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TRACIE K. LINDSEMAN
CLERK OF SUPREME COURT

BY CHIEF DEPUTY CLERK

STATE OF NEVADA

STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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ADVISORY OPINION: JE11-001

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 PREVIOUSLY IN A ROMANTIC RELATIONSHIP WITH THE ATTORNEY AND WERE FOR A TIME DOMESTIC PARTNERS.

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 and the district judge were more than fifteen years prior in a romantic relationship and domestic partners?

ANSWER

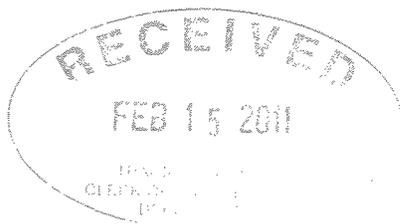
Yes; unless the district judge concludes pursuant to Nevada Code of Judicial Conduct ("NCJC") Rule 2.11 that the jurist's relationship with the attorney and his or her law firm creates, in fact, a personal bias or prejudice toward counsel or counsel's clients.

FACTS

Under the previous version of NCJC Rule 2.11, the Supreme Court of Nevada 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. Millen v. District Court, 122 Nev. 1245, 148 P.3d 694 (2006). The recusal list is a registry that identifies persons or entities that have a relationship with a judge that presents a reason for the disqualification of the judge. In the *Millen* decision, the Court held impermissible the use of recusal lists for which the basis for disqualification rests on former 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. NCJC Rule 2.11(A)(1) of the revised Canons is identical in all material respects to former NCJC Canon 3E(1)(a). Compare Nevada Code of Judicial Conduct, Canon 3, Rule 3E(1)(a) with Nevada Code of Judicial Conduct, Canon 2, Rule 2.11(A)(1).

A district judge has inquired whether, consistent with NCJC Rule 2.11(A)(1), a person or entity may be included on a recusal list where the effected district judge has *not* 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 explains that prior to election as a judge, he or she was over a decade prior in a romantic relationship with an attorney for less than one year during a portion of which time they shared a residence. The jurist indicates that there is no continuing business, financial or regular social contact with the attorney.



The district judge advises that based on this relationship, the attorney already has been placed on the jurist's recusal list with the approval of the Chief Judge of the district court. The judge affirmatively disclaims any actual bias or prejudice. Placement on the recusal list was undertaken for privacy considerations and because litigants might reasonably question the judge's impartiality. Also, the interests of judicial economy are advanced as a justification for including the former domestic partner on the recusal registry. The district judge now inquires whether, given placement of this attorney on the recusal list, the members of that attorney's entire law firm should or must likewise be placed on such disqualification list.

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.* NCJC Rule 2.11(A)(1) states:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . . The judge has a personal bias or prejudice concerning a party or a party's lawyer

Nevada Code of Judicial Conduct, Canon 2, Rule 2.11.

The Commentary to Rule 2.11(A)(1) provides:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific provisions of paragraphs (A)(1) to (6) apply

. . . .

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

Nevada Code of Judicial Conduct, Canon 2, Rule 2.11, *Comment [1] & [4]*. Based on these comments, the Nevada Supreme Court has explained that Rule 2.11 requires disqualification in any instance where impartiality is reasonably questioned, but that disqualification of an entire law firm at which a relative of the judge is affiliated is not cause for an automatic recusal.

Here, the jurist unequivocally disavows any actual bias or prejudice to the former romantic and domestic partner. Accordingly, Rule 2.11(A)(1) is not an appropriate ground for disqualification. Rule 2.11(A)(2) likewise does not apply in the context described in the comments. The attorney is not a current domestic partner or a relative and thus the attorney's status as party, legal counsel, witness, or his or her

financial or other interest is not within the enumerated basis for the application of this disqualification rule. *See* Nevada Code of Judicial Conduct, Canon 2, Rule 2.11(A)(2)(a)-(d). These facts all indicate that the mere placement of this attorney on the recusal list should not be mechanically applied without other factors to require the members of that attorney's entire law firm likewise be placed on the disqualification list.

We view this interpretation wholly consistent with the decision of the Supreme Court of Nevada in *Millen v. District Court*, 122 Nev. 1245, 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. at 1254-1255, 164 P.3d at 700-701 (emphasis added and footnotes omitted).

The Court, therefore, criticized including persons or entities on recusal lists where the grounds for disqualification are relationships or factors enumerated in NCJC Canon 3E(1)(a). Former Canon 3E(1)(a) is in all respects relevant here the same as new NCJC Rule 2.11(A)(1) and we conclude that Rule 2.11(A)(1) should be interpreted and applied consistent with the *Millen* decision. Under the rule announced in the *Millen* case and the facts here presented, the Standing Committee questions whether the Court would sustain the practice of placing the former romantic and domestic partner on the recusal list. *See* Advisory Opinion: JE07-005 (May 22, 2007); Advisory Opinion JE07-004 (May 21, 2007); Advisory Opinion: JE06-005 (June 30, 2006). Even assuming for the purpose of this analysis that automatic recusal is proper under the general standard -- that is the judge's impartiality might reasonably be questioned -- we cannot endorse the placement of the attorney's entire law firm on the recusal list in the face of the judge's unqualified disclaimer of any personal animus. Before the judge disqualifies himself or herself in proceedings where other members of the attorney's firm appear, the law indicates there must be either (i) actual bias or

prejudice; or (ii) after adherence with the disclosure procedures set forth in NCJC Rule 2.11(C), a record to support the assertion that the judge's impartiality might reasonably be questioned. See, e.g., 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). We have previously observed that there could be situations in which the rules established by the Court in this arena are 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.

CONCLUSION

Unless a district judge entertains actual bias or prejudice toward counsel, a basis for automatic disqualification does not exist from the mere fact that an attorney is affiliated in the law firm of a long removed former romantic and domestic partner of the judge. The judge may preside in cases in which one of the parties is represented by a member of the attorney's law firm.

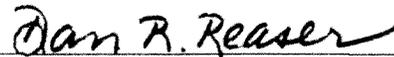
Moreover, given the facts presented, the members of the entire law firm affiliated with the former romantic and domestic partner should not be included on a recusal list on the grounds that judicial disqualification is warranted because of bias, prejudice or knowledge pursuant to NCJC Canon 3E(1)(a). 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 should adhere to the procedures under Rule 2.11(C) and make a case-by-case evaluation of the grounds for possible disqualification.

REFERENCES

Rule 5 Governing Standing Comm. On Judicial Ethics & Elect. Prac.; Nevada Code of Judicial Conduct, Canon 2, Rule 2.11; Comment [1] & [4] to Rule 2.11; 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); 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: JE07-005 (May 22, 2007); Advisory Opinion JE07-004 (May 21, 2007); Advisory Opinion: JE06-005 (June 30, 2006); see also [Former] Nevada Code of Judicial Conduct, Canon 3E(1)(a).

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Dan R. Reaser, Esq.
Committee Chairman