

ETHICS ADVISORY COMMITTEE

STATE OF NORTH DAKOTA

OPINION 93-1

ISSUE

Whether a judge should voluntarily remove himself or herself from a proceeding when a party to that proceeding files an official complaint against him or her alleging that the judge has been prejudiced by participation in an earlier proceeding.

ANSWER

Section 3(C)(1)(a) of the North Dakota Rules of Judicial Conduct specifies that "a judge's disqualification is appropriate when the judge's impartiality might reasonably be questioned, including but not limited to instances {in which}...a judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...." N.D.R. Judicial Conduct 3(C)(1)(a).

The Judicial Ethics Advisory Committee interprets this section to be substantially similar to the federal reasonableness standard for disqualification. Although the federal standard may require recusal when the North Dakota standard will not, the Committee has relied on interpretation of the federal standard in developing guidance for judges applying the North Dakota standard.

It is the Committee's opinion that pursuant to the North Dakota reasonableness standard, if a trial judge's impartiality could reasonably be questioned, the trial judge should recuse himself or herself in order to promote judicial integrity even if his or her bias is unintentional. However, the trial judge does not have to recuse himself or herself unless the complaint alleges specific facts showing partiality. When the complaint alleges specific facts, the judge must examine the allegations of bias or prejudice. If this examination indicates that the judge might make a decision on some basis other than the merits, recusal is necessary. Recusal is not necessary, however, unless the perceived bias or prejudice stems from an extrajudicial source; what the judge learns from participation in the case cannot be the basis for perceived bias or prejudice. For example, the alleged bias or prejudice does not stem from an extrajudicial source if it is based on a previous adverse ruling in the course of trial, the enforcement of a trial order, or the merely administrative actions of a chief judge in his or her official capacity.

Pursuant to the federal reasonableness standard, section 455 of title 28 of the United States Code, a trial judge must recuse himself or herself if a reasonable person could question his or her impartiality. Reasonableness is determined from all of the relevant circumstances available to the judge, not just those known to the parties or the public. Both the North Dakota and federal standards require recusal when the judge's impartiality could reasonably be questioned. Although the federal standard provides alternative means by which a trial judge might determine if a reasonable person would question the trial judge's impartiality, the Committee recommends the

federal option of personal determination by the trial judge. The trial judge should consider the particular facts known personally to him or her and make the determination of reasonableness on his or her own.

Under the rule of necessity, the trial judge may not recuse himself or herself if the complaint is so general that it could apply to any judge who presides over the matter. Additionally, if the trial judge determines that no reasonable person would question his or her impartiality, the judge should remain in the proceeding.

Under the federal standard, if the trial judge remains in the proceeding, the appellate courts use a three-part test to determine if the trial judge's decision to remain in the proceeding constitutes harmful error necessitating a new trial. The appellate court considers the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining public confidence in the judicial process. If the judge's impartiality arises out of a relationship between the judge and a party to the proceeding before him or her, North Dakota case law holds that the judge's prior orders in the proceeding are void.

RECUSAL ANALYSIS

Note: Whenever the trial judge is faced with an allegation of judicial bias or prejudice, the trial judge should make a record of the judge's determinations based on the recusal analysis.

1. Was a nonfrivolous complaint filed with the Judicial Conduct Commission?
 - A. If yes (i.e., nonfrivolous), the trial judge should continue the recusal analysis.
 - B. If no (i.e., frivolous), there is probably no recusal issue, and the judge should remain in the proceeding.

2. Does the complaint allege judicial bias with specific facts and information?
 - A. If yes, the trial judge should continue the recusal analysis.
 - B. If no, the trial judge should probably remain in the proceeding.

3. Does the alleged judicial bias arise out of rulings during the course of trial or enforcement of the trial order?
 - A. If yes, the trial judge should probably remain in the proceeding. At this state of the recusal analysis, the trial judge may consider the reasonableness standard discussed in question 4.
 - B. If no (the bias results from an extrajudicial source), the trial judge should continue the recusal analysis.

4. Under the reasonableness standard, would a reasonable person considering all the relevant facts and circumstances, not merely those known to the parties or public, question the trial judge's impartiality?
 - A. If yes, the trial judge should continue the recusal analysis.
 - B. If no, the trial judge should probably remain in the proceeding.

5. Is the complaint so general that it could apply to any judge?
 - A. If yes, under the rule of necessity, the judge should remain in the proceeding.
 - B. If no, the judge should recuse himself or herself.