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**STATE OF NEVADA**

**STANDING COMMITTEE ON JUDICIAL ETHICS**

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**ADVISORY OPINION: JE16-004**

**PROPRIETY OF A JUSTICE PRESIDING  
IN AN APPEAL OF A CASE HEARD BY  
A RELATIVE OF THE JUDGE IN A  
LOWER COURT PROCEEDING**

**ISSUE**

May a Supreme Court Justice who is directly related to a Justice of the Court of Appeals that presided over an appeal participate in future proceedings of that case where the Supreme Court has vacated the decision of the Court of Appeals and granted *de novo* review of the District Court decision?

**ANSWER**

Yes. A Supreme Court Justice is not disqualified from presiding over an appeal of a District Court decision simply because a statutorily close relative presided over an interim review by the Court of Appeals which has since been vacated. However, disclosure of the relationship on the record is prudent and appropriate.

**FACTS**

The Nevada Supreme Court retains sole discretion to accept petitions for review from the Court of Appeals, and such review is only granted in extraordinary cases. The Supreme Court conducts such review *de novo*, and effectively limits its review to a review of the District Court decision. A Justice has inquired whether it would be a

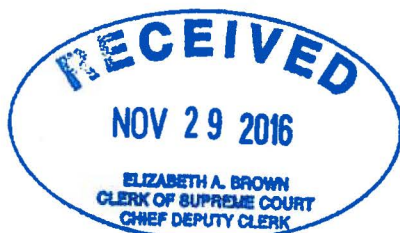
violation of the Nevada Code of Judicial Conduct ("NCJC") for a Supreme Court Justice who is directly related to a Justice of the Court of Appeals within the third degree of consanguinity, to participate in a case where the Supreme Court vacated the decision of the Court of Appeals and granted *de novo* review of the District Court decision.

**DISCUSSION**

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

As a starting point, Canon 1 requires a judge to "uphold and promote the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety." Public confidence in the judiciary is eroded by conduct that appears to compromise the independence, integrity and impartiality of the judiciary or creates the appearance of impropriety, the test for which is "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Comments [1], [3], and [5] to Rule 1.2.

The Canons require that a judge perform his or her duties fairly and



impartially, without bias or prejudice, and at all times to be objective and open minded. See Rule 2.2; Rule 2.3; Comment [1] Rule 2.2. Of particular relevance to this inquiry, Rule 2.4 prohibits a judge from permitting family, social, or other interests or relationships from influencing the judge's judicial conduct or judgment, or from conveying the impression that any person or organization is in a position to influence the judge.

These concepts of complete judicial impartiality pervade the Canons. However, Rule 2.11 and Nevada Supreme Court precedent specifically guide the judiciary on when disqualification is warranted. See *Ham v. District Court*, 93 Nev. 409, 415 (1977); *Las Vegas Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997). Rule 2.11 requires a judge to disqualify himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned", including, but not limited to, circumstances in which the judge has a personal bias or prejudice or the judge knows a person within the third degree of relationship who has more than a de minimis interest that could be substantially affected by the proceeding. The issue presented in this hypothetical highlights the juxtaposition of these concepts of complete impartiality and a judge's duty to sit.

The Nevada Supreme Court has held that the specific disqualification provisions of the Canons and case law applying those provisions should control over broader impartiality limitations, and the Code recognizes that in some circumstances the "rule of necessity may override the rule of disqualification." *Hecht*, 113 Nev. at 636 n.2 (comparing former versions of Rule 2.11 and Canon 1); Comment [3] Rule 2.11. A trial judge has a duty to sit and "preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason

to the contrary." *Hecht*, 113 Nev. at 636 (quoting *Ham*, 93 Nev. at 415) ("[T]he judge has an obligation, part of his sworn duty as a judge, to hear and decide cases properly brought before him. He is not at liberty, nor does he have the right, to take himself out of a case and burden another judge with his responsibility without good and legal cause."). Rule 2.7 offers a similar admonition: "A judge shall hear and decide matters assigned to the judge except when disqualification is required by Rule 2.11 or other law."

Absent an actual personal prejudice or bias, *Hecht* controls to determine whether a judge's impartiality can reasonably be questioned. "Attitude of a judge toward an attorney or party is largely irrelevant" because it is not indicative of "extrajudicial bias". *Hecht*, 113 Nev. at 636. *Hecht* requires an extreme showing of bias in order for a judge to be disqualified for bias for or against a party. In this regard, the opinion of the judge as to whether or not he or she can be impartial must be given great weight. While the Committee recognizes that other jurisdictions have interpreted impartiality provisions more broadly, the Nevada Supreme Court has consistently upheld the rule of necessity and duty to sit absent a showing of bias. Cf. *MI Eth. Op. JI-31(1990)* (opining that judge should recuse rather than review decision of spouse).

Based on the principles in *Hecht*, the Committee has taken a very narrow view of those circumstances in which the connection or relationships of a person to a judge require disqualification. See *Advisory Opinion JE06-005* (judge not disqualified simply because the attorney for a party is the judge's opponent in an upcoming election); *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); *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); *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). While a judge must always self-monitor his or her impartiality and may voluntarily recuse where deemed appropriate to uphold the integrity of the judicial system, given the duty to sit espoused in Rule 2.7 and *Hecht*, the Committee believes the circumstances where the Committee could opine that disqualification is mandated are limited to extraordinary circumstances as instructed by *Hecht*. In short, a judge must always be vigilant in monitoring whether he or she can remain impartial under *Hecht*, but unless disqualification is required under Rule 2.11 or statute, a judge should fulfill his or her duty to preside over matters duly assigned.

The Committee found particularly compelling in this hypothetical the fact that the justice would not be directly reviewing the decision of a statutorily close relative. As presented in this inquiry, the related Justice would recuse from review and decision of the Supreme Court to grant a petition for review of the Appellate Court

decision, and would not become involved in the proceeding until after the Appellate Court decision has been vacated. Thus, the Justice would only be directly reviewing the decision of the District Court, not the decision of a statutorily close relative on the Appellate Court.

Comment [5] to Rule 2.11 provides 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." The Committee has historically recognized that whether disclosure is required depends on the circumstances presented, and may or may not be necessary in each case. See *Advisory Opinion JE02-001*; *Advisory Opinion JE03-001*; *Advisory Opinion JE06-005*. Although the Committee does not believe disqualification is required in this hypothetical, it believes disclosure of the justice's relationship with the member of the Court of Appeals is prudent and appropriate.

### CONCLUSION

A Supreme Court Justice is not disqualified from presiding over an appeal of a District Court decision simply because a statutorily close relative presided over an interim review by the Court of Appeals which has since been vacated. However, the Committee believes disclosure of the relationship is prudent and appropriate and would remind judges to remain vigilant in self-monitoring their ability to be impartial in all matters consistent with *Hecht*.

### REFERENCES

*Ham v. District Court*, 93 Nev. 409, 415 (1977); *Las Vegas Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997); *Cf. MI Eth. Op. JI-31(1990)*; Nev. Code Jud. Conduct,

Canon 1, Rule 1.2; Canon 2, Rule 2.2; Rule 2.3, Rule 2.4, Rule 2.7, Rule 2.11; *Rule 5 Governing the Standing Committee On Judicial Ethics*; *Advisory Opinion JE06-005*; *Advisory Opinion JE00-001*; *Advisory Opinion JE02-001*; *Advisory Opinion JE03-001*; *Advisory Opinion JE03-003*; *Advisory Opinion JE04-001*; *Advisory Opinion JE04-005*.

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