

FILED

MAY 22 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY \_\_\_\_\_  
DEPUTY CLERK

STATE OF NEVADA  
STANDING COMMITTEE ON  
JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: May 22, 2007

OPINION: JE07-005

FACTS

PROPRIETY OF A DISTRICT JUDGE PRESIDING IN CASES IN WHICH AN ATTORNEY OR MEMBERS OF THE ATTORNEY'S LAW FIRM ARE COUNSEL TO A PARTY WHERE THE EFFECTED JUDGE WAS REPRESENTED BY THE ATTORNEY IN ADMINISTRATIVE PROCEEDINGS AND CIVIL LITIGATION RELATED TO COMPLIANCE WITH THE REQUIREMENTS OF THE NEVADA CODE OF JUDICIAL CONDUCT ("NCJC").

Nevada courts employ the use of recusal lists as a case management tool. A recusal list is a registry that identifies persons or entities that have a relationship with a judge that presents a reason under the Nevada Code of Judicial Conduct ("NCJC") for the disqualification of the judge. The Supreme Court of Nevada has approved the use of appropriately created and maintained recusal lists that include persons and entities with whom a judge has an objectively determined relationship or other factor that is a basis for disqualification under NCJC Canon 3E(1)(b), 3E(1)(c) or 3E(1)(d). Millen v. District Court, 122 Nev. Adv. Op. No. 105, 148 P.3d 694 (2006). In the *Millen* decision, the Court held impermissible the use of recusal lists for which the basis for disqualification rests on NCJC Canon 3E(1)(a). The Court stated that in such cases, recusal must be decided by the effected judge on a case-by-case basis.

ISSUE

May a district judge preside in cases in which one of the parties is represented by an attorney or a member of the attorney's law firm if the attorney represented the district judge in unrelated administrative proceedings and civil litigation concerning the judge's compliance with the requirements of the NCJC?

ANSWER

Yes; unless the district judge concludes pursuant to NCJC Canon 3E(1)(a) that his relationship with the attorney and his law firm creates in fact a personal bias or prejudice toward counsel or counsel's clients.

A district judge has inquired whether, consistent with *Millen* and NCJC Canon 3E(1)(a), a person or entity may be included on a recusal list where the effected district judge has determined he or she has in fact a personal bias or prejudice toward a litigant or counsel or possesses knowledge concerning a certain matter that is a valid reason for disqualification. The district judge identifies a number of situations

RECEIVED  
MAY 22 2007  
JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

where this might be appropriate given the identity of attorneys. The principal example is where the attorney represented the district judge in administrative proceedings and civil litigation in which the judge's compliance with the requirements of the NCJC was at issue. Another instance was where an attorney is or was an opposition candidate for the judicial office held by the judge. Other examples include where the attorney has either represented the judge or been counsel for an adverse party in civil litigation or an administrative proceeding in which claims were otherwise brought against the judge.

### DISCUSSION

The Committee's opinion evaluates the question presented only as relates to compliance with the requirements of the Nevada Code of Judicial Conduct. *Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.* Canon 3E(1)(a) of the Nevada Code of Judicial Conduct states:

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

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 (1997).

The Court observed in a related *Hecht* decision 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." *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 635, 940 P.2d 127 (1997). Instead, the opinion of the judge as to whether he or she can be impartial must be given great weight. *Id.* at 637, 940 P.2d at 129.

With this background, we begin our analysis of the specific issue presented here with the decision of the Supreme Court of Nevada in *Millen v. District Court*, 122 Nev. Adv. Op. No. 105, 148 P.3d 694 (2006). There the Court ruled:

Subjective reasons for disqualification based on a judge's personal bias or prejudice or knowledge of disputed facts presents another dimension to our consideration of recusal

lists' propriety. A judge is presumed to be unbiased, and generally, "the attitude of a judge toward the attorney for a party is largely irrelevant." We have concluded that disqualification for personal bias requires "an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice." Generally, disqualification for personal bias or prejudice or knowledge of disputed facts will depend on the circumstances of each case. ***Recusal on those grounds, therefore, does not meet the case management objectives for recusal lists.*** Going further, generally a judge does not know whether he or she possesses knowledge of disputed facts in a case until long after the case has been filed. ***We therefore disapprove of recusal lists for which the basis for disqualification rests on NCJC Canon 3E(1)(a). Recusal by a judge in such cases is best resolved on a case-by-case basis.***

*Id.*, slip op. at 8, 164 P.3d at 700-701 (emphasis added and footnotes omitted).

