

ETHICS ADVISORY COMMITTEE

STATE OF NORTH DAKOTA

95-1

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 was the judge's political opponent in a prior judicial race, and if removal is required, for what period of time is the judge disqualified.

ANSWER

There should be some period during which the judge recuses himself from any proceeding in which a former opponent for judicial office serves as an attorney, whether or not there is actual bias or prejudice on the part of the judge. If in fact the judge considers 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, the length of the recusal period is governed by what is a reasonable time for the public perception to conclude that there is no bias. The decision as to the period of recusal should be determined by the judge.

Canon 3(E)(1)(a) of the North Dakota Code of Judicial Conduct specifies that "A judge shall disqualify himself or herself in an 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 . . ."

This rule addresses itself both to actual bias or lack of impartiality and the appearance of bias or lack of impartiality. This is indicated by the commentary to Canon 3(E) which states, "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3(E)(1) apply."

The North Dakota Code of Judicial Conduct became effective January 1, 1994. There has been no North Dakota Supreme Court decision interpreting this new Canon. The present Code was preceded by the Rules of Judicial Conduct. Section 3(C)(1)(a) of those Rules of Judicial Conduct contained language very similar to that contained in the Code of Judicial Conduct, Canon 3(E)(1), except for the fact that it applied only to a "party" and not a "party's lawyer." That rule was examined by the North Dakota Supreme Court in Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718 (N.D. 1994) where the court, in speaking to the disqualification of a judge where impartiality might reasonably be questioned, recognized that a decision as to recusal is 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." The Supreme Court had earlier, in examining the Rules of Judicial Conduct (the rules effective up to January 1, 1994) come to the same conclusion and pointed out 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'." Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993) (quoting Baier v. Hampton, 440 N.W.2d 712 (N.D. 1989)).

It is therefore clear that where the issue relates to a party before the judge, evidence of actual partiality or bias is not required, but in such a case the perception of partiality must result in disqualification in order to promote judicial integrity, even though there be no actual bias on the part of the judge.

The issue of disqualification where bias might arise out of the fact that a party's attorney was an opponent in a prior judicial race has been addressed at any length by only one judicial ethics committee that the Committee was able to find. The Judicial Inquiry Commission of the State of Alabama, on August 27, 1984, rendered an opinion which recognized that if facts exist arising out of the campaign, "which cause the judge to harbor a personal bias or prejudice towards the clients of the attorney because of his representation, or if other facts or circumstances exist which cause the judge's impartiality to be reasonably questioned, then the judge may be disqualified." In that opinion, the Judicial Inquiry Commission recognized that the canons are designed for the purpose of preventing not only partiality but the appearance of partiality.

The Committee concludes that there is at least an appearance of impartiality when a former opponent is an attorney in a proceeding before an incumbent judge, and that the period of the required recusal depends upon what period is determined to be a reasonable time considering the circumstances.

It seems clear that the judge should make the determination as to when and how long to recuse. In the Farm Credit Bank case, the court recognized that "although it has been said that judges should err on the side of caution and always disqualify themselves in cases raising 'close questions,' recusal is not required in response to spurious or vague charges of partiality," and the court went on to recognize the possibility of claims of partiality being used as a vehicle for such agendas as judge-shopping and the like. Farm Credit Bank of St. Paul v. Brakke supra, (citations omitted).

The Committee was also cognizant of the fact that, in any event, the attorney is left with recourse in that he or she can file a demand for change of judge pursuant to §29-15-21, N. D. Cent. Code.