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STATE OF NEVADA
STANDING COMMITTEE ON JUDICIAL
ETHICS AND ELECTION PRACTICES

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PROPRIETY OF A JUDGE PRESIDING OVER PENDING OR FUTURE CASES WHEN AN ATTORNEY FOR ONE OF THE PARTIES HAS FILED A LAWSUIT AGAINST THE JUDGE ON BEHALF OF A DIFFERENT CLIENT.

attorney in the federal court case for filing a frivolous suit.

Issues

No motion to disqualify the judge in any case in which the attorney represents a party has yet been filed. The issue posed is whether the judge should disqualify himself or herself from further presiding over pending or future cases in which the attorney is involved even without a motion for the judge's disqualification having been filed.

1. Is a judge disqualified from presiding over a case in which a party is represented by an attorney who has filed a separate lawsuit against the judge on behalf of another party in another court?

Discussion

2. Is the judge disqualified from presiding over future cases in which the attorney represents one of the parties even if the case in which the judge was sued has been resolved?

The Nevada Code of Judicial Conduct sets forth the applicable standards from which our judges are provided guidance for ethical conduct. Regarding the instant issue, Canon 3(E)(1) provides:

The answer to both issues is: No.

" A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned including but not limited to instances where:

Facts

An attorney filed a civil action on behalf of a plaintiff in federal court alleging that various state officer defendants, including a state court judge, violated plaintiff's civil and constitutional rights. At the time the suit was filed and served on the judge, the judge was presiding over pending cases in which the attorney represented parties, other than the party on whose behalf the attorney sued the judge. After the civil rights complaint was served on the judge, the attorney withdrew as plaintiff's counsel in that case, and the plaintiff is now acting in pro per. The judge's attorney has recommended that the judge seek sanctions, pursuant FRCP 11, against the

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."

The Nevada Supreme Court has consistently held that the attitude of a judge toward the attorney for a party is largely irrelevant. *Las Vegas Downtown Redev. Agency v. Hecht*, 113 632, 635, 940 P.2d 127

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(1997). Citing its earlier decision in *Ainsworth v. Combined Insurance Co.*, 105 Nev. 237, 259, 774 P.2d 1003, 1019 (1989), the Court stated:

"We held that '[g]enerally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party.' *Id.* at 259, 774 P.2d at 1019; *see also* In Re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988). The purpose for such a policy was that:

"In a small state such as Nevada, with a concomitantly bar membership, it is inevitable that frequent interactions will occur between members of the bar and the judiciary. Thus, allegations, of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the dispensation of justice.

"*Dunleavy* 104 Nev. at 790-91, 769 P.2d at 1275. Furthermore, we stated that if a litigant could successfully challenge a judge based upon allegations of bias against counsel for the litigant, 'it would bid fair to decimate the bench' and lawyers, once in controversy with a judge, 'would have license under which the judge would serve at

their will.' *Id.* at 790, 769 P.2d at 1275 (quoting *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975). This policy still applies and we continue to believe that to permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel in cases in which there is anything but an extreme showing of bias would permit manipulation of the court and significantly impede the judicial process and the administration of justice."

The Court further held that the adoption of Canon 3(E)(1)(a) of the Code of Judicial Conduct in 1992 did not vitiate the court's prior statements of law concerning jurist disqualification. While Canon 3(E)(1)(a) states that a judge can be disqualified for animus toward an attorney, situations where such disqualification has been found are exceedingly rare, and non-existent in Nevada. *Id.* The Nevada Supreme Court recently amended the commentary to Canon 3E which cites its holding in *Hecht*.

In *Hecht*, the Court held that a Supreme Court Justice who had criticized campaign donations made by an attorney to the Justice's opponent during a contested election, and had arguably suggested that the attorney's contribution violated campaign contribution limits, was not disqualified from later participating in an appeal in which the attorney represented one of the parties. The Court held that the Justice's comments did not rise "to anything near the level warranting [his] disqualification." *Id.*, at 637.

In *Martin v. Beck*, 112 Nev. 595, 915

P.2d 898 (1996), an appellant moved to disqualify one of the Supreme Court Justices because he had filed a perjury complaint against her attorney with the Attorney General's Office in regard to statements that the attorney made in another matter involving the attorney's knowledge of the Justice's ownership of a tavern. In holding that the Justice's action against the attorney did not disqualify him, the Court stated:

"The Court of Appeals for the First Circuit has recognized the "[a] judge who believes misconduct has occurred has a responsibility to act. If a counsel oversteps his bounds, delay in issuing warnings or taking action may lead to matters getting further out of hand..." *In re Cooper*, 821 F.2d 833, 843 (1st Cir. 1987). Additionally, courts have concluded that a judge's referral of an attorney to the state disciplinary board does not constitute disqualifying bias against the attorney. See., e.g., *State v. Mata*, 71 Haw. 319, 789 P.2d 1122 (Haw. 1990)."

A judge has the duty to not allow his personal feelings for or against an attorney to interfere with the dispensing of fair and impartial justice. If judges were required to disqualify themselves from presiding over any case involving an attorney who has separately filed a suit against the judge, the result would be, as the Supreme Court stated in *Hecht*, *supra*, to "permit manipulation of the court and significantly impede the judicial process and the administration of justice."

Conclusion

Therefore, a judge is not automatically disqualified from presiding over a case under Canon 3(E)(1)(a) of the Nevada Code of Judicial Conduct because the attorney for one of the parties has filed a lawsuit against the judge on behalf of a different client. A judge is under no legal or ethical duty to recuse himself from cases because of alleged personal bias or prejudice against an attorney, unless the judge concludes that his or her bias or prejudice would interfere with the judge's ability to be fair and impartial to the parties.

References

Nevada Code of Judicial Conduct: Canons 1, and 3; *Las Vegas Downtown Redev. Agency v. Hecht*, 113 632, 635, 940 P.2d 127 (1997); *Martin v. Beck*, 112 Nev. 595, 915 P.2d 898 (1996); *Ainsworth v. Combined Insurance Co.*, 105 Nev. 237, 259,774 P.2d 1003, 1019 (1989).

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