Informal Opinion 17-02

September 15, 2017

Question: The justices of the Utah Supreme Court have asked whether any of them are required to recuse themselves from a case in which three members of the court are named in a complaint filed in the district court and the case is now before the supreme court.

Answer: The three members who are named must recuse themselves. The other two members may hear the case.

Discussion:

A Utah State prison inmate filed a lawsuit against several state trial and appellate court judges, including three justices of the Utah Supreme Court. The complaint alleges a violation of Utah Code § 78B-6-601, which provides:

> Any judge, whether acting individually or as a member of a court, who wrongfully and willfully refuses to allow a writ of habeas corpus whenever proper application has been made shall forfeit and pay a sum not exceeding $5,000 to the aggrieved party.

The three justices identified in the inmate's lawsuit had previously denied a petition for writ of certiorari on a lower court's decision denying his petition for a writ of habeas corpus.

In Informal Opinion 97-8, the Ethics Advisory Committee addressed the question of whether a judge is required to enter disqualification when the judge is sued by a party who has a case pending before the judge. The committee determined that "a lawsuit complaining of a judge's official actions would not automatically require the judge's disqualification." The committee relied on two principles for this conclusion: First, mandating disqualification would permit judge-shopping. And, second, under the extrajudicial source rule, facts supporting disqualification typically must come from an extrajudicial source and not be rooted in proceedings before the judge. Although judge-shopping is always a concern when judges are sued, in this situation the committee's focus is on the extrajudicial source rule.

When bias or prejudice is alleged, disqualification is required only when the bias or prejudice is "personal." See State v. Clark, 2005 UT 75, ¶ 31, 124 P.3d 235 ("[B]ias and prejudice are only improper . . . when they are personal.") The occurrences during court proceedings typically do not support disqualification because the interactions between judges and case participants are not personal. In Poulsen v. Frear, 946 P.2d 738, 742 (Utah Ct. App. 1997) the Utah Court of Appeals stated that a "judge's behavior toward a party during court proceedings must be extreme to warrant a finding of prejudice." The court explained further that disqualification "is warranted 'only, when it appear[s] that, apart from the judge's analysis of issues of fact or law, [the judge] [has] such a bias in favor of one party or prejudice against the other that [the judge] [cannot] fairly and impartially determine the issues.'" Id. (quoting

Orderville Irrigation Co. v. Glendale Irrigation Co., 409 P.2d 616, 621 (Utah 1965)) The Utah Supreme Court recognized this principle again in In re Inquiry Concerning a Judge, 2003 UT 35, ¶ 7, 81 P.3d 758, stating that "bias or prejudice must usually stem from an 'extrajudicial source,' not from occurrences in proceedings before the judge."

If the inmate had filed suit against the three justices in federal court, the extrajudicial source rule, as discussed in Informal Opinion 97-8, would allow the three justices to continue presiding over cases involving the inmate, even if the federal complaint asked for pecuniary damages against the justices. Such a lawsuit would be based on actions in the justices' judicial capacities and therefore the circumstances are not personal. The committee recognizes that judicial immunity protects judges from claims requesting monetary damages. Although not addressed in Informal Opinion 97-8, the fact that a judge is very unlikely to suffer financial consequences based on judicial acts may also be a factor in why disqualification is not automatic.

This case presents a unique situation in which a statute ostensibly creates a financial consequence for a judge based on a judicial decision. A judge who "wrongfully and willfully refuses to allow a writ of habeas corpus" could be named in a lawsuit. The committee believes that, for several reasons, the likelihood of a litigant successfully obtaining a $5,000 award against a judge is very low. Nevertheless, the committee cannot imagine any circumstance in which a judge may preside over a case in which the judge is named as a party, even if the case involves only judicial acts and even if liability is very unlikely. Thus, the three justices named in the lawsuit may not preside over the inmate's case.

The issue for the two remaining justices is whether they may consider a case in which their colleagues have been named as defendants, the allegations in the complaint are based on the judicial acts of those colleagues, and there is a possibility of a damages award. Because the complaint is based on judicial acts, the extrajudicial source rule applies. The question is then whether there are additional factors that make the situation personal.

In Informal Opinions 96-2 and 98-14, the committee determined that a judge must enter disqualification in any case involving an employee of the judge's district. The committee determined that a reasonable person could conclude that the judge and the employee have regular contact with each other, and therefore a judge would have a personal bias toward an employee who is a party. In Informal Opinion 01-2, the committee confirmed that Informal Opinions 96-2 and 98-14 also apply when a judge is a party. A judge generally may not preside over a case involving a judge of the same district.

The principle established in Information Opinions 96-2 and 98-14 was based on an employee being a party to a lawsuit in the employee's personal capacity. The fact that the judge and employee regularly interact, or appear to regularly interact, causes concern when the employee's personal interests are the subject of litigation. Although the interaction occurs in a professional capacity, the circumstances become personal when personal interests are at stake. The question is then whether the circumstances become personal when the case before the judge involves an employee or judge as a party, but the judge is reviewing official actions by the party.

