

STATE OF WASHINGTON  
ETHICS ADVISORY COMMITTEE  
ETHICS OPINION 18-03

Question

May an incumbent judge hear a case where the prosecuting attorney is running for election against the judge? If the answer is yes and the incumbent judge has a subjective belief that he or she can be fair and impartial toward the prosecutor/opposing candidate, is a disclosure of this relationship and subjective belief sufficient? If the prosecutor/opposing candidate, defense attorney, or defendant object, must the incumbent judge withdraw? Is the analysis different for a trial and/or dispositive motions as opposed to standard motions on the docket?

There are multiple prosecutors in this county, with the prosecutor/opposing candidate making regular appearances along with other prosecutors on full dockets. There are several judges in the county who rotate calendars on a weekly basis. Depending on each week's particular schedule, another judge could be made available to hear the cases from which this judge becomes disqualified. There could be situations where another judge is not available to hear the matter.

Answer

Several provisions of the Code of Judicial Conduct (CJC) are applicable to the question presented. A judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. CJC 1.2. And, a judge shall perform all duties fairly and impartially. CJC 2.2. A judge shall also perform the duties of judicial office without bias or prejudice. CJC 2.3(A).

With regard to disqualification, CJC 2.11(A) requires a judge to recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. If a judge has a personal bias or prejudice concerning a party or a party's lawyer, disqualification is required. CJC 2.11(A).

While the incumbent judge may have a subjective belief that he or she can be fair and impartial, an objective approach also must be taken in evaluating whether the

incumbent judge presiding over the court proceedings where an opposing candidate appears on behalf of a party gives an appearance of impropriety or partiality.

Previously, the committee has advised that when a public defender who is involved in a contested election with a judge, appears in front of the judge, the judge must disclose to the defendant on the record that the judge and the public defender/judicial candidate are involved in a contested election and offer to recuse. (02-21).

A judge is not necessarily required to recuse when an attorney in a case is also the judge's election opponent. However, in addition to the judge's subjective analysis of whether he or she can be fair and impartial, the judge also must objectively review whether the circumstances create a situation where the judge's ability to be fair and impartial may be reasonably questioned. A reasonable question as to the judge's ability to be fair and impartial could lead to an appearance of impropriety that would undermine the public confidence in the integrity and impartiality of the judiciary and requires recusal.

Thus, specific circumstances during a campaign that could compromise the public's confidence in the judge's ability to be fair and impartial must be subjectively and objectively evaluated. If, after this subjective and objective evaluation, the judicial officer believes his or her ability to be fair and impartial cannot be reasonably questioned, the judge need not recuse. However, the judge still must disclose the facts of the contested election on the record and offer to recuse.

This evaluation should be conducted in all matters where the opposing candidate appears before the incumbent judge. The evaluation should also be conducted even if the court has multiple judges and multiple prosecutors that are regularly available so cases can be transferred. Should a circumstance arise in which the incumbent judge is disqualified from hearing the matter and they are the only judge available, the rule of necessity referenced in CJC 2.11 Comment [3] should be reviewed to determine whether it is an appropriate exception based on the immediacy of the needed judicial action and the ability to transfer the matter to another judge.