

# Quasi-Judicial, But Not Quasi-Ethical: Conflicts of Interest and Appearance of Fairness for Hearing Examiners

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## I. What ethical rules apply to hearing examiners?

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines.

*Fundamental Principles of Professional Conduct, Washington Rules of Professional Conduct.*

Hearing examiners face thorny conflict of interest and appearance of fairness issues, yet hearing examiners occupy a unique status with respect to the applicability of ethical rules. Hearing examiners serve a quasi-judicial function that is addressed only briefly by the Rules of Professional Conduct, as the Rules primarily address a lawyer's conduct when representing clients. The Code of Judicial Conduct applies only to judicial officers, not quasi-judicial officers such as hearing examiners. Several canons and rules in the Code provide helpful guidance, however, regarding appearance of fairness and conflict of interest issues both within and outside of hearings. For this reason, local hearing examiner rules and procedures sometimes reference and/or incorporate provisions of the Code. Finally, hearing examiners are subject to state law, as well as local rules and procedures, incorporating standards of conduct relating to conflicts of interest and the appearance of fairness.

We discuss below the guidance provided by the Rules of Professional Conduct and the Code of Judicial Conduct, as well as state law, regarding the appearance of fairness and conflicts of interest. In Section II, we provide some scenarios presenting conflict of interest and appearance of fairness issues for our consideration and discussion.

## A. Rules of Professional Conduct

The Rules of Professional Conduct ("RPCs") apply to all lawyers practicing in Washington State. Although many provisions of the RPCs apply to lawyer conduct when representing clients, some provisions relating to appearance of fairness and conflicts of interest do apply to lawyers working as hearing examiners. Some of these provisions are found in the Preamble to the RPCs, which preamble is for orientation purposes only, as only the text of the RPCs is authoritative. Additionally, while non-lawyers working as hearing examiners are not expressly bound by the RPCs, a violation could create appearance of fairness issues under state law or local hearing examiner rules and procedures.

The provisions of the RPCs most relevant to appearance of fairness and conflict of interest issues for hearing examiners include:

- **Preamble, Paragraph 4**

In all professional functions a lawyer should be competent, prompt and diligent.

- **Preamble, Paragraph 5**

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

- **Preamble, Paragraph 6**

In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

- **RPC 1.12 – Former Judge, Arbitrator, Mediator or Other Third-Party Neutral**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge *or other adjudicative officer* or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge *or other adjudicative officer* or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer or LLLT (Limited License Legal Technician) is disqualified by paragraph (a) of this Rule or LLLT RPC 1.12, no lawyer in a firm with which that lawyer or LLLT is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer or LLLT is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule. (Emphasis added.)

This latter rule expressly applies to hearing officers. See Comment [1]. "The term 'adjudicative officer' includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges."

## **B. Code of Judicial Conduct**

By its terms, the Code of Judicial Conduct (CJC) applies to individuals authorized to perform judicial functions, including judges, magistrate judges, court commissioners, and in some instances, part-time judges and judges pro tempore. Although the CJC does not expressly apply to hearing examiners,

some municipal procedures incorporate the provisions of the CJC as guidance for hearing examiner conduct. *See, e.g.,* King County Hearing Examiner Rule of Procedure XIII (“In the application of this rule the examiner will be guided by the provisions and interpretations of Canon 3 of the Code of Judicial Conduct.”) Moreover, as discussed further below, the appearance of fairness doctrine governs not only fairness in quasi-judicial proceedings, but the appearance of fairness. Thus, in order to comply with appearance of fairness principles, hearing examiners would be well-advised to be familiar with the CJC and to strive to comply with the provisions of the CJC relevant to hearing examiner conduct.

The provisions of the CJC most relevant to hearing examiners include:

- **Canon 1:** A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
  - **Rule 1.2 - Promoting Confidence in the Judiciary**  
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.\*
  - **Rule 1.3 - Avoiding Abuse of the Prestige of Judicial Office**  
A judge shall not abuse the prestige of judicial office to advance the personal or economic interests\* of the judge or others, or allow others to do so.
  
