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Jeffrey W. Stempel

University of Nevada, Las Vegas -- William S. Boyd School of Law

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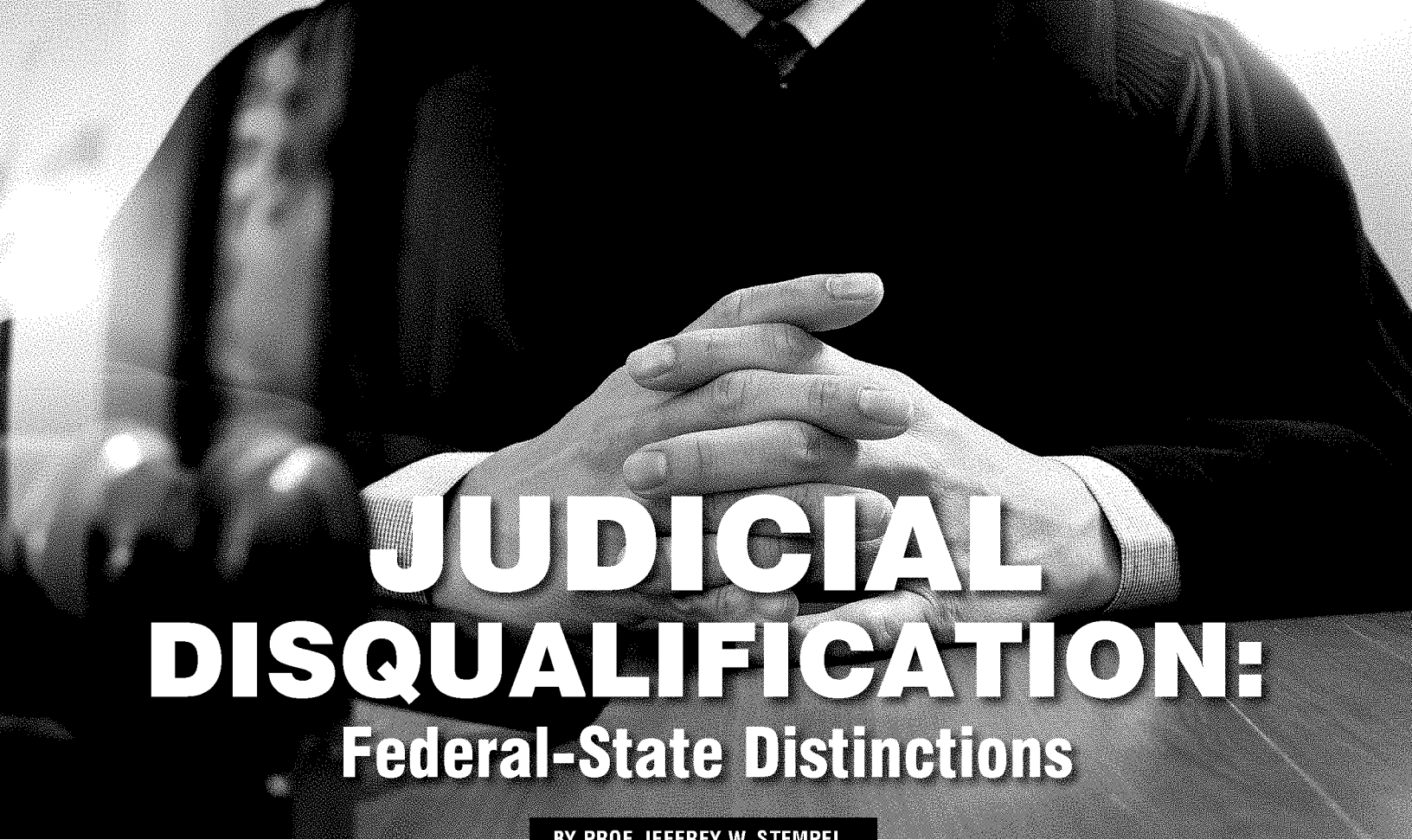


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JUDICIAL DISQUALIFICATION: Federal-State Distinctions

BY PROF. JEFFREY W. STEMPEL

Federal and state law regarding disqualification (aka recusal) of judges is both similar and different, requiring that counsel be aware of federal and state statutes, the Nevada Code of Judicial Conduct and even constitutional considerations.

