

Advisory Opinion 08-01

Question

Can an Assistant City Attorney Supervisor (the “Employee”) who oversees the City Attorney’s prosecutions in Seattle Municipal Court’s Mental Health Court serve as a judge pro tem in King County District Court’s Mental Health Court?

Answer

Yes, so long as the Employee:

1. disqualifies himself from prosecuting or overseeing cases in his capacity as a City employee when his activities as a judge pro tem would impair, or even appear to impair, his independence of judgment in the performance of his official duties; and
2. does not use City resources to fulfill his responsibilities as a judge pro tem.

Facts

Both the City and the County have established Mental Health Courts in which prosecutors and defense attorneys collaborate to find the best outcome for criminal cases involving the mentally ill. The City attorneys who work in the City’s court still represent the City’s interest at all times, and attorneys for defendants – the same public defender agency holds the contract for both courts – still represent their clients’ interests at all times.

Western State Hospital (“WSH”) performs competency evaluations for both the City and the County. Competency evaluations are necessary to determine whether a defendant, as a result of mental disease or defect, lacks the capacity to proceed to trial. The Employee has worked with many WSH psychologists and psychiatrists in competency proceedings in the City’s Mental Health Court, in some cases defending their findings and in other cases challenging them.

Analysis

1. The Ethics Code requires that the Employee recuse himself from acting in his official City capacity whenever activities in which he engaged as a judge pro tem would impair, or appear to impair, his independent judgment in the performance of his City duties.

SMC 4.16.070.1.a provides that “[n]o City officer or employee shall:

Engage or have engaged in any transaction or activity, which is, or would to a reasonable person appear to be, in conflict with or incompatible with the proper discharge of official duties, or which impairs, or would to a reasonable person appear to impair,

the officer's or employee's independence of judgment or action in the performance of official duties and fail to disqualify him or herself from official action in those instances where the conflict occurs.

While sometimes the Commission's opinions have elided this fact, it is clear from the code that SMC 4.16.070.1.a does *not* prevent City officers or employees from engaging in outside activities. It instead requires that, having engaged in those outside activities, the officer or employee recuse him or herself from City actions when those outside activities might impair or appear to impair the officer or employee's independence of judgment. In other words, it is not for this Commission to say whether the Employee may or may not serve as a judge pro tem, or what cases he may hear and what cases he may not here. The Commission, instead, is charged with deciding which *City* matters the Employee would be required to disqualify himself from, should he elect to serve as a judge pro tem.¹

The Ethics Code requires that the Employee recuse himself from the City's prosecution of any individual over whose case the Employee presided as a Judge Pro Tem. Having been in the position to make judgments about the individual outside of the Employee's work for the City would, to a reasonable person, likely affect the Employee's judgments as a City employee. Such cases may also reflect well or poorly on decisions made by the Employee in his capacity as a Judge Pro Tem. This is true whether or not the individual's case before the County has formally ended.

Similarly, if the Employee in his capacity as a Judge Pro Tem makes credibility determinations regarding particular individuals, those determinations would at least appear to impair his judgments regarding those particular individuals as a City employee. Having determined that a particular WSH employee or law enforcement official was or was not credible in a County court proceeding, a reasonable person would question whether that WSH employee or law enforcement official would get a "fair shake" from the Employee acting in his official capacity as a City employee. Conversely, if the Employee makes no decisions regarding a person's credibility, or simply orders an evaluation of an individual, the Employee cannot be said to have engaged in an activity that would appear to impair his independent judgment when he fulfills his responsibilities as a City employee.

2. The Employee may not use City resources to facilitate his service as a Judge Pro Tem.

Since the Employee will be paid for his work as a Judge Pro Tem, his work will be akin to any other employee who has a side business. The Commission has long held that the use of City facilities to support an employee's side business is a violation of the Ethics Code, regardless of whether the use is *de minimis*. Accordingly, the employee may not use City facilities or City time to accomplish his duties as a Judge Pro Tem. If he received a call or e-mail that relates to

¹ At some point, the questions merge into one – employees whose outside activities would require them to disqualify themselves from a substantial amount of their job responsibilities would be wise not to engage in those outside activities. The Commission, however, believes that is a decision for employees to make, in consultation with their managers.

his work for the County, he should return the call or e-mail from a non-City facility, or from an area of a City facility that is open to the public.

Conclusion

The Ethics Code will not bar the Employee from serving as a Judge Pro Tem, or dictate which cases the Employee can hear. The Ethics Code reaches City officers and employees outside activities only to the extent that those activities may constitute a misuse of their official position, or give the employee an improper interest in a City contract, and the Employee's service as a Judge Pro Tem implicates neither of these two prohibitions.

The Ethics Code will, however, require the Employee to recuse himself from taking official actions involving individuals whose cases he hears as a Judge Pro Tem, or from taking official actions involving individuals whose credibility he has weighed in his capacity as a Judge Pro Tem. In such cases, the Employee's service as a Judge Pro Tem would impair or appear to impair his independent judgment.