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STATE OF NEVADA  
STANDING COMMITTEE ON  
JUDICIAL ETHICS AND ELECTION PRACTICES

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**OPINION: JE06-005**

PROPRIETY OF A JUDGE PRESIDING OVER PENDING CASES WHERE THE ATTORNEY FOR ONE OF THE PARTIES IS THE OPPONENT OF THE JUDGE IN AN UPCOMING JUDICIAL ELECTION.

standards from which our judges are provided guidance for ethical conduct. Canon 2 requires a judge to avoid the "appearance of impropriety" and Canon 2A requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Commentary to Canon 2A states that the test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

**ISSUES**

1. Is a judge disqualified from presiding over a case in which a party is represented by an attorney who is the opponent of the judge in an upcoming judicial election?
2. Assuming the judge is not disqualified, must the judge disclose that the attorney for the party is his opponent in an upcoming judicial election?

However, Canon 3E of the Code of Judicial Conduct specifically guides the judiciary in matters of disqualification. The Nevada Supreme Court has held that the "specific disqualification provisions of Canon 3E and subsequent case law applying those provisions, should control over the broader statement of Canon 2." *Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 636 n.2, 940 P.2d 127 (1997).

**ANSWER**

The answer to both issues is No.

In relevant part, Canon 3E(1) of the Nevada Code of Judicial Conduct states:

**FACTS**

An attorney has cases pending before a particular judge. The judge asks whether he is disqualified from presiding over cases where the attorney representing a party is his opponent in an upcoming judicial election. If disqualification is not required, is the judge nevertheless required to disclose those facts?

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:

**DISCUSSION**

The Nevada Code of Judicial Conduct sets forth the applicable

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(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer . . . .

In part, the Commentary to Canon 3E(1) provides:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply . . . .

A judge has a duty to sit. *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977). Whether a judge's impartiality might reasonably be questioned, and the opinion of the judge as to his or her ability to be impartial, is determined pursuant to *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1977).

Certainly, Canon 3E(1)(a) requires disqualification if, as a result of the election contest, the judge comes to the conclusion that he or she has a personal bias or prejudice concerning the party's lawyer. However, absent such actual personal bias or prejudice, the Committee must decide this question based upon the principles set forth in *Hecht*. In *Hecht*, our Court started from the principle that the "attitude of a judge toward an attorney for

a party is largely irrelevant" because it is not "indicative of extrajudicial bias against the party." *Hecht*, 113 Nev. at 635. *Hecht* requires an extreme showing of bias in order to permit a judge to be disqualified on the basis of bias for or against a litigant's counsel. *Id.* at 636. Under *Hecht*, the opinion of the judge as to whether he or she can be impartial must be given great weight. *Id.* at 637.

Based upon the principles announced in *Hecht*, this Committee has taken a very narrow view of those circumstances in which the connection or relationship of an attorney to a judge requires disqualification under Canon 3E(1). *See, e.g.*, Advisory Opinion: JE-00-001 (judge not disqualified from a case in which party is represented by an attorney who has filed a separate lawsuit against the judge on behalf of another party in another court); Advisory Opinion: JE02-001 (judge not necessarily required to recuse himself or herself from hearing matters involving an attorney who has supported the judge's election campaign); Advisory Opinion: JE03-001 (judge not necessarily disqualified from presiding over a case when the judge's spouse has been retained by one of the parties to the litigation as a paid expert medical consultant); Advisory Opinion: JE03-003 (judge not necessarily disqualified from hearing cases prosecuted by attorneys supervised by judge's husband); Advisory Opinion: JE04-001 (judge not necessarily disqualified from presiding over cases in which the judge's former public agency client is a party); and Advisory Opinion: JE04-005 (judge not necessarily disqualified from hearing cases involving reports, witnesses or parties

coming under the ultimate control of the father of the judge).

The case most directly relevant here is *Vallardes v. Second Judicial District Court*, 112 Nev. 79, 910 P.2d 256 (1996). Vallardes, a criminal defendant, was represented by an attorney who was narrowly defeated by the judge before whom his arraignment was scheduled in what the Nevada Supreme Court described as a "hotly contested election." In the course of that campaign, the judge had distributed two separate letters containing disparaging remarks about the attorney's ethics, honesty, and competency. A motion to disqualify was filed, and denied by a different district judge. The Nevada Supreme Court concluded that Canon 3E(1) did not require recusal because the record did not demonstrate an actual or apparent bias against the attorney. See, *Vallardes*, 112 Nev. at 84.

Although in *Vallardes* the proceeding occurred after the election rather than before the election and during the election campaign, it is the Committee's view that under the *Hecht* principles and *Vallardes*, Canon 3E(1) does not require recusal simply because a party is represented by the opponent of the judge in a proceeding which takes place during the election contest. That fact alone does not meet the extreme showing of bias which is required for recusal under *Hecht*.

The Commentary to Canon 3E(1) also states that "A judge should disclose on the record information that the judge believes 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." In the past, depending on the circumstances, this Committee has concluded that disclosure may or may not be required. With respect to campaign contributions, the Committee determined that disclosure was not required based upon the mere fact of a contribution, but might be required if the support was more substantial. See, Advisory Opinion: JE02-001. Similarly, the Committee concluded that disclosure depended on the circumstances in the situation where the judge's spouse had a business relationship with the attorney before the judge. See, Advisory Opinion: JE03-001. Although the Committee does not conclude that disclosure is required here, it unanimously agrees that disclosure is the prudent course to follow under the circumstances.