- **Canon 2:** A judge should perform the duties of judicial office impartially, competently, and diligently.
  - **Rule 2.2 - Impartiality and Fairness**  
A judge shall uphold and apply the law,\* and shall perform all duties of judicial office fairly and impartially.\*
  - **Rule 2.3 - Bias, Prejudice, and Harassment**
    - (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
    - (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment ...
    - (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.
    - (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making reference to factors that are relevant to an issue in a proceeding.
  - **Rule 2.4 - External Influences on Judicial Conduct**
    - (A) A judge shall not be swayed by public clamor, or fear of criticism.
    - (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.
    - (C) A judge shall not convey or authorize others to convey the impression that any person or organization is in a position to influence the judge.
  - **Rule 2.6 - Ensuring the Right to Be Heard**

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.\*
- (B) Consistent with controlling court rules, a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.
- **Rule 2.8 - Decorum, Demeanor, and Communication with Jurors**
  - (A) A judge shall require order and decorum in proceedings before the court.
  - (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

Canon 2 also includes detailed rules regarding Ex Parte Communications (Rule 2.9), Judicial Statements on Pending and Impending Cases (Rule 2.10), and Disqualification (Rule 2.11). Although hearing examiners are not bound to follow these rules, they may find helpful guidance in their provisions for challenging ethical questions. The full text of these rules is attached as **Appendix A**.

- **Canon 3:** A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
  - **Rule 3.1 - Extrajudicial Activities in General**  
 A judge may engage in extrajudicial activities, except as prohibited by law\* or this Code. However, when engaging in extrajudicial activities, a judge shall not:
    - (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
    - . . .
    - (C) participate in activities that would undermine the judge's independence,\* integrity,\* or impartiality;\*
    - (D) engage in conduct that would be coercive . . .

### C. Appearance of Fairness Under State Law

The judicially created "appearance of fairness doctrine" also applies to quasi-judicial proceedings and in many respects mirrors the canons and rules of the CJC. In particular, CJC Rule 1.2, 2.2, 2.3 and 2.4 set standards for judicial conduct that are directly analogous to the standards imposed by courts in applying the appearance of fairness doctrine. The doctrine is intended to protect against actual bias, improper influence, prejudice or favoritism. It is also aimed at curbing conditions that create an appearance of these conditions, or could undermine the integrity of the proceedings by causing suspicion, misinterpretation, prejudgment, partiality, and conflicts of interest. If an action is subject to the appearance of fairness doctrine, then all legally required public hearings, as well as the participating public officials, will be scrutinized for apparent fairness. See *Chrobuck v. Snohomish Co.*, 78 Wn.2d 858, 480 P.2d 489 (1971). Notably, the test for finding a violation of the appearance of fairness is the same in the judicial and quasi-judicial context. That inquiry is: would a disinterested person, having been apprised of the decision-maker's interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? *Swift v. Island Cnty.*, 87 Wn.2d 348, 361, 552 P.2d 175, 183 (1976);

see also *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 524-25, 145 P.3d 1208, 1212 (2006). If the answer is yes, then the decision must be voided.

Additionally, the legislature has adopted a statutory appearance of fairness doctrine applicable “to local land use decisions,” but “limited to the quasi-judicial actions of local decision-making bodies.” RCW 42.36.010. “Quasi-judicial actions of local decision-making bodies” include the actions of “the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.” RCW 42.36.010.

Some of the key provisions of this statutory appearance of fairness doctrine are as follows:

- **RCW 2.36.060 - Quasi-judicial proceedings — Ex parte communications prohibited, exceptions.**  
During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:
  - (1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and
  - (2) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.
- **RCW 42.36.080 - Disqualification based on doctrine — Time limitation for raising challenge.**  
Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.
- **RCW 42.36.110 - Right to fair hearing not impaired.**  
Nothing in this chapter prohibits challenges to local land use decisions where actual violations of an individual's right to a fair hearing can be demonstrated.
- Many local jurisdictions have adopted ethics codes or appearance of fairness doctrines.
  - See, e.g., Kitsap County Code 1.3.1 Appearance of Fairness - All proceedings before the Hearing Examiner are subject to the appearance of fairness doctrine and RCW 42.36.

