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STATE OF NEVADA

STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION: JE06-001

PROPRIETY OF A JUDGE
TESTIFYING AS AN EXPERT IN A
PROCEEDING FOR WHICH THE
JUDGE WAS ENGAGED PRIOR TO
TAKING THE BENCH.

Issue

May a judge testify as an expert in
a legal malpractice action for which the
judge was engaged prior to taking the
bench?

Answer: No.

Facts

Prior to being commissioned and
sworn as a senior judge, the judge was
engaged to evaluate the circumstances and
render an opinion on a claim of legal
malpractice. The matter is now set for
trial, and the judge has inquired whether
he may testify at the request of the party
who engaged him.

Discussion

The question is answered only in
terms of the Nevada Code of Judicial
Conduct. The Committee does not pass on
the admissibility of evidence in a judicial
proceeding, and is constrained not to act
on a request for an opinion when there is
litigation concerning the subject of the
request. SCJEEP Rule 5(4)(a).

A senior judge is a former supreme
court justice or district judge recalled to
active service by the Supreme Court
pursuant to SCR 10. Except with respect to
three provisions, the Code of Judicial
Conduct applies to a senior judge. A senior
judge is ineligible to practice law except as
a mediator or arbitrator. *SCR 10(4);
Application of the Code of Judicial
Conduct (B)(1); Canon 4(G)*. The
provisions of Canon 4(E) and 4(H) do not
apply to a senior judge. *Application of the
Code of Judicial Conduct (B)(2)*.
Application of the code to a senior judge in
the circumstance posed, then, is
indistinguishable from its application to a
sitting district judge or supreme court
justice.

Canon 2 provides that a judge shall
avoid impropriety and the appearance of
impropriety in all of the judge's activities.
Specifically, it provides, "A judge shall not
lend the prestige of judicial office to
advance the private interest of the judge or
others..." *Canon 2(B)*. This prohibition has
been held to preclude a judge from
providing opinion testimony in a legal
malpractice action. *See, for example, State
of Washington, Ethics Advisory Committee,
Opinion 85-04; Comett v. Johnson, 571
N.E.2d 572 (Ind. App. 1991) and In re
McCully 942 P.2d 327 (Utah 1997)*.

In previous opinions, the Committee
has said that the Canons would preclude a
judge who had previously served as a

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prosecutor from assisting his successor in trial preparation when a case was remanded for a new trial (*JE98-003*), and that a full time justice court judge could not act as an attorney or fiduciary in bankruptcy court or operate an attorney-assisted paralegal service (*JE01-001*). It has also said that Canon 2(B) would preclude a judge from writing a letter of support for a personal physician for consideration by state medical licensing authorities (*JE04-004*).

Canon 2(B) expressly prohibits a judge from testifying as a character witness voluntarily. The commentary with respect to that provision makes it clear that a judge should avoid situations where it might appear that the prestige of the judicial office is being used to advance the private interest of another. That rationale applies with equal force to a judge testifying as an expert witness.

In a similar manner, a judge testifying as an expert witness in a legal malpractice proceeding would be improper or give rise to an appearance of impropriety regardless of the intent of the parties or the judge, and in spite of any measures taken to insulate the finder of fact from the status of the witness as a judge. Testifying as an expert witness at trial on a claim of legal malpractice is among the features of the practice of law that an attorney, on taking the bench, is no longer eligible to perform.

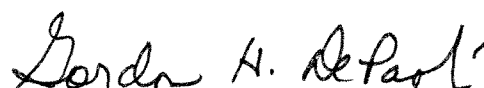
Conclusion

A judge may not testify as an expert in a legal malpractice action for which the judge was engaged prior to taking the bench.

References

SCR 10 (4); Application of Code of Judicial Conduct (B)(1); (B)(2); Nevada Code of Judicial Conduct, Canon 2; Canon 2(B); Canon 4(E); Canon 4(G); Canon 4(H); State of Washington, Ethics Advisory Committee Opinion 85-04; Comett v. Johnson, 571 N.E. 2d 572 (Ind. App. 1991); In Re McCully, 942 P.2d 327 (Utah 1997); JE98-003; JE01-001; JE04-004.

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