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STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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PROPRIETY OF A JUDGE WITH SUPERVISORY AUTHORITY FOR COURT ADOPTING PROCEDURE DISQUALIFYING JUDGE OF SUCH COURT FROM PRESIDING IN DOMESTIC VIOLENCE CASES BASED ON THAT JUDGE'S MISDEMEANOR CONVICTION OF BATTERY DOMESTIC VIOLENCE.

courses that are not administered by the justice court as an aspect of the Judge's sentence. The chief judge of the justice court (the "Chief Judge") has inquired whether and under what circumstances the Judge may preside in domestic violence cases. Specifically, the Chief Judge inquired if given the conviction the Judge may immediately preside in such cases, must defer presiding in such matters until the Judge completes the domestic violence courses, or may never preside in such matters.

ISSUE

May the chief judge of a justice court adopt and implement a case management procedure that effectively disqualifies a justice court judge of such court from presiding in domestic violence cases because the judge so disqualified was convicted of the misdemeanor offense of battery domestic violence.

DISCUSSION

The Committee's opinion evaluates the question presented only as it relates to compliance with the requirements of the Nevada Code of Judicial Conduct. *Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices*. This advisory opinion request requires the Committee to evaluate three separate ethical rules applicable to two different jurists and balance the competing policies of the applicable rules.

ANSWER

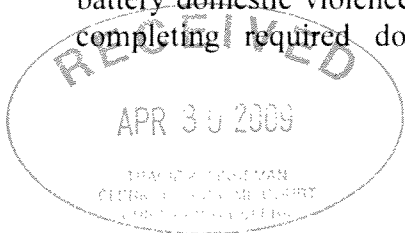
The chief judge may implement reasonable case management measures reasonably necessary to assure the prompt disposition of matters before, and the proper performance of judicial responsibilities of, the convicted judge. Such a case management process should be developed consistent with the ethical rules that govern the effected judge.

The first of the rules is Canon 3C(1), which provides that:

FACTS

A justice court judge (the "Judge") has been convicted of misdemeanor battery domestic violence and is currently completing required domestic violence

A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and



court officials in the administration of court business.

There is no commentary to Canon 3C(1). The Supreme Court of Nevada, however, has interpreted and applied Canon 3C(1), concluding that in instances where a judge's lack of cooperation with court administration adversely impacts the court's functions the "judge is properly subject to discipline." See Matter of Halverson, 123 Nev. Adv. Op. No. 48, slip op. at 27, 169 P.3d 1161 (2007). Included as an example in the *Halverson* decision was conduct of the judge that resulted in extraordinarily high numbers of peremptory challenges requiring corresponding effort by court administration to process the challenges and reassign cases. See *id.* slip op. at 27-28, 169 P.3d at 1181-1182.

The next relevant provision of the Nevada Code of Judicial Conduct (the "NCJC") is Canon 3C(3), stating:

A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

There is likewise no commentary to this canon. The commentary to the substantially similar Rule 2.12 of the Model Code of Judicial Conduct states that "public confidence in the judicial system depends upon timely justice" and thus "a judge with supervisory authority *must* take the steps needed to ensure judges under his or her supervision administer their workloads promptly." See American Bar Assoc., Model Code of

Judicial Conduct, Rule 2.12, at 29 (2007)(emphasis added).

The final ethical rule pertinent here is Canon 3E(1)(a) of the NCJC, which states "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"

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).

In the *Hecht* decision the Supreme Court of Nevada explained that judicial disqualification must be based on "actual bias" and "substantial weight" must be given to the judge's assessment of his or her ability to be fair and impartial. 113 Nev. at 636-637, 940 P.2d at 139.

More recently, in *Millen v. District Court*, 122 Nev. 1245, 148 P.3d 694 (2006), the Court stated:

A judge is presumed to be unbiased 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.

Id. at 1254-1255, 164 P.3d at 700-701. There the Court ruled impermissible the use of recusal lists to further case management objectives for which the basis for automatic 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.

By analogy, a procedure whereby the Chief Judge imposes an automatic recusal of the Judge because of his conviction of battery domestic violence or his current domestic violence course obligation could be viewed as in conflict with the Nevada Supreme Court’s requirement that disqualification under Canon 3E(1)(a) must be determined by the effected judge on the facts of each case.

We have previously opined that based on the *Millen* case, docket management procedures adopted by a court may not provide for automatic judicial disqualification where the basis is bias, prejudice or knowledge pursuant to NCJC Canon 3E(1)(a). In that regard, we concluded that if case management objectives require development of an appropriate policy for deviation from the

ruling in the *Millen* decision, the more appropriate means is a rule-making proceeding before the Court. See Advisory Opinion No. JE07-006.