## II. Practical Applications of Conflict of Interest and Appearance of Fairness Rules

Allegations implicating the appearance of fairness doctrine or raising conflicts of interest can have serious consequences. Washington courts have invalidated hearing examiner decisions because either the hearings appeared unfair or decision-makers with apparently improper motives failed to disqualify themselves from the decision-making process. In applying the appearance of fairness doctrine, the Washington Supreme Court has identified three major categories of bias that it has recognized as grounds for the disqualification of quasi-judicial decision-makers or subsequent invalidation of their decisions: personal interest, prejudgment of issues, and partiality. *Buell v. Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972). As noted above, each of these grounds reflect the admonitions in CJC Canons 1 and 2, Rules 1.2, 2.2-2.4.

These issues are explored in the various cases cited below, with related applications discussed in the FAQ's that follow.

### A. Personal Conflicts of Interest

While Rule 1.2 of the CJC requires a judge to avoid the appearance of impropriety generally, Rule 2.4 more specifically speaks to the problem of personal interest. The Rule states a “judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.” This requirement has been applied to hearing examiners through the appearance of fairness doctrine. Washington courts have ruled that hearing examiners violate the doctrine of the appearance of fairness by hearing matters in which their “personal interest” is implicated, even when the official does not actually stand to gain, but only appears to be personally interested. Examples of prohibited personal interest, or the appearance thereof, are below:

- **Financial Gain**

In *Swift v. Island County*, 87 Wn.2d 348, 552 P.2d 175 (1976), a conflict arose from the fact that the chairperson of the board of county commissioners was also a stockholder and chairperson of the board of the mortgagee of the affected development. In *Buell v. Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972), a planning commission member was disqualified because the value of his land increased as a result of a rezone of property next to his land. By contrast, the Court has also held that where a property is too far away to be directly benefitted by a rezone, no violation of the appearance of fairness occurs. See *Byers v. The Board of Clallam County Commissioners*, 84 Wn.2d 796, 529 P.2d 823 (1974).

- **Employment or Prospective Employment by Interested Person**

The appearance of fairness doctrine was violated when a planning commissioner involved in a rezone decision was employed by a bank holding a security interest in land that doubled in value due to the rezone. But the past employment of an official by a rezone applicant is not a violation of appearance of fairness. *Narrowview Preservation Association v. Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974); see also *Hayden v. Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981). The appearance of fairness doctrine was violated where the prospective employment of a city councilmember might appear to be based on his decision (retained as attorney for successful land use applicant). *Fleming v. Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972).

- **Associational Ties and Relationships**

Social or familial relationships between a decision-maker and parties to a hearing (or non-parties who have an interest in the outcome of the proceeding), should be disclosed and made part of the record. A violation of the appearance of fairness has been found where a decision maker's civic involvement with a group involved in a pending zoning application appeared to influence her decision. *Save A Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d. 862, 576 P.2d 401 (1978). In this case, the court commented that the rule "does not prohibit membership in community organizations; it prohibits participation in at least quasi-judicial proceedings when such membership demonstrates the existence of an interest which might substantially influence the individual's judgment."

## **B. Prejudgment of Issues**

The comment to CJC Rule 2.2 expressly states that judges should be open-minded. Although judges and public officials are not strictly prohibited from expressing opinions about general policy, decision-makers need to reserve judgment until after all the evidence has been presented. Impartiality in a proceeding may be undermined by a decision-maker's bias or prejudgment of a pending matter, or even the appearance of pre-judgment.

A decision-maker may be challenged under this doctrine for "prejudgment concerning issues of fact about parties in a particular case ... [or] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy..." *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972). Prejudgment and bias are thus to be distinguished from the ideological or policy leanings of a decision-maker. A challenger must present evidence of actual or potential bias to support an appearance of fairness claim. *Org. to Pres. Agr. Lands v. Adams Cnty.*, 128 Wn.2d 869, 890, 913 P.2d 793, 805 (1996).

