



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Expedited Opinion¹ 2022-049

[Posted October 20, 2022]

**RESPONDING TO A REQUEST FOR A DECLARATION IN A HABEAS
CORPUS ACTION**

I. Question

The Committee on Judicial Ethics Opinions has been asked for advice regarding how a judicial officer should respond to a request from an attorney to submit a declaration in a habeas corpus action regarding the judicial officer's prior representation of a criminal defendant.

¹ The California Supreme Court Committee on Judicial Ethics Opinions (CJEO or the committee) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) (eff. Jan. 1, 2021). Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and the public regarding judicial ethics.

II. Advice Provided

The California Code of Judicial Ethics² provides that a judicial officer may not submit a declaration in a habeas corpus action absent a subpoena if the declaration will contain character testimony regarding the criminal defendant. While not expressly required by the code, to avoid the appearance of impropriety, a judicial officer is advised to require a subpoena even if the declaration will contain only factual testimony. If the judicial officer has any question regarding whether the declaration may contain character testimony, he or she is advised to err on the side of caution and require a subpoena. If the judicial officer chooses not to require a subpoena, he or she is advised to, at a minimum, refrain from using or referring to judicial title to avoid the appearance of lending judicial prestige to advance another's interests.

III. Facts

Prior to taking the bench, a judicial officer served as a public defender. One of the criminal defendants whom the judicial officer previously represented at trial now seeks relief from a capital sentence through a petition for habeas corpus. The criminal defendant's current attorney has asked the judicial officer to submit a declaration in support of the habeas petition regarding the judicial officer's prior representation of the criminal defendant and other facts about available resources at the public defender's office at the time of trial that may provide the basis for habeas relief. The primary contention in the habeas petition is the previous ineffective assistance of counsel.

IV. Discussion

To the extent that a judicial officer is being asked to provide character testimony regarding the criminal defendant in the declaration, the judicial officer may not do so absent a subpoena. Canon 2B(2)(a) provides that, "[a] judge may testify as a character witness, provided

² All further references to the code, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

the judge does so only when subpoenaed.”^{3 4} In addition, providing character testimony absent a subpoena may suggest that the judicial officer is lending judicial prestige to advance the interests of the criminal defendant or the criminal defendant’s attorney in violation of canon 2B(2). (Canon 2B(2) [a judge shall not lend judicial prestige or use judicial title in any manner to advance the pecuniary or personal interests of the judge or others].) Other canons may also apply, such as a judge’s duty to ensure public confidence in the integrity and impartiality of the judiciary (canons 1, 2, and 2A), as it may suggest bias or undermine public confidence for a judicial officer to publicly appear to take sides in a habeas corpus action by submitting a declaration in support of a criminal defendant.

Even if a judicial officer is only being asked to provide factual testimony in the declaration, the judicial officer should consider requiring a subpoena to avoid any appearance of impropriety. Under the code, there is no requirement that a judge be subpoenaed in order to provide factual testimony. (Canon 2B(2)(b) [requiring judges to be subpoenaed before testifying as a character witness, but not imposing the same requirement for factual testimony].) However, Judge Rothman has advised in his treatise on judicial ethics that judges may wish to require a subpoena before providing factual testimony to minimize the appearance of favoritism or lending judicial prestige. (Rothman et al., Cal. Judicial Conduct Handbook (2020 Supp.) §8:49, p. 551 [although the code only addresses character testimony, it is a good idea for a judge to require a subpoena whenever he or she is asked to testify because requiring a subpoena helps avoid the appearance that the judge favors a particular party]; Cal. Judges Assn., Judicial Ethics Update (April 2008) p. 4 (CJA Ethics Update) [judge who was the trial judge in a criminal

³ While the code does not define the term “testify,” California law defines testimony to include both oral testimony and written statements, such as affidavits and declarations. (Code Civ. Proc., § 98.)

⁴ There is a narrow exception to the general prohibition against judicial officers providing character testimony absent a subpoena for Commission on Judicial Performance proceedings, which is not relevant here. (Canon 2B(2)(b) [written testimony, absent a subpoena, regarding the character of a judge being investigated by the Commission on Judicial Performance is permissible].)

proceeding may testify as a percipient witness in federal court on a habeas claim but should require a subpoena to avoid the appearance of favoritism].)

Based on the facts provided, the declaration requested could include character testimony. For example, it is possible that the declaration, in describing the judicial officer's prior representation of the criminal defendant and available resources at the public defender's office at the time of trial, may include details regarding the criminal defendant's conduct or mitigating circumstances that could fall within the scope of character testimony. If there is any question regarding whether the testimony in the declaration includes character testimony, the committee advises the judicial officer to err on the side of caution and require a subpoena to ensure compliance with canon 2B(2)(a).⁵

If the judicial officer chooses not to require a subpoena, the committee advises the judicial officer, at a minimum, not to reference his or her current title or position except in response to a subpoena or court order. (CJA Ethics Update (Nov. 2012), *supra*, at p. 5 [judge who represented defendant in a death penalty trial prior to appointment may, but is not required to, furnish a declaration about factual recollections, but should not opine on defendant's competency and should not use judicial title or position in the declaration]; CJA Ethics Update (April 2008), *supra*, at p. 4 [judge who previously represented criminal defendant at trial may submit a percipient witness declaration in appeal proceedings but should be careful not to identify as a judge since the judge's current position has no bearing on the substance of the declaration]; CJA Ethics Update (Feb. 1994), *supra*, at p. 6 [judge may sign, as a percipient witness, a factual declaration for either side in a habeas corpus action provided the judge's current office is not identified].) It does not appear that the judicial officer's current title or

⁵ While the committee advises caution about providing testimony absent a subpoena, nothing prohibits the judicial officer from privately or informally providing factual information to the criminal defendant's legal team concerning the judicial officer's prior representation, as long as the judge does not provide legal advice or otherwise violate the code. (Canon 4G [a judge shall not practice law]; CJA Ethics Update (Jan. 2018), *supra*, at p. 4 [judge, who as an attorney represented a defendant now charged with the death penalty, may provide factual information to defendant's current attorney regarding an earlier probation report]; CJA Ethics Update (Jan. 2012), *supra*, at p. 4 [judge who previously represented a client in a murder case may provide factual information to a mitigation specialist for habeas proceedings].)

position would be relevant to the habeas proceeding based on the present facts. However, if information concerning the judicial officer's title and position are requested by subpoena or the court handling the habeas corpus action, the judicial officer must comply. Canon 2A provides that a "judge shall respect and comply with the law," which includes compliance with a legally served subpoena or court order. (*Marshall v. McComb* (1977) 68 Cal. App. 3d 89, 98 [judge's disobedience of a valid subpoena was a contempt of the authority of court]; Advisory Com. commentary foll. canon 2B [a judge does not have a privilege against testifying in response to any official summons].)

V. Conclusion

To the extent that character testimony is being sought, a judicial officer may not submit a declaration in a habeas corpus action at the request of the criminal defendant's attorney absent a subpoena. Even if the declaration only contains factual testimony, the judicial officer is advised to require a subpoena to avoid the appearance of favoritism or lending judicial prestige to advance a person's interests. If the judicial officer has any question regarding whether the testimony contained in the declaration may be construed as character testimony, the committee advises to err on the side of caution and require a subpoena. If the judicial officer chooses not to require a subpoena, the committee advises against reference to current title or position except in response to a subpoena or court order, as it may be construed as improperly lending judicial prestige to advance a person's interest.



This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. rule 1(a), (b).) It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this

opinion are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a)).)