

MOTION #12

**MOTION TO BAR THE TESTIMONY OF FORMER MUNICIPAL
COURT JUDGE, SETH DAVENPORT, ESQ.**

While the Court Rules permit an attorney to issue a subpoena to compel a person “to attend and give testimony at the time and place specified therein,” excusal from providing testimony under a subpoena requires the identification of some clearly defined interest that is advanced by such exemption. State v. Clark, 191 N.J. 503, 509 (2007); R. 1:9-1. However, compliance with a subpoena is not without exceptions.

Here, Seth Davenport, Esq. must be barred from testifying about matters which are currently under investigation by the Advisory Committee on Judicial Conduct (“ACJC”). On September 9, 2010, Mr. Davenport received a letter from the ACJC regarding his tenure as a municipal court judge in the Township of Montville. In particular, the letter advised that an investigation was being conducted as to Mr. Davenport’s representation of the former Mayor John Rosellini in Davenport’s private capacity as an attorney and Davenport’s involvement as the presiding judge in the municipal court matter of State v. Soussa, SC-2003-000092. While at the current time no formal disciplinary charges have been brought against Seth Davenport, and the ACJC is in the process of investigating the conduct described above, subjecting Mr. Davenport to providing testimony in the matter at issue would violate the confidentiality available to him during the ACJC’s investigatory process which serves to protect him from unfair allegations that may never lead to formal disciplinary charges.

The ACJC is charged with the responsibility of investigating allegations that a judge, whether of the Superior, Surrogate’s, Tax or Municipal Court, is guilty of improper conduct. State v. Clark, 381 N.J. Super. 41, 44 (App. Div. 2005); R. 2:15-8. Judges are under a duty to cooperate with an ACJC investigation. Id.; See R. 2:15-7. “That said, confidentiality during the ACJC’s investigatory process serves to protect judges from unfair allegations that may never lead

to formal disciplinary charges against the judge. Such protections prevent untested accusations from affecting a judge's career until the judge has had 'a chance fairly to meet them.'" *Id.* (quoting *In re Alvino*, 100 N.J. 92, 103 (1985)); See also *Landmark Commc'ns, Inc., v. Virginia*, 435 U.S. 829, 835 (1978) ("[U]ntil the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints."). "[C]onfidentiality is thought to encourage ... the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination." *Clark, supra*, 191 N.J. at 511. Thus, "[t]he reason for maintaining confidentiality during the investigatory process is to preserve a basic fairness that is in keeping with the early stage of the ACJC's review. That concern militates in favor of giving a judge the opportunity to answer charges and persuade the ACJC of their unfounded nature before the accusations become part of the public domain."³ *Id.* at 512-513; See *Alvino, supra*, 100 N.J. at 105-106.

"In fashioning the confidential period of investigatory review, however, [the Court] did not intend to craft a rule 'designed to provide confidentiality to acts discovered through disciplinary investigations when those acts amount to potential criminal conduct'." *Id.* at 512. Therefore, only after an indictment has issued and a criminal trial is poised to commence, will the ACJC's confidentiality not harm the judge involved. *Id.* at 515. After an indictment, the ACJC is no longer concerned about the public becoming aware of "groundless" complaints against judges. *Id.* at fn. 2.

Therefore, the testimony of former municipal court Judge, Seth Davenport, Esq. should be barred.

³ "Although there is the general assertion of confidentiality over the investigatory stage of the disciplinary process, our *Rules* do not specifically address the circumstance of a subpoena issued in respect of a criminal trial against a judge." *Clark, supra*, 191 N.J. at 510.