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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

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ADVISORY OPINION: JE25-001

PROPRIETY OF A SITTING JUDICIAL OFFICER PRESIDING OVER MATTERS INITIATED WHEN THE JUDICIAL OFFICER SERVED AS THE ELECTED OR APPOINTED DISTRICT ATTORNEY, STATE ATTORNEY GENERAL, OR PUBLIC DEFENDER AND THE STATE OR OTHER CLIENT OF THE DISTRICT ATTORNEY'S/ATTORNEY GENERAL'S/PUBLIC DEFENDER'S OFFICE IS A PARTY.

ISSUES

May a sitting judicial officer preside over matters where: (1) the judicial officer served as the elected- or appointed-district attorney, state attorney general, or public defender prior to attaining judicial office at the initiation of the matter; and (2) the judicial officer's name appears on pleadings and other papers as counsel in the matter due to the judicial officer's former official capacity?

ANSWER

Yes, so long as (1) the judicial officer's involvement in the office's representation only extended to his or her official capacity, meaning the judge did not participate personally and substantially in the matter in their previous role; (2) the judicial officer does not have a bias concerning a party or party's lawyer and did not obtain personal knowledge of the facts in controversy in the course of their previous role; and (3) the judicial officer has otherwise taken action, such as disclosing the circumstances surrounding their involvement

in their prior role on the record, to avoid an appearance of impropriety or other violations of the Revised Nevada Code of Judicial Conduct.

FACTS

The Standing Committee on Judicial Ethics ("Committee") received an inquiry from a judge who previously served as the elected district attorney for the jurisdiction in which the judge now sits. The judge seeks an advisory opinion from this Committee regarding the propriety under the Revised Nevada Code of Judicial Conduct ("NCJC") or other applicable regulations of the judge presiding over matters before the court that were initiated while the judge served as the elected district attorney wherein previous pleadings and papers listed the judge as the district attorney.

DISCUSSION

A. The Committee's Jurisdiction.

The Committee is authorized to render advisory opinions evaluating the scope and applicability of the NCJC. *Rules Governing the Standing Committee on Judicial Ethics*, Rule 5.

B. "Personal" participation vs. "official" participation.

Rule 2.11(A)(1), (6)(a-b) of the NCJC states:

(A) A judge shall disqualify himself or herself in any proceeding in which

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the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

...

(6) The judge:

(a) served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; [or]

(b) served in governmental employment and in such capacity *participated personally and substantially as a lawyer or public official concerning the proceeding*, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

....

(Emphasis added).

In Nevada, like in many other jurisdictions, it is a common ministerial practice for a suit prosecuted or defended by an elected- or appointed-attorney's office to list the office-holding attorney as an attorney of record on pleadings and papers. However, the extent of the office-holding attorney's involvement in these matters often is limited and only involves delegating the matter to deputies within their office. Regardless of the

degree of personal participation, the name of the office-holding attorney will appear on pleadings and papers. As part of this ministerial practice, when the office-holding attorney changes (e.g., due to election outcomes), NRCP 25(d) provides that the "officer's successor is automatically substituted as a party."

For example, a deputy district attorney may receive a case file, make charging decisions, and prosecute a case without ever seeking the office-holding district attorney's involvement. Despite this, the signature blocks on the filings in the matter will most likely list the district attorney by name and title, and then indicate that the signor is the deputy who is signing on behalf of the office. This indicates that the deputy, who is handling the matter *personally* and *substantially* for the office, is acting on authority delegated to him or her through an *official* act of the district attorney.

In Advisory Opinion JE01-002, this Committee opined "that a lawyer within a government agency does not ordinarily have association with other lawyers employed by the agency within the meaning of" what is now codified as NCJC 2.11(A)(6)(a). That opinion involved a judge who previously served as a deputy district attorney and questioned whether judicial officers in that circumstance needed to disqualify themselves from all matters involving their former office due to their potential prior association with attorneys in the office.

The Committee reaffirms its opinion stated in JE01-002, but also finds the facts presented here distinguishable enough to warrant further discussion and clarification. In JE01-002, the judge involved was formerly a *deputy* district attorney, and, therefore, the judge's name likely would have

only appeared on filings in matters the judge personally and substantially worked on.

Here, in contrast, as an elected- or appointed-attorney, the judicial officer's name appeared on pleadings in all matters the office handled during the judicial officer's tenure as a non-judicial office-holder, regardless of the degree of actual involvement. Thus, the judicial officer's name appearing on pleadings and papers is not dispositive evidence of personal and substantial involvement in the matter.