Reasonable Question as to Impartiality

Although 28 U.S.C. §144 permits what appears to be automatic disqualification upon submission of an affidavit of judicial bias, the statute has been construed narrowly and is seldom used. The workhorse for federal judicial recusal is 28 U.S.C. §455, which requires disqualification where the judge has “a personal bias or prejudice concerning a party” §455(a) and provides that a judge “shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.” Nevada Code of Judicial Conduct Rule 2.11(A) contains the same language. The test is not whether the individual judge is actually biased or thinks he or she cannot be fair. Rather, the test is whether a reasonable, adequately informed observer would have reasonable concerns about the

judge’s ability to be impartial. This ground for recusal may be waived, but 28 U.S.C. §455(e) requires the waiver be preceded by a full disclosure. Nev. Jud. Code Rule 2.11(C) requires similar disclosure.

Reconciling the “Duty to Sit” and Disqualification

The legislative history of 28 U.S.C. §455 makes it quite clear that Congress intended to eliminate the “duty to sit” doctrine, but Nevada case law continues to recognize it. *See, e.g., Ham v. District Court*, 566 P.2d 420, 424 (Nev. 1977). But the court has not commented extensively on the doctrine in nearly 10 years, and in January 2010 it adopted a revised Code of Judicial Conduct that eliminated the earlier code’s express commentary favoring the doctrine. *See also Millen v. District Court*, 148 P.3d 694, 699-700 (Nev.

2006)(also describing operation of recusal lists maintained by state judges) (duty to sit must yield to concerns over fairness and impartiality as well as litigant’s right to chosen counsel). The duty-to-sit concept should not be interpreted as suggesting undue resistance to recusal but merely that judges should not use disqualification as an excuse for avoiding disfavored cases. Rule 2.7 (titled “Responsibility to Decide”) states that a judge “shall hear and decide matters assigned to the judge *except when disqualification is required by Rule 2.11 or other law*” (emphasis added). Comment [1] to Rule 2.7 explains that the admonition of the rule is designed to ensure that “a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues or involve difficult, controversial, or unpopular parties or lawyers.”

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Enumerated Grounds for Disqualification and the Federal-State Difference Re: Financial Interests

Nevada Code 2.11(B) and 28 U.S.C. §445(b) are virtually identical in setting forth grounds for required disqualification on the basis of what might be described as financial, professional and family affiliations. Both make disqualification automatic when the judge:

- Has “personal knowledge of disputed evidentiary facts concerning the proceeding” §455(b)(1); Rule 2.11(A)(1);
- Served as a lawyer in the matter or the judge’s former firm is involved in a matter or a lawyer in the firm is a “material witness” in the matter §455(b)(2); Rule 2.11(A)(2);
- Worked on the matter as a government attorney or other employee, is a material witness in the matter or “expressed an opinion” on the merits of a case while serving in government; §455(b)(3); Rule 2.11(B)(6)(b);
- Has a financial interest (either individually or as a fiduciary) in the “subject matter in controversy or in a party to the proceeding” or has “any other interest that could be substantially affected by the outcome of the proceeding,” a ground for disqualification that also applies to the judge’s spouse or “minor child residing in the household;” §455(b)(4); Rule 2.11(A)(3); and

The Rule 2.11 language refers specifically to an “economic interest,” defined as “ownership of more than a de minimis legal or equitable interest” and expressly defined not to include individual holdings within a mutual fund, interest in securities owned by a charitable organization, bank deposits or government

securities. In other words, state law takes a less rigid attitude toward financial conflicts than does federal law.

- Has a spouse or a relative “within the third degree of relationship [first cousins or closer]” or a cousin’s spouse who is a party in the matter or an officer, director or trustee of a party; a lawyer in the proceeding; is likely to be a material witness; or “[is] known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.” §455(b)(5); Rule 2.11(A)(2)(also requiring that the interest be “more than a de minimis interest”).

The federal statute (28 U.S.C. §455(e)) expressly provides that the financial grounds for disqualification are not waivable and that the financial interests of the judge, spouse or family need only be slight. Although the federal financial disqualification rules are rigid, the judge must “know” of the conflict. But 28 U.S.C. §455(c) requires the judge to “inform himself of his personal and fiduciary financial interests” and to “make a reasonable effort” to know about family finances. Where the judge becomes aware of the conflict “after substantial judicial time has been devoted to the matter” disqualification “is not required if the judge ... divests himself or herself of the [disqualifying] interest.” See 28 U.S.C. §455(f).

