



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2011-02

March 11, 2011

QUESTION:

How should a judge address disclosure and disqualification issues where counsel in a proceeding before the judge either currently or previously provided legal representation for the judge or is employed by a law firm which currently or previously provided legal representation for the judge in a personal matter?

The specific circumstances giving rise to this inquiry are as follow:

Prior to becoming a judge, and while employed as an assistant district attorney, the judge and the judge's then-spouse separated. The judge was referred to an attorney by a mutual friend and entered into an attorney-client relationship with the attorney, through which the attorney was employed to draft a separation agreement, the terms of which had been agreed upon by the judge and spouse, and to bring an action for an absolute divorce, which was uncontested. Prior to employing the attorney, the judge had no prior relationship with any member of the firm to which the attorney belonged. The judge's spouse retained counsel after execution of the separation agreement. The attorney client relationship began July 27, 2006 and concluded March 16, 2007, the date upon which the judgment of absolute divorce was entered. The judge was billed for, and paid, the fee for the attorney's services in full, without receiving any discount. More than a year later, in April 2008, the judge was appointed to the District Court bench. For a period of time after taking office, the judge did not handle matters involving the attorney, but did preside over matters involving other members of the attorney's firm, and after an additional period of time the judge began to hear matters involving the attorney, after disclosing the fact of the prior representation and upon consent of all parties. The judge did not form any ongoing relationship with the attorney and does not consider himself/herself to be biased as a result of the prior representation. Since taking office, the judge has presided over more than one hundred cases involving the firm's attorneys, and has ruled against the firm in a number of those matters. In 2010, the judge was assigned to preside over all matters pending between the parties to a family court case. The action did not involve the attorney who represented the judge, but did involve two other attorneys who practice in the same firm. Neither of those attorneys had any involvement

in the judge's personal matter. The judge did not disclose the prior representation to the parties or counsel. A motion was filed to disqualify the judge.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge's disqualification was not required in this matter, nor was the judge required to disclose the prior representation. The Commission determined that while legal representation is ongoing, and for a reasonable period of time after the conclusion of the representation (a minimum of six months), a judge must disclose the relationship and disqualify him/herself upon the request of either party or follow the remittal of disqualification procedure set forth in Canon 3D of the Code of Judicial Conduct. After a reasonable time has lapsed, provided the judge believes he/she can remain impartial, continued disqualification will not be required. The Commission advises the better practice to be continued disclosure of the prior representation for an additional period of time depending upon the specifics of both the prior representation and the matter currently before the court, and upon motion for disqualification, to permit another judge to rule on the motion if the judge declines to recuse. In the exercise of discretion, based upon a consideration of all relevant factors at the time, the judge may at some point cease disclosure of the prior representation.

DISCUSSION:

This inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canons 1 and 2A of the Code address the requirements that a judge conduct himself/herself in such a manner as to promote public confidence in and ensure the preservation of the independence, integrity and impartiality of the judiciary. Canon 2B of the Code provides that a judge should not allow "family, social or other relationships to influence the judge's judicial conduct or judgment" nor "convey or permit others to convey the impression that they are in a special position to influence the judge." Canon 3C(1) of the Code reads, "[O]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned ..."

For as long as a judge's personal legal representation is ongoing and for a reasonable time thereafter, the judge's impartiality may reasonably be questioned in other matters wherein the attorney who represents the judge, or members of the attorney's firm, appear as counsel before the judge. Therefore disqualification either upon motion of a party or *sua sponte* is appropriate and unquestioned. In the alternative, a judge may disclose the conflict and follow the remittal of disqualification procedures of Canon 3D of the Code.

The difficult issue is the determination of "a reasonable time". In Formal Advisory Opinion 2009-02, the Commission adopted "a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding." While any pre-determined period of disqualification will be subject to criticism as arbitrary, the Commission concluded a defined period was needed to provide a baseline for guidance and to allow reasonable questions of partiality to abate. A longer period of presumptive disqualification would be burdensome upon the judicial system,

particularly in the many rural judicial districts in North Carolina where there are limited numbers of judges and lawyers.

While disqualification will usually not be required following the end of the six month period following conclusion of the relationship, the particular circumstances of the representation may necessitate continued disqualification. As stated by the Colorado Judicial Ethics Advisory Board, “The judge first should consult his or her own emotions and conscience to determine freedom from disabling prejudice. The judge also should consider whether an objective, disinterested person aware of all the circumstances would reasonably question the judge’s partiality because of the past representation. Among the circumstances the judge should take into consideration are the length of time he or she was represented by the attorney, the nature and extent of the representation (e.g., was the subject of the representation a simple transactional matter or did it involve protracted litigation), the amount of money paid to the attorney, and how much time has elapsed since the representation.” C.J.E.A.B. Ad. Op. 2006-05.

In the specific circumstances under consideration, the representation involved an essentially uncontested separation agreement and divorce which ended more than three years prior to the filing of the action in which the motion to disqualify was filed. There was no relationship between the judge and the attorney or the attorney’s firm prior to initiation of the representation or subsequent to its completion. Customary counsel fees related to the representation were charged to and paid by the judge. The judge has presided over numerous cases wherein the attorney and other members of the attorney’s firm appeared as counsel without objection or motion to disqualify after disclosure. The Commission determined the totality of the circumstances do not provide grounds upon which the judge’s impartiality may reasonably be questioned.

References:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 3C(1)