## **C. Partiality**

CJC Rule 2.2 requires impartiality and fairness, while CJC Rule 1.2 expressly forbids partiality or the appearance thereof. Hearing examiners must be especially cognizant of the ways in which their personal activities or positions can suggest partiality in their duties. This is especially true in the case of part-time examiners, who may also have business interests or activities in their relevant jurisdictions apart from their roles as hearing examiners. Individuals in this position also should be careful not to run afoul of RPC 1.12. A hearing examiner may not represent in his or her capacity as a lawyer anyone in connection with a matter in which the examiner participated personally and substantially as the examiner. Moreover, lawyers at the examiner's firm may not represent such an individual unless the examiner is screened or the proper notice is provided.

These circumstances also present appearance of fairness concerns. For example, in *Hayden v. Pt. Townsend*, 28 Wn. App. 192 (1981), the planning commission chairperson, who advocated a particular rezone for his business, relinquished his position as chair of the hearing, and did not vote or otherwise participate in his official capacity. Nevertheless, an appearance of fairness violation occurred because the chairperson was "unquestionably active in supporting the rezoning application." The record reflected that the chairperson "prepared an environmental checklist in connection with the rezoning, actively answered questions about it, and sought to obtain the declaration of non-significance that was

finally issued by the city.” At the hearings on the matter, the chairperson “actively supported the rezoning application” and “was allowed by the planning commission to question other speakers, a privilege not accorded to any opponent of the rezoning or to anyone else” and “offered procedural advice to the temporary chairman.” As a result, the zoning decision was invalidated.

Similarly, in *Buell v. Bremerton*, an appearance of fairness violation occurred where the chairman of the planning commission had the possibility of interest in rezoned property by virtue of appreciation in his property values resulting from the rezoning. As a result, the Court invalidated the rezoning ordinance, regardless of fact that the action carried without the necessity of counting the chairman’s vote. The Court found that “the self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness.” “The importance of the appearance of fairness has resulted in the recognition that it is necessary only to show an interest that might have influenced a member of the commission and not that it actually so affected him.”

### **Frequently Asked Questions on the Appearance of Fairness Doctrine<sup>1</sup>**

1. What is an ex parte communication?

An ex parte communication is a one-sided discussion between a decision-maker and the proponent or opponent of a particular proposal that takes place outside of the formal hearing process on a quasi-judicial matter. No member of a decision-making body is allowed to engage in ex parte communication when quasi-judicial matters are pending.

2. How is it determined whether a matter is pending?

“Pending” means after the time the initial application is filed or after the time an appeal is filed with the local government. Thus, if a matter would come before the decision-maker *only* by appeal from a decision by the hearing examiner or planning commission, it is not considered pending with respect to councilmembers or until an appeal is filed. It would, however, be pending with respect to the hearing examiner or planning commissioners.

3. If a decision-maker announces before the hearing has even been held that her/his mind is already made up on a matter, what should be done?

The decision-maker should disqualify her/himself. See *Chrobuck v. Snohomish County*, 7 Wn.2d 858, 480 P.2d 489 (1971).

4. What should a decision-maker do if an appearance of fairness challenge is raised?

The challenged decision-maker should either refrain from participation or explain why the basis for the challenge does not require him or her to refrain.

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<sup>1</sup> Adapted from *The Appearance of Fairness Doctrine in Washington State*, Municipal Research and Services Center Report No. 32 (April 2011).



5. Are there any limitations on raising an appearance of fairness challenge?

Yes. Any claim of a violation must be made “as soon as the basis for disqualification is made known to the individual.” If the violation is not raised when it becomes known, or when it reasonably should have been known, the doctrine cannot be used to invalidate the decision. RCW 42.36.080.

6. If a violation is proved, what is the remedy?

The remedy for an appearance of fairness violation is to invalidate the local land use regulatory action. The result is that the matter will need to be reheard. Damages, however, cannot be imposed for a violation of the doctrine. *See Alger v. City of Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987).

