a subpoena (see Opinion 07-153).

A judge who testifies either in person or by affidavit must refrain from disclosing information protected by the attorney/ client privilege (see CPLR 4503) or any other legal privilege to which his/her former client is entitled, unless the client has waived the privilege or unless a court orders the judge to disclose such information (see Opinion 07-153).

The Committee is authorized to issue opinions to judges "... related to ethical conduct, proper execution of judicial duties, and possible conflicts between private interests and official duties" (22 NYCRR 101.1). Therefore, the Committee does not address any issue that may arise pursuant to the Attorney's Code of Professional Responsibility.