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STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

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PROPRIETY OF A NEVADA DISTRICT JUDGE PRESIDING IN CASES IN WHICH THE ATTORNEY FOR A PARTY IS A MEMBER OF, OR ASSOCIATED WITH, THE LAW FIRM RETAINED TO REPRESENT THE JUDICIAL DISTRICT IN EMPLOYMENT LAW MATTERS.

ISSUE

Are the District Judges of a particular Judicial District disqualified from or required to make disclosures and obtain consent in presiding in cases in which a party is represented by an attorney who is a member of, or associated with, the law firm that has been retained by such Judicial District?

ANSWER

No, with qualifications and exceptions. In certain instances disqualification is required and disclosure and consent may be made and obtained in appropriate instances.

FACTS

A Judicial District has retained an attorney to provide employment law advice and representation in connection with the District's personnel and human resource matters. The Chief District Judge and another District Judge have been selected to administer the engagement between the employment lawyer and the Judicial District.

The attorney retained is a partner in a law firm. Attorneys who are members of, and associated with, this law firm appear in unrelated matters on behalf of clients before the District Judges with the Judicial District.

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DISCUSSION

The Committee is authorized only to render an opinion that evaluates compliance with the requirements of the Nevada Code of Judicial Conduct (the "NCJC"). *Rule 5 Governing the Standing Committee On Judicial Ethics & Election Practices.* Accordingly, this opinion is limited by the authority granted by Rule 5.

The question presented here implicates Canon 2. That canon states "[a] judge shall perform the duties of judicial office impartially, competently, and diligently. Nevada Code of Judicial Conduct, Canon 2. Under Canon 2, the subject of disqualification is addressed in Rule 2.11. The pertinent parts of Rule 2.11 to the question presented here provide:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonable be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> . . . .
>
> (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court staff, court officials and others

> subject to the judge's direction and control, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court staff, court officials and others subject to the judge's direction and control, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Nevada Code of Judicial Conduct, Canon 2, Rule 2.11(A)(1) & (C).

The Standing Committee has previously opined on the analogous judicial ethical requirements under the previous canons. In our Opinion JE99-007, we concluded that all of the District Judges of a particular Judicial District must disqualify themselves when the specific deputy attorney general representing the judges in a lawsuit appeared before a judge of that district as counsel of record in an unrelated matter. See *Advisory Opinion No. JE99-007* (January 12, 2000). In that opinion, the Standing Committee determined, however, that the disqualification did not extend to every case handled by a member of the Office of the Attorney General of Nevada and we also noted that because the case involved claims against the judges in their official capacity, the disqualification could be waived under a process similar to the disclosure and consent procedure like that set forth in Rule 2.11(C).

In 2007, the Standing Committee was asked to revisit the issue of disqualification from the judges of an entire district. There, we opined that the District Judges of a Judicial District were not disqualified from presiding in cases where the attorney representing a party in such cases was associated with the law firm representing a judge's association in a matter before the Nevada Legislature. See *Advisory Opinion No. JE07-001* (March 15, 2007). We there distinguished our conclusion in Opinion JE99-007 on the grounds that the earlier instance dealt with a matter where the deputy attorneys general were directly representing the judges as compared to an association of judges. The 2007 opinion also concluded that although not required, a District Judge could reasonably decide on an individual case basis to disclose and allow consent in a procedure such as permitted under Rule 2.11(C).

As a threshold matter, we note that Canon 2 and Rule 2.11(A)(1) require a District Judge to disqualify in any situation where the jurist harbors ***actual*** bias or prejudice. Accordingly, in connection with the issue here presented, a District Judge "shall" be disqualified if they have "a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." This is a decision that the jurist must reach searching their conscience and based on the specific facts known to them, given the relationship with or representation by the retained employment lawyer.

In the broader context of applying Rule 2.11, however, each of Opinion JE99-007 and JE07-001, as well as in this case, we do not deal with ***actual*** bias, but instead the critical issue is whether the judge's impartiality might reasonably be questioned. The Supreme Court of Nevada has explained that under Rule 2.11, "a judge is disqualified whenever the judge's impartiality might reasonable be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply." *Commentary [1]* to Rule 2.11.

In situations where the judge is faced with presiding in a case where the judge's own lawyer is appearing for a party, the analysis is that the Standing Committee articulated in Opinion JE99-007 and disqualification is required. The rationale for that conclusion is based on the nature of the relationship between

attorney and client. That relationship is typically dependent on trust, candor and reliance and as one of our sister advisory committees has noted, "[i]t would be hard to imagine that litigants . . . would not be distrustful of the impartiality of a judge in a matter in which the law firm representing the judge was the firm of record in a matter before the judge." See *Judicial Ethics Advisory Committee, Florida Supreme Court, Op. No. JE05-15 (citing Op. No. 99-13)* (October 19, 2005). This interpretation of the canon appears consistently embraced. See, e.g., *Judicial Ethics Advisory Board, Colorado Supreme Court, Op. No. 06-05* (July 12, 2006); *Washington Ethics Advisory Committee, Op. No. 95-12* (March 10, 1995); *Illinois Judicial Ethics Committee, Op. No.03-05* (October 23, 2003).

