

NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE

Opinion 2019-1

ISSUES

1. Whether appearing as a prosecutor in a case to handle routine administrative hearings like first appearances, preliminary hearings and scheduling conferences constitutes personal and substantial participation on the file such that a judge must recuse myself, when the actual decisions about the merits of the case are decided by another government attorney; and
2. Whether appearing as a prosecutor in a case to handle routine administrative hearings like first appearances, preliminary hearings and scheduling conferences constitutes public expression of an opinion concerning the merits of the matter in controversy, such that I must recuse myself, when the actual decisions about the merits of the case are decided by another government attorney.

ANALYSIS

Rule 1.2 of the North Dakota Code of Judicial Conduct provides: “A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.” More specifically, a judge’s impartiality may be questioned when the judge was previously involved in a case. Rule 2.11 provides, in part:

- A. A judge shall disqualify in any proceeding in which the judge's impartiality* might reasonably be questioned, including the following circumstances:

...

(5) The judge:

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the matter, or has publicly expressed in such capacity an opinion concerning the merits of the matter in controversy

...

A judge must avoid the appearance of impartiality. Personal and substantial involvement with a case or publically expressing an opinion on the matter could lead a reasonable person to question the judge’s impartiality, requiring recusal.

It is the opinion of the Committee that any involvement with a file while serving in governmental employment, such as assistant state’s attorney, constitutes personal and substantial involvement that could lead the public to reasonably question the judge’s impartiality. A case-by-case determination of whether recusal is necessary will need to be made by the judge. See State v. Ellis, 2009 MT 58, ¶ 4, 206 P.3d 564. Other jurisdictions follow a “six month rule” wherein a judge who previously worked in the county state’s attorney’s office, for the first six months on the bench, refrains from presiding over any cases coming out of that county office. Following the

six month period, the judge determines on a case-by-case basis whether recusal is necessary. The Committee suggests a six month rule followed by a case-by-case determination is reasonable.

It is the opinion of the Committee that merely working on a matter while with the state's attorney's office is not, in general, a public expression of opinion on the merits of the controversy. Rather, something more than handling an appearance for another attorney would be needed.

CONCLUSION

The Committee is of the opinion that any involvement with the case while with the state's attorney's office constitutes personal and substantial involvement requiring recusal. The Committee is of the opinion that merely working on a matter does not constitute a public opinion of the merits requiring recusal.