

APR 11 2003

STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

Date Issued: April 2, 2003

JE03-001

PROPRIETY OF A DISTRICT JUDGE PRESIDING OVER PENDING OR FUTURE CASES WHEN THE JUDGE'S SPOUSE HAS CONSULTED AS A MEDICAL EXPERT ON BEHALF OF ATTORNEYS APPEARING BEFORE THE JUDGE.

The judge has asked the committee to consider different factual scenarios which might be presented based upon the physician's work as a consultant for attorneys appearing before the judge including: Currently working as a consultant on behalf of one of the parties in a case before the court; currently consulting with an attorney on a case assigned to another department; past consultation on behalf of an attorney currently appearing before the court.

ISSUES

1. Is a judge disqualified from presiding over a case when the judge's spouse, a medical doctor, has been retained by one of the parties to the litigation as a paid expert medical consultant?
2. Assuming the judge is not disqualified, must the judge disclose the business relationship between her spouse and the attorney appearing in her court?

The judge points out to the Committee that requiring disclosure and disqualification where there has been any contact between the physician-spouse and one of the attorneys appearing in the court could be potentially disruptive, requiring an uneven allocation of cases to other judges. The judge's spouse has volunteered that to avoid conflicts in the future, the physician-spouse will not undertake any new consultation or expert work.

Answer: The judge need not be disqualified if the judge believes he or she can be impartial. Disclosure depends on the circumstances.

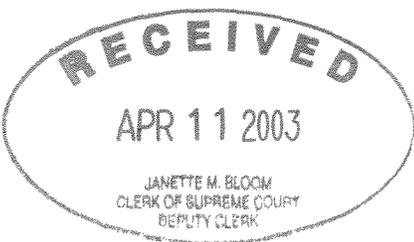
No motion to disqualify the judge in any case in which the physician-spouse has been a consultant on behalf of an attorney or party has yet been filed. This issue is posed in a hypothetical form as authorized by the rules of the Committee.

FACTS

A district judge is married to a physician. The physician is a specialist who has had an active medical practice in Nevada for 20 years. As part of a regular medical practice, the judge's spouse has consulted with attorneys handling personal injury and medical malpractice cases. The consultations have included a range of work from informal telephone conversations to medical records review and retention as an expert witness.

DISCUSSION

The Nevada Code of Judicial Conduct sets forth the applicable standards from which our judges are provided guidance for ethical conduct.



Canon 3E(1) provides:

“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: (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.”

(c) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) The judge or the judge’s spouse, or a person with the third degree of relationship to either of them, or the spouse of such a person:

.....

(iii) is known by the judge to have more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

Canon 3E(2) provides:

A judge shall keep informed about the judge’s personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interest of the judge’s spouse and minor children residing in the judge’s household.

The district judge seeking this opinion is applauded for making the effort to keep informed about the economic interests of the physician-spouse as required by the Canons. However, the Committee agrees with the judge that judges should not be too quick to disqualify themselves based upon the possibility that their impartiality might be questioned, as disqualification works a hardship upon the parties to litigation, the orderly conduct of the court’s calendar and other judges in the district.

The Nevada Supreme Court has made clear that it takes a narrow view of those circumstances which justify disqualification pursuant to the Canons of Judicial Ethics. The commentary to Canon 3E informs Nevada’s judiciary that judges have “a duty to sit.” Commentary Canon 3E(1) and see *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977).

The Nevada Supreme Court has held that the judge’s professional relationship with the plaintiff in a personal injury action (a former county probation officer) did not demonstrate judicial bias sufficient for the court to require recusal, citing with favor the following holding from another jurisdiction:

“[A judge] must have neighbors, friends, and acquaintances, business and social relations and be a part of his day and generation. Evidently the ordinary results of such associations

and the impressions they create in the mind of the judge are not the “personal bias or prejudice” to which the statute refers.”

Jacobson v. Manfredi, 100 Nev. 226, 230, 679 P.2d 251 (1984), citing to *ex parte N.K. Fairbank Co.*, 194 F.978, 989 (M.D. Ala. 1912).

