

A defendant was charged with murder. While walking down the hallway of the federal courthouse during a recess in the defendant's trial, the judge overheard the defendant say to his attorney, "So what if I did it? There's not enough proof to convict." After the judge reported the incident to counsel, the prosecutor called the judge as a witness in the trial.

Is the judge's testimony regarding the defendant's statement admissible?

- A. Yes, as the statement of a party-opponent.
- B. Yes, because the defendant's statement, although otherwise privileged, was made without reasonable efforts to preserve confidentiality.
- C. No, because the statement was a privileged attorney-client communication.
- D. No, because a judge may never testify in a trial over which he or she is presiding.

## Explanation:

### Judge & juror competency as witness

<b>Judge</b>	May not testify in trial over which judge is presiding No objection necessary to preserve issue for appeal
<b>Juror</b>	During trial      May not testify before jury in which juror is sitting Objection outside jury's presence must be permitted
	After trial          May not testify about jury deliberations
	or
indictment	May testify about improper extraneous prejudicial information, outside influence, or mistake on verdict form

Under Federal Rule of Evidence 605, a **judge** is **prohibited from testifying** in a trial over which he/she is **presiding**. This is true even when that testimony pertains to otherwise admissible evidence—eg, statements by party-opponent, unprivileged communications. Therefore, the judge's testimony regarding the defendant's statement is inadmissible.

**(Choice A)** A statement made by a party-opponent (eg, the defendant) or his/her representative is generally admissible because it is not hearsay. But the statement cannot be admitted through the presiding judge's testimony.

**(Choices B & C)** Communications between a client and an attorney are privileged if they were intended to be confidential and made for the purpose of obtaining or providing legal assistance for the client. This privilege is not waived by an inadvertent disclosure to a third party (eg, the judge) unless the client failed to take reasonable steps to prevent or rectify the disclosure—eg, by communicating in a public place and loudly enough to be overheard (as seen here). But this does not allow a presiding judge to testify about the communication.

### Educational objective:

A judge may never testify in a trial over which he/she is presiding—even when that testimony pertains to otherwise admissible evidence.

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