The Supreme Court of Nevada has made unequivocal its disapproval of inclusion of persons or entities on recusal lists where the grounds for disqualification are

relationships or factors enumerated in NCJC Canon 3E(1)(a). That said, we recognize that there could be situations in which the rule established by the Court is unnecessarily inflexible. Those situations, and the development of an appropriate policy for deviation from the ruling in the *Millen* decision, however, is more appropriately the subject of a rule-making proceeding before the Court than an opinion of the Committee.

We also note, that our prior opinions provide guidance on a number of relationships or factors that present a specific instance where disqualification by the judge is wholly proper under NCJC Canon 3E(1)(a). For instance, we have opined on the standard that applies to disqualification where an attorney in a matter before the court is an opponent of the judge in a judicial election. See Advisory Opinion: JE06-005. There we collected a number of our prior opinions and observed:

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: JE00-001 (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); 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.)

See Advisory Opinion JE-06-005.

Similarly, we have issued opinions that demonstrate when disqualification is warranted based on the objective criteria enumerated in NCJC Canon 3E(1)(b), 3E(1)(c) or 3E(1)(d), and where the judge could, consistent with the *Millen* decision, include the person or entity on an appropriately created and maintained recusal list. Examples are (i) disqualification where a judge is represented by a deputy attorney general in a suit filed by the county clerk against

all the judges of a district and the deputy attorney general then appears before a judge of the district as counsel of record in an unrelated matter, *see* Advisory Opinion: JE99-007; and, (ii) disqualification of a justice of the peace in criminal and civil cases in which parties are represented by a law firm at which the judge's child is employed as an associate attorney, *see* Advisory Opinion: JE07-004.

### CONCLUSION

Unless a district judge concludes pursuant to NCJC Canon 3E(1)(a) that his relationship creates in fact a personal bias or prejudice toward counsel or counsel's clients, the judge may preside in cases in which one of the parties is represented by an attorney or a member of the attorney's law firm that has represented the district judge in unrelated administrative proceedings and civil litigation concerning the judge's compliance with the requirements of the NCJC.

That said, the name of a person or entity may not be included on a recusal list where the reason for judicial disqualification is bias, prejudice or knowledge pursuant to NCJC Canon 3E(1)(a). In the *Millen* decision the Supreme Court of Nevada ruled that recusal on those grounds does not meet the case management objectives that otherwise justify the use of recusal lists. Instead, the judge must make a case-by-case evaluation of the grounds for possible disqualification.

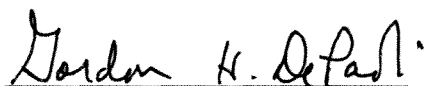
### REFERENCES

Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.; Canon 3E(1)(a), 3E(1)(b), 3E(1)(c) and 3E(1)(d); Millen v. District Court, 122 Nev. Adv. Op. No. 105, 148 P.3d 694 (2006); Las Vegas Downtown Redev. Agency v.

Hecht, 113 Nev. 644, 940 P.2d 134 (1997); Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 632, 940 P.2d 127 (1997); Ham v. District Court, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977); Advisory Opinion JE07-004; Advisory Opinion: JE06-005; Advisory Opinion: JE04-005; Advisory Opinion: JE04-001; Advisory Opinion: JE03-003; Advisory Opinion: JE03-001; Advisory Opinion: JE02-001; Advisory Opinion: JE00-001; and Advisory Opinion: JE99-007.

---

*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.*



**Gordon H. DePaoli, Esq.**  
*Committee Chairman*