Any judge seeking further background as to facts justifying disqualification in this state should review the two decisions entitled *Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997) 940 P.2d 127 (1997) and 113 Nev. 644, 940 P.2d 134 (1997), where the court rejected attempts to disqualify justices and reviewed many other Nevada cases rejecting disqualification attempts despite apparently extreme facts. The court made it clear in *Hecht* that it will give substantial weight to any challenged judge’s opinion whether he or she has bias or prejudice toward a party in a case.

With this background of Nevada Supreme Court authority interpreting the Nevada Code of Judicial Conduct in a very narrow manner with regard to disqualification, the Committee believes that the factual scenarios presented by the current advisory opinion request should also be interpreted in a restrictive manner and against disqualification.

In the first hypothetical scenario presented by the judge, the judge’s spouse is a consultant on behalf of one of the parties in a case presently before the court. The consultation may range from an informal telephone conversation to the judge’s spouse actually appearing as a witness in the judge’s court. The Committee does not believe that these facts present an automatic basis for recusal. If in fact there was an informal

telephone conversation with the judge’s spouse and the spouse-physician was paid a small fee for such consultation, the Committee believes this would be an insignificant interest in the litigation which would not justify recusal. If on the other hand, the physician-spouse was anticipated to be an expert witness testifying at trial, the judge and the spouse may both have “an economic interest” in the subject matter in controversy and the spouse may be considered a material witness to the proceeding, either case justifying recusal. Canon 3E(1)(c) and (d)(iv). However, even in the case of the physician-spouse appearing as a witness in the judge’s court, the judge’s opinion whether he or she can be impartial will be given great deference and recusal is not necessarily mandatory.

The Committee does agree that in a situation where the physician spouse has a current economic relationship with a party to the case there is a duty to disclose. “A judge should disclose on the record information that the judge believes that the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” Commentary Canon 3E(1).

If the judge discloses information that creates a possible conflict, this gives the attorneys the opportunity to seek a peremptory challenge or to file an affidavit of bias pursuant to NRS 1.235 and SCR 48.1.

The remainder of the hypothetical scenarios presented by the judge consider situations where the physician spouse has a financial relationship with an attorney arising out of litigation currently pending in another department or has had a past financial relationship with an attorney on other cases. If the judge believes that she can be impartial, the Committee does not believe that such

scenarios require disqualification. If the judge believes that she cannot be impartial, she should disclose facts that the attorneys “might reasonably consider relevant to the question of disqualification.”

This is a difficult area in which to create a “bright line” for easy application by the judiciary. The Committee believes that under the factual scenarios presented, disqualification will be only in extremely rare situations where the judge decides that he or she cannot be impartial based upon a present economic relationship between an attorney practicing before the judge and the judge’s physician-spouse. In the event of a current financial relationship between attorney and physician spouse, even if the judge believes that she can be impartial, disclosure to the attorneys is required by the Canons. In the event attorneys appearing before the judge have had a past economic relationship with the physician-spouse, if the judge believes that he or she can be impartial, the Committee sees no need to disclose the past relationship.

CONCLUSION

The circumstances under which a judge may be required to disqualify in Nevada are extremely limited. Disqualification is not required in all instances where a lawyer appearing before the judge has retained the judge’s physician-spouse as a consultant or expert witness. The judge should disclose facts creating a potential basis for disqualification even if the judge believes he or she can be impartial, where there is a present financial relationship between the physician-spouse and an attorney appearing before the court.

REFERENCES

Nevada Code of Judicial Conduct; Canon 2, Canon 3E, Canon 3E(1), Canon 3E(1)(c) and (d)(iv), NRS 1.235 and SCR 48.1; *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977); *City of Las Vegas Downtown Redevelopment Agency v. The Eighth Judicial District*, 116 Nev. 640, 5 P.3d 1059 (2000); *Jacobson v. Manfredi*, 100 Nev. 226, 230, 679 P.2d 251 (1984); *N.K. Fairbank Co.*, 194 F.978, 989 (M.D. Ala. 1912); *Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997) 940 P.2d 127 (1997) and 113 Nev. 644, 940 P.2d 134 (1997).

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.

Phillip W. Bartlett
Committee Chairman

