

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 04-02
(April 14, 2004)

**Disqualification in Cases in Which an Attorney Is the
Judicial Candidate in Opposition to the Judge**

Issues

1. Are incumbent judges required to disqualify themselves in cases filed by their announced opponents in judicial elections?

Answer: Yes, with qualifications.

2. If so, are successful incumbents required to disqualify themselves for a specific length of time following an election?

Answer: No.

Facts

A superior court judge who is required to stand for election every four years wants to know if he must disqualify himself in cases involving a local attorney who has announced that he is running against the judge in the fall election. The judge sits in a rural area with only a small number of attorneys. The attorney has indicated to the judge that he would prefer to have the judge continue to hear cases pending in that judge's division.

Discussion

Issue 1

This question is not specifically addressed in the Code of Judicial Conduct and can only be answered by considering several related canons. Canon 2A, for example, requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3E(1) elaborates on this standard by requiring a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer" In addition, Canon 3F (the remittal of disqualification section) states:

A judge disqualified by the terms of Section 3E may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If the parties and their lawyers after such disclosure and

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an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement should be incorporated in the record of the proceeding.

Lastly, we note that Canon 5B(1) provides that,

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit selection system or retention election: (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary”

While these canons provide a helpful framework for understanding how the code views impartiality, the commentary to Canon 3E(1) provides more specific guidance in addressing the issues raised here. "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in § 3E(1) apply." In addition, our prior opinions suggest that this inquiry is based on an objective, rather than subjective, standard. *See, e.g.*, Op. 01-02, Issue 1 ("Although the standard is an objective one, it is the appearance of partiality, more than the reality, that is at issue."); Op. 95-11 ("The test . . . [is] whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge could find that there is a reasonable basis for questioning the judge's impartiality," or whether "the facts known to the judge [would] suggest the appearance of impropriety to a reasonable person."). *See also* Op. 96-03 ("Disqualification depends on the circumstances and is required whenever there is an actual conflict of interest or one that would be *reasonably* perceived as such by the public.").

Although there has not been unanimity among the jurisdictions on this issue *See, e.g.*, Jeffrey M. Shaman, et al, *Judicial Conduct and Ethics* § 11.12 (2000), applying the foregoing principles here, we believe that an incumbent judge generally should recuse himself or herself from cases in which an announced, opposing candidate appears before the judge. *See* Fla. Op. 84-12. Stated another way, if a neutral, objective observer would reasonably question the judge's impartiality in a proceeding involving the attorney or opposing candidate, regardless of the judge's own, subjective view on the matter, Canon 3E(1) requires disqualification unless remittal occurs pursuant to Canon 3F. And, if the attorney (who is also the opposing candidate) or his or her client questions the incumbent judge's impartiality and do not consent to the judge's further participation in the case, the judge should recuse. Conversely, if a neutral, objective observer would not *reasonably* question the judge's impartiality, and particularly where (as here) the attorney or candidate expressly agrees to and prefers the judge sitting on the proceeding, the judge need not recuse, and the formal remittal requirements of Canon 3F need not be met. These results are compatible with the "reasonableness test" adopted in Opinion 95-11 for issues under Canon 3E(1).

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We caution, however, that we restrict this opinion to an *announced* candidacy. Mere rumors of a candidacy would not be sufficient to require disqualification, absent either personal bias, prejudice, or other extraordinary circumstances which raise a reasonable question as to the judge's impartiality.

We also note that simple notice from the potential attorney candidate to the judge that the attorney will be a candidate during an upcoming election would not be a circumstance in which the judge's impartiality would reasonably be questioned and, therefore, recusal would not be required at that point. Of course, if the judge developed a personal bias or prejudice from the notice of the candidacy, the judge would still have the responsibility to recuse himself.

Another issue pertaining to this inquiry deals with the availability of a judge to continue to hear a matter if there is no other judge available to handle it. The comments to Canon 3E(1) anticipate such a situation:

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Issue 2

Absent any personal bias, prejudice or the existence of extraordinary circumstances arising out of the campaign which would cause a reasonable question as to the judge's impartiality, a judge is not disqualified when the defeated political opponent of the judge represents a party in a post-election proceeding before that judge. *See Shaman, supra* and Ala. Op. 00-761; *see also Reach v. Reach*, 378 So. 2d 1115 (Ala. Ct. Civ. App. 1979). The judge must be cautious, however, that, if the particular circumstances might cause others to reasonably question the judge's impartiality, then he should recuse himself.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2 A, 3E(1), 3F and 5B(1) (1993).

Other References

Alabama Judicial Inquiry Commission, Advisory Opinion 00-761 (Sept. 7, 2000).

Arizona Judicial Ethics Advisory Committee, Opinions [95-11](#) (June 16, 1995); [96-03](#) (March 12, 1996); [01-02](#) (Dec. 31, 2001).

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Florida Supreme Court Commission on Standards of Conduct Governing Judges,
Opinion 84-12 (May 30, 1984).

Reach v. Reach, 378 So. 2d 1115 (Ala. Ct. Civ. App. 1979)

Jeffrey M. Shaman, et al, *Judicial Conduct and Ethics* § 11.12 (3d ed. 2000).