7. Does the appearance of fairness doctrine prohibit a decision-maker from reviewing and considering written correspondence regarding matters to be decided in a quasi-judicial proceeding?

No. Decision-makers can accept written correspondence from anyone provided the correspondence is disclosed and made part of the record of the quasi-judicial proceeding. RCW 42.36.060.

8. What local government department oversees application of the appearance of fairness doctrine?

No person or body has the authority to oversee application of the appearance of fairness doctrine to members of a decision-making body. It is up to the individual members to determine whether the doctrine applies to them in a particular situation and to disqualify themselves if it does. A governing body probably has the authority to establish rules regarding the appearance of fairness based upon its statutory authority to establish rules of conduct.

### Topics for Discussion

1. In what respect is the appearance of fairness doctrine implicated by the hearing examiner’s control over the proceedings? Is the hearing fair if the examiner reprimands one or both party’s lawyers for inappropriate conduct during the hearing? What is the obligation of the hearing examiner to “rein in” counsel? *See CJC 2.3(C); Heeter Const., Inc. v. W. Virginia Human Rights Comm’n*, 217 W. Va. 583, 618 S.E.2d 592 (2005).
2. When a hearing examiner is also a lawyer in private practice, what restrictions should fall upon the examiner’s partners and associates? Can they practice before the tribunal? Can they take on work related to a matter that was before the examiner? *See e.g. Erickson v. State ex rel. Bd. of Med. Examiners*, 282 Mont. 367, 938 P.2d 625 (1997); CJC 2.4(B); RPC 1.12.
3. When does the personal speech or affiliations of a hearing examiner impact the appearance of fairness? For example, can a hearing examiner who is also a member of the Chamber of Commerce hear a matter impacting economic development in his or her town? Does a hearing

examiner face any limitations on his or her right of free expression? See e.g., *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978); See CJC 3.

## Appendix A

### Additional potentially relevant CJC provisions:

#### **Rule 2.9 - Ex Parte Communications**

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter,\* before that judge's court except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, or ex parte communication pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge affords the parties a reasonable opportunity to object and respond to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law\* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

#### **Rule 2.10 - Judicial Statements on Pending and Impending Cases**

(A) A judge shall not make any public statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending\* or impending\* in any court, or make any nonpublic statement that would reasonably be expected to substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

#### **Rule 2.11 - Disqualification**

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge\* of facts that are in dispute in the proceeding.

(2) The judge knows\* that the judge, the judge's spouse or domestic partner,\* or a person within the third degree of relationship\* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis\* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,\* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,\* has an economic interest\* in the subject matter in controversy or in a party to the proceeding.

(4) [Reserved]

(5) The judge, while a judge or a judicial candidate,\* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer or a material witness in the matter during such association;

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

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge disqualified by the terms of Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

(D) A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge's judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider:

- (1) the total amount of financial support provided by the party relative to the total amount of the financial support for the judge's election,
- (2) the timing between the financial support and the pendency of the matter, and
- (3) any additional circumstances pertaining to disqualification.

## Appendix B

### Sample Local Rules and Procedures

#### Conflicts of Interest and Appearance of Fairness

##### **Bellingham Municipal Code 2.56.040 Conflict of interest – Freedom from improper influence.**

The hearing examiner shall not conduct or participate in any hearing or decision in which the hearing examiner has a direct or indirect personal interest which might exert such influence upon the examiner that might improperly interfere with the decision-making process. Any actual or potential conflict of interest shall be disclosed to the parties immediately upon discovery of such conflict and the examiner shall abstain from any further proceedings in the matter unless all parties agree in writing to have the matter heard by that hearing examiner.

No person shall attempt to interfere with or improperly influence the hearing examiner in the performance of designated duties. This provision shall not prohibit the city attorney from providing legal advice to the hearing examiner.