Considering this, the Committee opines that Rule 2.11 permits a judicial officer who served as a district attorney, attorney general, public defender, or other elected- or appointed-governmental attorney, may preside over matters involving their former office wherein they are ministerially listed as an attorney of record, subject to certain conditions. The judicial officer must not have a personal bias toward a party or attorney in the matter and must not have personal knowledge of the disputed facts. *See* NCJC 2.11(A)(1). Additionally, the judicial officer's involvement must have been merely official (*i.e.*, ministerial) in nature and the judicial officer must not have performed any substantive work on or made any decisions specific to the matter beyond delegating to deputies in accordance with the office's general policies and procedures. *See* NCJC 2.11(A)(6)(b); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (holding "that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case").

Upon conducting this analysis, unless other grounds for disqualification exist, the judicial officer must continue to preside over the matter. *See* NCJC 2.7. Taking such an

approach, in the view of the Committee, would adequately protect the due process rights of litigants and ensure the judicial officer can fulfill their duty to hear and decide assigned matters, while maintaining public confidence in the judiciary. *See* NCJC 2.7, comment 1.

C. Appearance of Impropriety

"A judge...shall avoid the appearance of impropriety." NCJC 1.2. Comment 5 to NCJC 1.2 further states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated [the NCJC] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as judge."

The Committee opines that a judicial officer who previously served as an elected or appointed government attorney choosing to preside over a matter involving their former office does not in and of itself create an appearance of impropriety, even if the matter was initiated while the judicial officer held the office, so long as the conditions of the previous section are met.

However, when a judicial officer does preside over such a matter, absent an explicit disclosure on the record, a reasonable person may look through the matter's pleadings and question whether the judicial officer could be impartial upon seeing the judicial officer named as an official attorney in prior filings. *See* NCJC 1.2, comment 5; *see also* NCJC 2.11, comment 5.

Thus, to avoid an appearance of impropriety and violating NCJC 1.2, the Committee opines that a judicial officer in such a circumstance should make a disclosure on the record as soon as

reasonably possible. In these cases, the Committee advises the judge to enter a written voluntary disclosure in the matter explaining the circumstances.

Specifically, consistent with the judicial officer's duties pursuant to NCJC 2.11, the Committee advises that the judicial officer state that their name appeared on earlier pleadings as a ministerial function of the prior office they held, and whether they had personal or substantial involvement in the matter, personal knowledge of the disputed facts, or bias toward any party or lawyer in the proceeding. Such disclosures, in the Committee's view, would foster transparency and candor in the proceedings and alleviate any appearance of impropriety regarding the judicial officer continuing to preside over the matter.

CONCLUSION

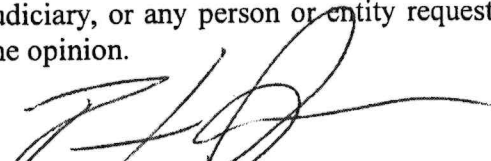
When a judicial officer who previously held office as an elected- or appointed-governmental attorney presides over a matter involving their former office, and the matter was initiated when the judicial officer held that office, they should make a disclosure on the record explaining their prior role in the case to avoid the appearance of impropriety. A judicial officer who previously held such an office—*e.g.*, an elected district attorney, the elected attorney general, or an appointed head of a public defender's office—may preside over matters involving their prior office that were initiated while they held that prior office, as long as the judicial officer's prior involvement in the matter was solely ministerial. The Committee views the appearance of such a judicial officer's name on earlier pleadings and papers as merely a ministerial practice in carrying out an official duty that does not in and of itself evidence personal or substantial involvement by the judicial officer.

Additionally, should NCJC 2.11 permit such a judicial officer to preside over such a matter, then NCJC 2.7 requires the judicial officer to hear and decide the matter in the absence of any other grounds for disqualification.

REFERENCES

Rule 5 of the Rules Governing the Standing Committee on Judicial Ethics; Revised Nevada Code of Judicial Conduct, Canon 1, Rule 1.2, Canon 2, Rules 2.7, 2.11; Nevada Rule of Civil Procedure 25; *Williams v. Pennsylvania*, 579 U.S. 1 (2016); and Advisory Opinion No. JE01-002 (Jan. 22, 2001).

This opinion is issued by the Standing Committee on Judicial Ethics. 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 requesting the opinion.



Rost C. Olsen, Esq.
Committee Chair