

FILED

DEC 12 2003

BY STEPHEN L. McALLUM
CLERK OF SUPREME COURT
STEPHEN L. McALLUM

STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

Date Issued: December 12, 2003

OPINION: JE03-003

PROPRIETY OF A HEARING MASTER
PRESIDING OVER CHILD SUPPORT
CASES PROSECUTED BY ATTORNEYS
WHO ARE SUPERVISED BY THE
MASTER'S SPOUSE

district attorney is involved in higher
administrative, policy and procedural issues
and not in making legal decisions with
regard to an individual child support matter.

ISSUE

DISCUSSION

Is a family court hearing master
disqualified from hearing cases prosecuted
by deputy district attorneys who are
supervised by the master's husband, an
assistant district attorney.

The Nevada Code of Judicial
Conduct sets forth the applicable standards
from which our judges are provided
guidance for ethical conduct. A full time
special master is subject to all of the canons
of ethics. See Application of the Code of
Judicial Conduct, paragraph A.

Answer: No.

Canon 2 provides:

FACTS

A judge shall avoid impropriety
and the appearance of impropriety in
all of the judge's activities.

A judicial district employs full time
hearing masters to preside over child support
cases. The hearing master's spouse has
recently been promoted to the position of
assistant district attorney responsible for the
supervision of the juvenile and family
services division in the district attorney's
office. This division employs attorneys who
prosecute the cases in front of the hearing
master. The prosecuting attorneys are
supervised by a chief deputy district attorney
who in turn reports to the assistant district
attorney, the hearing master's spouse. The
assistant district attorney does not make
family support court appearances or become
involved in any individual cases; legal issues
involving particular cases are handled by the
deputies subject to consultation, review and
direction by the chief deputy. The assistant

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 or disputed evidentiary
facts concerning the proceeding.

...

RECEIVED
DEC 12 2003
CLERK OF SUPREME COURT
By _____

(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 more than de minimus interest that could be substantially affected by the proceeding.

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

...

(ii) Is acting as a lawyer in the proceeding.

The commentary to Canon 3E, past decisions of this committee and decisions of the Supreme Court all make it clear that only in the most extreme cases is a judge disqualified from hearing a case because of the judge's relationship with an attorney appearing before the court. A judge has "a duty to sit." Commentary, Canon 3E(1), and See Ham v. District Court, 93 Nev. 409, 415, 566 P.2d 420,424 (1977).

This committee decided in an opinion issued on April 2, 2003, that if the judge believed he or she could be impartial, the judge was not disqualified from presiding over a case when the judge's spouse, a medical doctor, had been retained by one of the parties to the litigation as a paid expert consultant. Opinion JE03-001. The committee stated in that opinion that it was up to the judge to decide whether he or she can be impartial, which opinion would be given great weight. See Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 940 P.2d 134 (1997) ("Hecht II").

In an earlier case by the same name ("Hecht I"), the court ruled upon a motion to disqualify a Nevada Supreme Court justice for bias. The court stated: "This 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 Nev 632, 635 (1997). The court in Hecht I made several other statements important to the issue currently before this committee including:

1. "Generally 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."

2. "In a small state such as Nevada, with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the 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."

3. "... [W]e continue to believe that to permit a justice or a judge to be disqualified on the basis of bias for or against a litigant's counsel in cases where there was anything but an extreme showing of bias would permit manipulation of the court and significantly impede the judicial process and the administration of justice."

4. "In recent cases decided after the adoption of Canon 3E(1)(a), notwithstanding the Canon's expansive language, we have

reaffirmed the policy that a judge's bias toward an attorney is largely irrelevant."

5. "However, we conclude that the specific disqualification provisions of Canon 3E, and subsequent case law applying these provisions, should control over the broader statement of Canon 2."

Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev 635, 636, citing to In re Petition to Recall Dunleavy, 104 Nev 784, 769 P2d 1271 (1988).

With this background, 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.

Unlike the situation presented in Opinion JE03-001, the judge's spouse here has no economic interest in the outcome of the litigation. Further, it appears that the master's spouse has no direct involvement in either the prosecution of these cases or in the supervision of prosecution. The commentary to Canon 3E(1) states "a lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of section 3E(1)(b)." While that commentary refers to the disqualification of a judge who previously served in a government law office before taking the bench, the conclusion applies to the present fact scenario where it appears that the master's spouse will never appear in front of the master as an attorney and will have little or no involvement in the actual cases presented in the master's court.

The committee believes that under the factual scenario presented, disqualification is not required.

The question is also raised by this advisory opinion request whether the judge is required to disclose this relationship. As the committee has concluded that this is not a situation where the "judge's impartiality might reasonably be questioned," the committee does not believe that disclosure is required as neither the parties or their lawyer might "reasonably consider" this issue relevant to the question of disqualification. See Commentary to Canon 3E(1).

The committee cannot anticipate all potential matters that might be brought before this hearing master. If the hearing master believes based upon the circumstances of any particular case that the master should be disqualified or disclosure should be made to the attorneys and parties to allow for preemptory challenge or an affidavit of bias, then the master should use his or her discretion to take the appropriate action to allow the parties to pursue the steps allowed in NRS 1.235 and SCR 48.1.

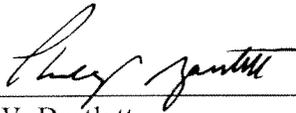
CONCLUSION

The circumstances under which a judge may be required to disqualify in Nevada are extremely limited. Disqualification is normally required only because of the judge's bias for or against a party. Disqualification because of a relationship with an attorney will be required in only the most egregious circumstances. The family support master is not disqualified because the master's spouse is an assistant district attorney in the Juvenile and Family Services Division of the District Attorney's office.

REFERENCES

Opinion JE03-001; Nevada Code of Judicial Conduct, Application, Canons 2 and 3E, and Commentary to 3E; Ham v. District Court, 93 Nev 409, 415, 566 P2d 420, 424 (1977); Las Vegas Downtown Redevelopment Agency v. Hecht, 113 Nev 632, 635 (1997); Las Vegas Downtown Redevelopment Agency v. Hecht, 113 Nev 644, 940 P2d 134 (1997); In re Petition to Recall Dunleavy, 104 Nev 784, 769 P2d 1271 (1988); NRS 1.235 and SCR 48.1.

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.



Philip W. Bartlett
Committee Chairman