Nevada statutes may also apply. NRS 1.225 and NRS 1.230 provide for recusal “when implied bias exists in any of the following respects” and then lists grounds similar to those set forth in Rule 2.11(A) (and 28 U.S.C. 455(b)) but less comprehensively. The more recently adopted Code of Judicial Conduct provides a broader guide for assessing whether counsel has a legitimate ground for seeking disqualification. Procedure for seeking recusal is set forth in NRS 1.235.

Specific Differences Between State and Federal Disqualification

Peremptory Challenges

One major difference between federal and Nevada disqualification is that Nevada provides litigants with a right of automatic disqualification of the originally assigned judge: a “preemptory” challenge that can be used only once by a litigant and does not preclude subsequent motions for disqualification for cause. Nevada Civil Rule 48.1 states that in any civil action “each *side* is entitled, as a matter of right, to one change of judge” (emphasis added). It also sets forth the procedure for exercising the right or peremptory challenge and established the current fee of \$450. The right evaporates once the judge “has made any ruling on a contested matter or commenced hearing any contested matter in the action.” Nev. R. Civ. P. 48.1(5). There is no peremptory challenge right regarding “any judge who is assigned to or accepts a case from the overflow calendar or against a senior or pro tempore judge assigned by the supreme court to hear any civil matter” (Rule 48.1(5)). Further, Eighth Judicial District Court Rule 1.65(b) expressly states that peremptory challenge is unavailable in construction defect cases.

Campaign Contributions

Judicial elections raise the question of whether campaign support by a party or counsel can constitute grounds for recusal. Campaign contribution alone does not require disqualification. See *City of Las Vegas Downtown Redevelopment Agency v. District Court*, 5 P.3d 1059, 1062-63 (Nev. 2000).

Campaign Statements

Nevada requires disqualification where the judge, as either judge or judicial candidate, makes a statement other than in a judicial proceeding, decision or opinion “that commits or appears to commit the judge to reach a particular result or rule in a particular

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way in the proceeding in controversy.” See Nev. Code Jud. Conduct Rule 2.11(A)(5). However, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and its progeny place some First Amendment restrictions upon state regulation of judicial campaign speech.

Disqualification Required by the Due Process Protections of the U.S. Constitution

In rare cases, the U.S. Constitution may require disqualification of an assigned judge. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927)(unconstitutional for judge to hear case when salary paid from fines collected in such cases). The Constitution requires recusal where “the probability of actual bias on the part of the decisionmaker is too high to be constitutionally tolerable.” See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the court required recusal of a West Virginia justice who received roughly \$3.5 million of campaign support from the CEO of a coal company appealing a multi-million-dollar adverse judgment. Accord, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016)(due process required recusal of state court justice who prosecuted defendant prior to joining the bench)(“The Court asks ... whether as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias”)(internal quotation marks omitted).

In *State v. Rippo*, a defendant convicted in 1993 argued that the trial judge should have recused due to an ongoing criminal investigation of the judge involving allegations of bribery in which the prosecutors were involved. See *Rippo v. State*, 946 P.2d 1017 (Nev. 1997)(affirming original conviction on appeal; rejecting judicial bias claim). There is also the argument that the judge (eventually acquitted) would favor the prosecution in non-bribed cases to cover his tracks. This theory of “camouflaging bias” was recognized as potentially viable in *Bracy v. Gramley*, 520 U.S. 899 (1997). The Nevada Supreme Court rejected Rippo’s argument (*Rippo v. State*, 368 P.3d 729 (Nev. 2016)) but was reversed in *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017)(courts must ask “whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable”). See also *Rippo v. State*, 423 P.3d 1084, 1102 (Nev. 2018)(on remand) (discovery and hearing needed to examine allegations of judicial bias claim); *Rippo v. State*, 2018 Nev. LEXIS 111 (Dec. 7, 2018)(denying rehearing). **NL**

JEFFREY W. STEMPEL is the Doris S. & Theodore B. Lee Professor of Law at the William S. Boyd School of Law-UNLV.



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