The committee concludes that it does not.

The committee has issued two opinions that recognize exceptions to Informal Opinions 96-2 and 98-14. In Informal Opinion 99-4, the committee determined that a judge is not required to enter disqualification when the judge's clerk files an affidavit reciting facts in the court record. In Informal Opinion 01-2, the committee determined that a judge is not required to enter disqualification when asked to review an affidavit alleging bias against a judge in the district. The opinions confirm that disqualification is viewed differently when a judge is reviewing issues that are not personal for the employee or judge who is a party. This conclusion is confirmed in other contexts.

The supreme court justices are occasionally called upon to review the decision of a colleague. If a trial court judge or a court of appeals judge is appointed to the supreme court, a prior decision by that judge may subsequently be reviewed by the supreme court. Although the justice who issued the decision may not hear the case, the judge's colleagues are not disqualified. Also, although the members of the court work as a body, vigorous debate and active dissent are important aspects of an appellate court. Each justice is required to independently assess the facts and the law and decide accordingly. The justices are required to set aside personal differences and agree or disagree based on the merits of the case.

These circumstances are a step removed from one in which a judge is a party to the case under review, but they support the conclusion that reviewing the decision of a colleague, even when the colleague is a party, is not personal. Although the review is not personal, there may be additional circumstances unique to a particular case that will require disqualification. Relevant to this opinion are the questions of whether the justices have in fact shown bias or prejudice, and whether the potential financial penalty creates a circumstance in which personal bias would exist.

As noted in Informal Opinion 97-8, when alleged bias is based on a judicial source, the alleged bias will not require disqualification "unless it is so egregious as to destroy all semblance of fairness." The extrajudicial source rule requires recusal when the alleged bias was displayed during court proceedings and the alleged bias evidences "deep-seated antagonism" by the judge toward the party seeking recusal. See Informal Opinion 05-2. Rule 2.11 of the Code of Judicial Conduct requires disqualification when a judge is biased against or in favor of a party. If a judge exhibits deep-seated antagonism toward a colleague, the judge could not preside over a case involving that colleague, even though the case involves review of judicial acts. Likewise, if a judge had said or done anything evidencing unshakeable support or excessive favoritism for another judge, that could support a motion for disqualification. Thus, if a supreme court justice has expressed unwavering allegiance to the judicial opinions of a colleague, the justice may have exhibited excessive support or favoritism and the justice could not preside over a case involving that colleague. There is no evidence before the committee suggesting this circumstance exists on the current supreme court.

The final question is whether the potential statutory penalty here creates a possibility for personal bias even though the financial penalty would be based on a judicial decision. A financial penalty arising from a judge's personal actions would clearly require disqualification. However when the penalty is ostensibly based on judicial actions, the penalty does not

automatically create a circumstance in which personal bias exists. The potential penalty must be examined in more detail to determine whether personal bias could arise.

In this circumstance, whether the penalty creates a personal concern sufficient to overcome the extrajudicial source rule is determined by looking at factors such as the size of the penalty, the likelihood of the penalty, the likelihood the judge will be personally responsible, and the extent to which the reviewing judge's decision directly plays a role in whether damages are awarded. The possibility that the potential financial penalty could create personal bias is mitigated by several factors:

1. There is a legitimate question as to whether the statute can overcome judicial immunity.
2. If a ruling is issued in favor of the inmate, because the award is based on judicial acts, the judge's employer may be the one who in fact pays the award.
3. The statute establishes a set penalty. If the statute allowed discretion on damages there might be a different conclusion.
4. The two justices will not directly determine whether the three justices are liable. Rather, the two justices will review a lower court decision analyzing the statute. The justices will uphold the decision or remand for additional proceedings. The justices will not directly determine liability but will be reviewing another judge's determination on liability.

These considerations lead to the conclusion that the case will not become personal and therefore the extrajudicial source rule is not overcome. The penalty can be awarded only based on a judge's judicial act. The possibility of a monetary award against the justices is remote. The potential amount is low. And the two justices' roles are focused on the trial court judge who determines liability.

The committee recognizes that it is extending the extrajudicial source rule to a situation different from those usually contemplated by the rule. The rule is typically applied when a litigant attempts to use actions or statements made during legal proceedings by the judge whose qualifications are being challenged. The issue here is not the judicial actions of the two justices whose qualifications are being examined. The issue lies in the judicial decisions of colleagues and the professional interactions between colleagues. The extrajudicial source rule is easily extended to this situation. The review of a colleague's decision is judicial in nature. The facts supporting disqualification must be based on something other than that fact.

In conclusion, a justice may hear a case in which a colleague is named in an action under Utah Code § 78B-6-601. The extrajudicial source rule applies and the factors that have been discussed do not insert personal bias into a proceeding that involves judicial review of a decision that can only be made in a judicial capacity.