

ETHICS ADVISORY COMMITTEE

STATE OF NORTH DAKOTA

OPINION 96-1

ISSUE

Whether a judge should voluntarily remove himself or herself from a proceeding when one of the parties to the proceeding is represented by an attorney who had an ethical complaint filed against him by the judge's spouse.

ANSWER

There should be a period of time during which the judge, whose spouse is an attorney filing an ethical complaint against a local attorney, recuses himself from any proceeding in which the attorney is appearing, whether or not there is actual bias or prejudice on the part of the judge. If the judge determines that there is actual partiality due to bias or prejudice, the recusal should last as long as the bias exists. If there is no actual bias, and the judge determines that his or her impartiality might reasonably be questioned, the judge should recuse himself for a reasonable period of time. The decision as to the period of recusal should be determined by the judge but should not exceed one year.

Canon 3(E)(1)(a) of the North Dakota Code of Judicial Conduct specifies that:

"A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning the party or a party's lawyer...."

The commentary to Section 3(E) states that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3(E)(1) apply." As the commentary bears out, both the Canon and its subsections are "intended to impose binding obligations" upon the judge. Therefore, a judge could be disqualified even if the judge has no personal bias or prejudice against the party's lawyer provided impartiality might reasonably be questioned.

Canon 2 of the North Dakota Code of Judicial Conduct specifies that "a judge shall avoid impropriety and the appearance of impropriety." The commentary to Canon 2 states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

This committee previously cited the North Dakota Supreme Court in Farm Credit Bank of St. Paul v. Brakke, 512 NW 2d 718 (ND 1994), and Sargent County Bank v. Wentworth, 500 NW 2d 862 (ND 1993) in analyzing the appearance of impartiality. The North Dakota Supreme Court, in speaking to the disqualification of a judge where impartiality might reasonably be questioned, noted that recusal is ultimately determined on the basis of whether a reasonable person could reasonably question the judge's impartiality and stated that "the appearance of

partiality test is one of reasonableness". See Farm Credit Bank at page 721. The Supreme Court had earlier concluded that "our primary concern is the preservation of public respect and confidence in the integrity of the judicial system, which 'can only be maintained if justice satisfies the appearance of justice'." See Sargent County Bank at page 877.

Previous decisions of this committee have recognized that evidence of actual partiality or bias is not required, but even the perception of partiality must result in disqualification in order to promote judicial integrity. This committee has also determined that reasonable persons might think that the bias of the complaining attorney's spouse would be shared by the judge such that the situation would fit within the parameters of Canon 3.

In light of the burden of keeping up the appearance as well as the reality of impartiality, Canon 3 mandates that the judge in this situation disqualify himself or herself. ND Code of Judicial Conduct Section 3(E)(1)(a). The enmity of the spouse might reasonably be assumed to be shared by the judge, even if in fact it is not. Non-recusal under these circumstance would lead to reasonable questions as to the judge's impartiality. In Farm Credit Bank at page 721, the Court stated that "it has been said that judges should err on the side of caution and always disqualify themselves in cases raising 'close questions'." It seems clear that the judge should make the determination as to when and how long to recuse. However, the committee determined that it was likely that a year after disposition of the ethical complaint, reasonable persons would cease to question the impartiality of the judge. Recognizing the need for judicial efficiency and the burden placed on the judiciary, the committee felt that the judge should make the decision as to the period of time of recusal not to exceed one year.

The committee also briefly analyzed whether reasonable questions of impartiality or impropriety arise when an associate of the accused lawyer appears before the judge. In this situation, the reasonable person might be carrying the imputation of animosity too far to suspect that the judge has animosity not only toward the accused lawyer but also toward associates of that lawyer. As with the application of most rules, the line must be drawn somewhere. The committee concluded that ending disqualification with the accused lawyer would be the common sense approach.

CONCLUSION

It appears mandatory that a judge, whose spouse is an attorney filing an ethical complaint to the State Bar Board against a local attorney, recuse himself or herself from hearing cases in which that attorney is appearing. Reasonable persons might believe that animosity of the complaining lawyer's spouse is shared by the judge. To preserve the public's interest in both the appearance and the reality of the judge's impartiality, recusal is recommended for a reasonable time considering the circumstances for a period not to exceed one year.