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STATE OF NEVADA  
STANDING COMMITTEE ON JUDICIAL  
ETHICS AND ELECTION PRACTICES

DATE ISSUED: January 12, 2000

OPINION: JE99-007

PROPRIETY OF THE JUDGE'S  
ATTORNEY APPEARING IN FRONT OF  
THE JUDGE AS COUNSEL OF RECORD

Issue

Is a judge required to disqualify himself or herself when a deputy attorney general representing all the judges of a district in a suit filed by the county clerk appears before a judge of the district as counsel of record in an unrelated matter?

Answer: Yes.

Facts

All of the district judges in a judicial district have been sued in the Supreme Court by the county clerk in a complaint for usurpation of office under NRS 35.050 including an application for writ of prohibition. Each of the district judges have been individually named as defendants in their official, public capacity. The complaint does not seek a monetary award from the defendant judges and the judges have no pecuniary interest in the litigation. The attorney general's office has designated two deputy attorneys to provide representation of the judges pursuant to NRS 41.0339.

The chief judge of the district asks the Standing Committee whether the district judges are required to disclose the attorney general's representation in the above referenced case and be subject to disqualification in matters in which the two designated attorneys of the attorney general's office represent a party. The Standing

Committee has also been asked to determine whether the district judges are required to disclose the attorney general's representation and be subject to disqualification in matters which involve representation by any deputy attorney general. Deputy attorneys general appear frequently before the district court judges on a wide range of matters.

Discussion

The Nevada Code of Judicial Conduct provides:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...[Canon 3E(1)]

The rules also provide:

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification any may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. [Canon 3F]

The Committee believes that in any proceeding where the specific attorneys representing the judges appear as counsel, that this is a circumstance where "the judge's impartiality might reasonably be questioned." The attorney general's office appears as counsel in civil and criminal matters, including applications for post conviction

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relief, where the opposing parties might have reason to question the ability of the court to be fair to both sides because of their representation of the court in this important matter.

While the judges have been sued in their official capacity and they have no pecuniary interest in this litigation, the clerk of the court has alleged that the district judges and their predecessors engaged in conduct to usurp her power as an elected official which conduct is unlawful under Nevada's laws and constitution. In order to defend the judges, the designated attorneys general will undoubtedly be required to meet with the judges to review the allegations of the complaint and plan defense strategy in a lawsuit that appears to have the potential to raise strong feelings on both sides. With this background, even though the judges have been named in their official capacity, the Committee believes there is a potential that an opposing party may have reason to question the impartiality of the district judges when facing the two lawyers for the district judges.

Therefore, the judges of the judicial district are required to disqualify themselves in any proceeding in which these attorneys appear until this lawsuit is finally resolved. However, a judge disqualified may disclose on the record the basis of this disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive this disqualification [Canon 3E(1) and F].

The Committee believes that the facts in this case are distinguishable from Reilly v. Reilly, 489A.2d 1291 (Penn. 1985). In that matter, the lawyer in question represented every judge and justice in the state of Pennsylvania in a class action seeking increased judicial compensation for all judges.

The Supreme Court of Pennsylvania did not require the judge's attorney to recuse himself because of the "rule of necessity". The Court held that to require disqualification would make the attorney forego trial practice in the entire state of Pennsylvania and the Court held "no lawyer should be compelled to suffer such a disaster because of his pro bono representation of all of the judges of Pennsylvania." Reilly, supra at p. 213. The attorneys in question here are public attorneys whose income will not be affected by the disqualification of the judges of one of the several judicial districts in this state.

The "rule of necessity" however does guide the decision of the Committee in answer to the second part of this request: Are the judges of this district required to disqualify themselves in any appearance by any member of the attorney general's office? The attorney general's office is the largest law firm in this state, with its attorneys litigating matters of all type throughout district courts of the state of Nevada. There may be some possibility that a judge's impartiality would be questioned when a deputy attorney general not involved in the county clerk litigation appears in district court. However, this possibility is remote and even if present, recusal is avoided because necessity requires attorneys general unrelated to this case to represent the interests of the public and the state of Nevada in the courts of the district throughout the pendency of the instant litigation. It would not be practicable to transfer every case in a given judicial district to another judge to cure this problem. "The rule of necessity thus operates as an exception to the requirement of impartiality, prescribed by the demands of reality." Judicial Conduct and Ethics, Shaman, Lubet and Alfini (Second Ed. 1995 at Section 4.03 and 4.18).

By this ruling, the Committee hopes to

provide guidance as to the minimum requirement in these circumstances. We leave it to the good judgment of the district judges to decide whether notification and recusal may be appropriate in a broader range of matters involving the attorney general's office given the unique circumstances of a particular matter.

#### Conclusion

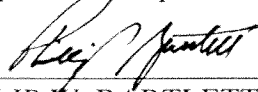
The judges of this judicial district are required to disqualify themselves when the deputy attorneys general representing them in an action brought by the clerk of the court for usurpation of power appear in unrelated actions. The judges are not required to disqualify themselves in matters being handled by other deputy attorneys general.

#### References

Nevada Code of Judicial Conduct:  
Canons 3E and 3F, Reilly v. Reilly, 489 A.2d 1291 (PA. 1985) and Judicial Conduct and Ethics, Shaman, Lubet and Alfini (Second Ed. 1995 at Section 4.03 and 4.18)

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Chairman