



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2009-07

September 24, 2009

QUESTION:

While in private practice, a judge represented Mr. X in a criminal trial which resulted in a conviction of first-degree murder and the pronouncement of a sentence of death. Mr. X is now awaiting execution and is a party, along with four other inmates, to litigation pending before the Court, which involves the legality of the execution protocol. The proceeding in question is an appeal from an order dismissing the petitioners' petition for judicial review of the decision on the legality of the execution protocol.

The specific inquiry is whether the judge's prior representation of Mr. X requires the judge's disqualification in the present case, and, if so, whether such disqualification may be waived by the parties. In addition the judge inquired as to whether the judge would be able to participate in the decision as to the other four petitioners if they submitted briefs and arguments separately from Mr. X's brief and argument.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that, upon motion of a party pursuant to Canon 3C of the Code of Judicial Conduct or upon the judge's own motion pursuant to Canon 3D of the Code, the judge should disqualify from participating in the current matter before the Court.

As an alternative to disqualification on the judge's own motion pursuant to Canon 3D, the judge may disclose on the record the basis of the potential disqualification. If the parties and their attorneys, independent of any request or participation by the judge, agree in writing that the basis for the judge's potential disqualification is immaterial or insubstantial, the judge may participate in the matter.

Finally, because the issues involving each of the five petitioners appear to be identical and a decision as to any one of them would control the outcome of the appeals of each of the others, the severance of Mr. X's appeal from those of the remaining petitioners would have no effect on the judge's disqualification.

DISCUSSION:

The inquiry implicates the following provisions of the Code of Judicial Conduct: Canon 2B, "a judge shall not allow the judge's . . . relationships to influence the judge's judicial conduct or judgment . . ." and Canon 3C(1), "a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned..." particularly subsections (a) and (b). Initially, the Commission recognizes that the issues involved in the criminal matter in which the

judge represented Mr. X, and those involved in the action currently before the Court, are not precisely the same. Regardless, the Commission is of the opinion that due to the former attorney-client relationship which existed between the judge and Mr. X, coupled with the nature of the prior representation, the judge's participation in the current proceeding before the Court could provide reasonable grounds to question the judge's impartiality and create the appearance of impropriety.

Reference:

North Carolina Code of Judicial Conduct

Canon 2B

Canon 3C(1)(a)

Canon 3C(1)(b)

Canon 3D