That said, we recognize that the situation presented here differs from those dealt with in the *Hecht* and *Millen* decisions in two very important respects. First, in the circumstances we are evaluating there is the objective fact that the Judge has been convicted of the misdemeanor offense of battery domestic violence. Accordingly, if the Judge were to preside in domestic violence cases, both the prosecutor and the defense attorney and their respective clients may reasonably and justifiably question the Judge’s impartiality.

The prosecutor and the victim rationally may view a jurist convicted of domestic violence as likely to identify with the interests and circumstances of the accused. Conversely, the accused and the defense attorney could be reasonably concerned that an elected judge may view as necessary establishing his or her bona fides as tough on domestic violence in order to counter the fact of the jurist’s conviction and any public criticism. Moreover, and for the same reasons, the public could legitimately doubt the integrity of the judicial process if the Judge presided in cases where he must adjudicate the guilt and determine the sentence of persons charged with the very offense for which the Judge was convicted, sentenced and punished.

Given these considerations, there is a reasonable likelihood that counsel or parties in domestic violence cases that would be assigned to the Judge would seek recusal. Repetitive and frequent recusal

requests could seriously disrupt the management of such cases in a metropolitan justice court.

These are very objective factors and *do not* depend on the facts of any particular case. Instead, the fact of conviction and the required domestic violence course obligations are constants based on the Judge's conduct. In instances where objective criteria for disqualification exist we have not hesitated to issue opinions advising disqualification. *See, e.g.*, Advisory Opinion No. JE07-004 (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); Advisory Opinion No. JE99-007 (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).

Second, we must consider that our opinion is sought here by the Chief Judge who has independent obligations governed by Canon 3C(3). Those obligations include "prompt disposition" of the Judge's cases and ensuring the Judge's "proper performance" of "judicial responsibilities." The Chief Judge's failure to implement appropriate measures to accomplish these objectives places the supervisory judge at risk of ethical dereliction and more importantly may undermine public confidence in the judicial system.

For these reasons, we conclude that pursuant to Canon 3C(1) the Judge must cooperate with the Chief Judge and other

judges of the justice court to facilitate the efficient administration of domestic violence cases. We also conclude that given the Nevada Supreme Court's decisions on Canon 3E(1)(a), the Judge must be accorded the opportunity by the Chief Judge to evaluate whether his or her own impartiality might reasonably be questioned. In the event the Judge determines not to disqualify himself or herself, and circumstances thereafter demonstrate that domestic violence cases assigned to the Judge are not promptly and efficiently processed consistent with the NCJC, we conclude the Chief Judge may implement consistent with Canon 3C(3), a case management procedure necessary to ensure prompt and efficient disposition of domestic violence cases.

From a practical perspective, the demands of these three judicial ethics rules must be balanced to preserve public confidence in the judiciary. This balancing effort strongly suggests the Chief Judge and the Judge should collaborate in adopting a remittal of disqualification process under Canon 3F. The effected Judge may assess and disclose the facts of conviction of battery domestic violence, and while continuing, the Judge's domestic violence course requirement. The Judge can cooperate in court administration as required by Canon 3C(1). The ethical obligations of the Chief Judge to manage the court's business will be satisfied. A process will be provided whereby litigants and their counsel could waive outside the Judge's presence the disqualification. The remittal of disqualification process can streamline court administration in this situation and need not be static as facts and circumstances warrant. This type of

procedure would demonstrate to the public cause to trust the integrity of the judiciary.

CONCLUSION

A chief judge of a justice court may adopt and implement a case management procedure that uses a remittal of disqualification process in domestic violence cases for a justice court judge of such court convicted of the offense of battery domestic violence. Given the requirements of the *Millen* decision, the chief judge must necessarily collaborate with the effected judge who has a duty to sit and who must harmonize that obligation with the equally important objective of efficient judicial administration and the protection of litigants' rights. In this collaborative process, the chief judge should facilitate the effected judge's obligation to independently evaluate whether his or her own impartiality might reasonably be questioned.

REFERENCES

Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices; Canon 3C(1), 3C(3) and 3E(1)(a); Matter of Halverson, 123 Nev. Adv. Op. No. 48, 169 P.3d 1161 (2007); Millen v. District Court, 122 Nev. 1245, 148 P.3d 694 (2006); Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 940 P.2d 134 (1997); Ham v. District Court, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977); Advisory Opinion JE07-006; Advisory Opinion JE07-004; and Advisory Opinion: JE99-007; American Bar Assoc., Model Code of Judicial Conduct, Rule 2.12 (2007).

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding on 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 requesting the opinion.



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