#### CONCLUSION

A judge is not disqualified from presiding over a pending case under Canon 3E(1) of the Nevada Code of Judicial Conduct simply because the attorney for a party is the judge's opponent in an upcoming judicial election. The judge is also not required to disclose that situation. However, it is the opinion of the Committee that disclosure is prudent and appropriate.

#### DISSENT

For the following reasons, one member of the Committee concludes that disclosure is required.

A reasonable person would believe that an attorney opposing a judge - trying to

take that judge's job - may question the impartiality of a judge or may have bias or prejudice against that party's attorney. Judges are human. If a judge's livelihood is being threatened by a lawyer running against him or her, the appearance of lack of impartiality must exist. Even if a judge and attorney are able to place their professional responsibilities above their personal biases, it is inevitable that the parties will perceive an appearance of bias or impropriety. This leaves both parties of the litigation with a legitimate basis for questioning the legal process. The party represented by the lawyer who is running against the judge may wonder if a particular decision was based on the merits of the case, or on the judge's personal feelings for the lawyer. Conversely, the opposing party may feel that an unfavorable decision was based on a judge's effort - whether the effort was conscious or not - to show that there was no bias. Not only does this undermine the public faith in the judicial process, it also places judges in a no-win situation.

The primary policy behind the Code of Judicial Conduct is "to promote public confidence in the judiciary." *Hogan v. Warden, Ely State Prison*, 112 Nev. 553, 558, 916 P.2d 805, 808 (1996). If circumstances show that a judge has a bias against an attorney, how can the judge's impartiality not "be reasonably questioned?" How is a litigant supposed to feel? Why should a judge be placed in such a situation?

The legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which

justice may be found and done. *Tennant v. Marion Health Care Found.*, 194 W.Va. 97, 459 S.E.2d 374, 384 (1995). Because fundamental fairness requires an absence of actual bias in the trial of a case, and "because the legal system has always sought to prevent even the probability of unfairness, due process may sometimes require a trial judge who has no actual bias to recuse himself or herself from a case where that judge's hearing of the case would create the appearance of partiality." *People v. Hall*, 157 Ill.2d 324, 626 N.E.2d 131 (1993), *rehearing denied* January 31, 1994, *cert. denied* 130 L. Ed.2d 415, 115 S.Ct. 507 (1994).

NCJC Canon 3E(1), adopted from the model rule, imposes a duty upon a judge to disqualify himself, or herself, in a proceeding where the judge's impartiality "*might reasonably be questioned*." [Emphasis added]. Throughout the code, the "appearance of impropriety" - not *actual* impropriety or *actual* bias - is the standard. As set forth in a recent law review article:

If dictionary definitions are indicative of how a word is to be understood, judges perhaps should be wary of rejecting a motion to disqualify for the appearance of partiality. When the dictionary meaning of "might" includes "expressing especially a shade of doubt of a lesser degree of possibility," use of that term in the Code would seem to require "a judge to err on the side of caution by

favoring recusal to remove any reasonable doubt as to his or her impartiality.

Abramson, "Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably be Questioned," 14 Geo. J. Legal Ethics 55, 58 (Fall 2000).

Although a judge does not necessarily have to disqualify himself or herself in this particular situation, for litigants to have faith in the legal system, the judge at minimum must make a disclosure on the record. If the judge feels that he or she cannot be impartial, the judge may withdraw. If the judge feels that he or she can be impartial, the judge need not withdraw, and an attorney may follow the procedure for having a judge disqualified, if appropriate.

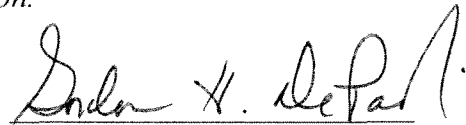
#### REFERENCES

Nevada Code of Judicial Conduct, Canon 2; Canon 2A; Canon 3E; Canon 3E(1), Canon 3 E (1)(a); Advisory Opinion: JE00-001; Advisory Opinion: JE02-001; Advisory Opinion: JE03-001; Advisory Opinion: JE03-003; Advisory Opinion: JE04-001; Advisory Opinion: JE04-005; Abramson, "Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably be Questioned," 14 Geo. J. Legal Ethics 55, 58 (Fall 2000); *Ham v. District Court*, 93 Nev. 409, 566 P.2d 420 (1977); *Hogan v. Warden, Ely State Prison*, 112 Nev. 553, 558, 916 P.2d 805, 808 (1996); *Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev.

632, 940 P.2d 127 (1997); *People v. Hall*, 157 Ill.2d 324, 626 N.E.2d 131 (1993), *rehearing denied* January 31, 1994, *cert. denied* 130 L. Ed.2d 415, 115 S.Ct. 507 (1994); *Tennant v. Marion Health Care Found.*, 194 W.Va. 97, 459 S.E.2d 374, 384 (1995); *Vallardes v. Second Judicial District Court*, 112 Nev. 79, 910 P.2d 256 (1996).

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*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.*



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