

**STATE OF NEVADA  
STANDING COMMITTEE ON JUDICIAL  
ETHICS AND ELECTION PRACTICES**

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**OPINION: JE98-003**

PROPRIETY OF A DISTRICT COURT JUDGE ASSISTING IN TRIAL PREPARATION OF A CASE ORIGINALLY PROSECUTED BY THE JUDGE PRIOR TO TAKING THE BENCH

Issue

May a district court judge assist a prosecutor in preparing a case for criminal prosecution that the judge handled as prosecutor prior to his appointment or election to judicial office? Answer: No.

Facts

Prior to election or appointment to judicial office, a district court judge served as a public prosecutor and in that role prosecuted a defendant to conviction and sentence. Subsequent to the judge's appointment or election to judicial office, the defendant's sentence was reversed by an appellate court and the case was remanded to the trial court for a new sentencing hearing and imposition of sentence. To what extent, if any, may the judge voluntarily and without compensation assist or advise the prosecutor now handling the case in preparing for the new sentencing hearing?

Discussion

The Nevada Code of Judicial Conduct sets forth the applicable standards from which our judges are provided guidance for ethical conduct. Regarding the instant hypothetical issue, Canon 4(G) provides:

"Unless otherwise permitted by law, a judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family."

In the context of a judicial canon which bars a judge from engaging in the private practice of law, the Arizona Supreme Court in In Re Matter of Fleischman, 188

Ariz. 106, 110; 933 P.2d 563, 567 (1997) defines the practice of law as follows:

"The practice of law consists of 'those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries . . . .' State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961), modified on other grounds, 91 Ariz. 293, 371 P.2d 1020 (1962). Those acts include but are not limited to assisting or advising in the preparation of legal documents or writings, advising regarding legal rights or liabilities, and representing another before a court or administrative agency. Id. 'They also include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation.' Id."

Canon 4(A) regarding a judge's extra-judicial activities in general further provides:

"A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties."

Canon 1 further provides:

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall

personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.”

Canon 2 also emphasizes that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A judge may not exercise powers properly belonging to the executive or legislative branches of the government. Nevada Constitution, Article 3, Section 1. By assisting in the prosecution of a criminal action, whether privately or publicly, a judge would be engaging in an executive function of government in violation of the principle of separation of powers. Del Papa v. Steffen, 112 Nev. 369, 915 P.2d 245 (1996).

#### Conclusion

By assisting or advising a prosecutor in preparing for a new sentencing hearing in regard to a case in which the judge formerly served as the prosecutor, the judge would be engaging in the practice of law prohibited by Canon 4(G). Regardless of whether the judge refrains from appearing in any court or public proceeding in lending such assistance or advice, and regardless of whether the judge receives compensation for such assistance or advice, engaging in conduct which involves assisting or advising in the preparation of legal documents or writings, or advising regarding legal rights or liabilities constitutes the practice of law prohibited by Canon 4(G).

In addition, by providing legal assistance or advice in a criminal prosecution, a judge would be engaging in conduct which may cast reasonable doubt on the judge’s capacity to act impartially as a judge in other matters and such conduct violates the principle of separation of powers between the judicial and executive branches of government.

Notwithstanding the foregoing statements, if a judge was requested by a current prosecutor to provide a written verbatim transcript of the judge’s otherwise

illegible handwritten notes prepared during his service as prosecutor before becoming a judge, it is the opinion of the Committee that providing a written verbatim transcription of otherwise illegible notes would not constitute the practice of law in violation of Canon 4. The Committee advises, however, that even in such circumstances, a judge should exercise great caution in making the written verbatim transcript of his otherwise illegible notes, and avoid doing anything other than preparing an exact written transcription of his notes. The judge should not discuss his notes, his transcription or any other matter with the current prosecutor.

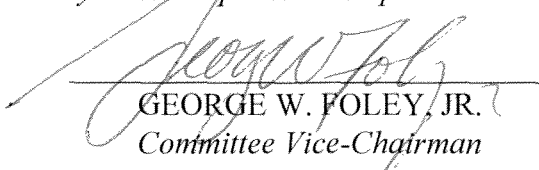
Nothing stated in this advisory opinion is intended to state that a judge may not appear as a percipient witness in a criminal proceeding to give relevant and admissible evidence.

Nor is this advisory opinion intended to prohibit a judge from providing assistance in a criminal investigation or prosecution in his or her capacity as a percipient witness. Again, however, even in his or her role as a percipient witness, a judge should refrain from giving any legal advice or engaging in conduct which involves the practice of law.

#### References

Nevada Code of Judicial Conduct: Canons 1, 2, and 4 (G); Nevada Constitution, Article 3, Section 1; In Re Matter of Fleischman, 188 Ariz. 106, 110; 933 P.2d 563, 567 (1997); and Del Papa v. Steffen, 112 Nev. 369, 915 P.2d 245 (1996).

*This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.*

  
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