Applying this standard here, the Standing Committee concludes that in any instance where a particular District Judge within the Judicial District is receiving legal counsel, advice or representation by the retained employment lawyer, that District Judge must disqualify himself or herself pursuant to Rule 2.11(A) from presiding in a case where the retained employment lawyer represents a party in that case. Under the facts here suggested, that disqualification would extend to the Chief District Judge and the other specific District Judge who has been selected to administer the engagement between the employment lawyer and the Judicial District. These two jurists are necessarily the client representatives of the Judicial District and the persons in the close professional relationship with the employment attorney. The Standing Committee concludes it would be difficult to imagine a litigant who would not reasonably question the impartiality of these two jurists when the employment lawyer appeared before them in another context even acknowledging that the "client" is technically the Judicial District. The same result is appropriate for any other District Judge that actually receives legal advice or representation from the attorney. Our determination in this regard, however, is qualified by the rule of necessity that the Nevada Supreme Court has indicated "may override the rule of disqualification." *Commentary [3]* to Rule 2.11.

The Standing Committee views other aspects of the relationship among the Judicial District, the various District Judges, the retained employment attorney and his or her law firm and other litigants and counsel as subject to a different standard. This assessment rests on the rationale that in these other contexts the intimacy of the relationship of attorney and client is much more attenuated, if not nonexistent. Thus, the question of disqualification must consider a variety of factors that influence whether the judge's impartiality might reasonably be questioned in accordance with Canon 2.

Our sister advisory committees have also grappled with this issue and among those evaluations we are particularly convinced by the standard articulated by Arizona Judicial Ethics Advisory Committee. The Arizona Committee has identified a three-prong test to apply absent actual bias in determining whether a reasonable person would question the impartiality of a judge who presides over a case involving an attorney with another connection with the judge. The test examines "(1) the directness of the relationship between the attorney and the judge; (2) the substance of the relationship; and (3) the length and ongoing nature of the relationship." *Arizona Supreme Court, Judicial Ethics Advisory Committee, Op. No. 92-11* (September 9, 1992). Applying this three-prong test, the Arizona Advisory Committee concluded that a trial judge could reasonably conclude that he was not required to disqualify himself where the attorney selected by an insurer to represent the judge in a private tort case was a member of the same law firm law firm representing a party in an pending medical malpractice case before the judge. See id.

The Standing Committee concludes likewise in the question presented here when applying the three-prong test to the other District Judges of the Judicial District – those ***not*** selected to directly administer the engagement between the employment lawyer and the Judicial District. The relationship between these District Judges on the one hand and the employment lawyer and his or her law firm is indirect because the employment attorney's client is the Judicial District and the relationship of client and attorney is wholly administered by the Chief District Judge and the other specific jurist. The substance of the relationship between the non-client representative District Judges and the employment lawyer or his or her law firm is some other lawsuit and not related to the employment or human resources matters for which the Judicial District has retained the lawyer and firm. While the relationship will ostensibly be on-going, the District Judges who have no involvement in administering the employment law engagement typically would have no direct knowledge of, or involvement with, the legal representation.

The Standing Committee embraces in the proper context the three-prong test articulated above because we believe this standard properly balances the jurists' obligations of impartiality under Canon 2 with the equally important duty of the judiciary to perform its elected duties to adjudicate cases. See *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977)(duty to sit); *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1977)(standard for judicial disqualification). Although the *Ham* and *Hecht* decisions interpreted an earlier version of Nevada Judicial Canons, we believe the Nevada Supreme Court would continue to apply the substance of these rulings in construing Rule 2.11.

In this regard, Rule 2.11(C) importantly provides a safety-valve for any instance where one of the non-client representative District Judges has concerns in a specific instance or generally. The Nevada Supreme Court has stated that:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, ***even if the judge believes there is no basis for disqualification.*** A judge making such a disclosure should, where practicable, follow the procedure set forth in Rule 2.11(C).

Commentary [5] to Rule 2.11 (emphasis added). In the discretion of the individual jurist, he or she may make disclosure of the attorney and client relationship between the Judicial District and the employment lawyer and law firm.

The procedure permitted under Rule 2.11(C) will provide transparency in any case where the facts warrant heightened sensitivity to perceptions of judicial impartiality or where the individual jurist believes disclosure and consent appropriate in his or her independent judgment. See, e.g., *Advisory Op. No. JE07-001* (March 15, 2007); *Arizona Supreme Court, Judicial Ethics Advisory Committee, Op. No. 92-11* (September 9, 1992).

CONCLUSION

All of the District Judges of a particular Judicial District are not disqualified from presiding in cases in which a party is represented by an attorney who is a member of, or associated with, the law firm that has been retained by such Judicial District. Where a particular District Judge within the Judicial District is receiving legal counsel, advice or representation by the retained employment lawyer, including the specific District Judge(s) administering the engagement between the

employment lawyer on behalf of the Judicial District, that District Judge must disqualify himself, or herself, pursuant to Rule 2.11(A) from presiding in a case where the retained employment lawyer represents a party in that case. Depending on the circumstances of a specific case or in discretion of a particular District Judge, the disclosure and consent procedure of Rule 2.11(C) otherwise would be appropriate or may be employed.

REFERENCES

Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices; Nevada Code of Judicial Conduct, Canon 2, Rule 2.11(A)(1) & Rule 2.11(C); *Commentary [1], [3] & [5]* to Rule 2.11; *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977); *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1977); *Advisory Opinion No. JE07-001* (March 15, 2007); *Advisory Opinion No. JE99-007* (January 12, 2000); *Judicial Ethics Advisory Board, Colorado Supreme Court, Op. No. 06-05* (July 12, 2006); *Judicial Ethics Advisory Committee, Florida Supreme Court, Op. No. JE05-15* (October 19, 2005); *Illinois Judicial Ethics Committee, Op. No.03-05* (October 23, 2003); *Washington Ethics Advisory Committee, Op. No. 95-12* (March 10, 1995); *Arizona Supreme Court, Judicial Ethics Advisory Committee, Op. No. 92-11* (September 9, 1992)..

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.

Dan R. Reaser

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