##### **Bremerton Municipal Code 2.13.050 – Improper influence, conflict of interest and appearance of fairness.**

No city official, elective or appointive, shall attempt to influence the Administrative Hearing Examiner in any matter officially before him so as to constitute misconduct of a public office under Chapter 42.20 RCW or a violation of the appearance of fairness doctrine. No member of the council shall participate in any proceedings on appeal from the Administrative Hearing Examiner's decision if to do so will constitute a conflict of interest or violation of the appearance of fairness doctrine. The Administrative Hearing Examiner shall conduct all proceedings in a manner to avoid conflicts of interest or other misconduct and to avoid violations of the appearance of fairness doctrine. If such conflicts or violations cannot be avoided in a particular case, the examiner shall assign an examiner pro tem to act in his absence.

##### **Douglas County Code 2.13.060 Examiner—Conflict of interest and freedom from improper influence.**

(A) The examiner shall not conduct or participate in any hearing or decision in which the examiner or any of the following persons has a direct or substantial financial interest:

1. The examiner's spouse, brother, sister, child, parent, in-laws, partner; any business in which the examiner is then serving or has served within the previous two years; or
2. Any business with which such examiner is negotiating for or has an arrangement or understanding concerning possible partnership or employment. Any actual or potential interest shall be disclosed prior to such hearing.

(B) Participants in the land use regulatory process have the right, insofar as possible, to have the examiner, deputy examiner and board of county commissioners free from personal interest or prehearing contacts on land use regulatory matters considered by them. It is recognized that there is a countervailing public right to free access to public officials on any matter. Therefore, the examiner and board of county commissioners shall reveal any substantial interest or prehearing contact made with them concerning the proceeding, at the commencement of such proceeding. If such interest or contact impairs the examiner's or board of county commissioners member's ability to act on the matter, such person shall so state and shall abstain therefrom to the end that the proceeding is fair and has the appearance of fairness.

(C) Immediately after the announcement of any interest or prehearing contact, any person who objects to the interest or prehearing contact shall state the objection and any reasons supporting the objection. The failure to state such an objection at the time of announcement is deemed to be a waiver of the objection, therefore, this objection cannot be raised for the first time at any subsequent time.

(D) The examiner, deputy examiner, or board of commissioners member, upon hearing an objection, shall personally decide whether the interest or contact will impair his or her ability to be fair and impartial, and shall hear the case or abstain accordingly.

(E) No county commissioner, county official, or any other person shall interfere with or attempt to influence the examiner or deputy examiner in the performance of their designated duties; provided, that a county official or employee may, in the performance of his own official duties, provide information for the examiner or process a county case before the examiner, when such actions take place or are disclosed in the examiner's hearing or meeting.

**Lynnwood City Code 2.22.070 0 – Hearing examiner – Conflict of interest.**

No examiner shall conduct or participate in any hearing, decision or recommendation in which the examiner has a direct or indirect substantial financial or familiar interest, or concerning which the examiner has had substantial prehearing contacts with proponents or opponents wherein the issues were discussed; nor, on appeal from or review of an examiner's decision, shall any member of the legislative body who has such an interest or has had such contacts participate in the consideration thereof. This is not intended to prohibit necessary or proper inquiries on matters such as scheduling, but any such contacts are to be entered into the official record of the hearing. Whenever possible, such inquiries and the responses to such inquiries shall be in writing.

The office of the examiner shall be separate from and not a part of the community development department.

**Redmond City Code 4.28.080 Conflict of interest – Appearance of fairness.**

A Hearing Examiner shall be disqualified from involvement in actions in which the Examiner has a financial interest or in which the appearance of fairness doctrine codified in Chapter 42.36 RCW requires



disqualification. A financial interest shall be deemed to include, but not be limited to, their own interest or the interest of a client or employer. If the Examiner is disqualified or is otherwise unable to serve, the hearing shall be held by an alternate Hearing Examiner.

**Spokane County Code 1.46.040 – Qualifications.**

Examiners shall be appointed with regard to their qualifications for the duties of their office as established by the board of county commissioners. Examiners shall hold no other elective or appointive office or position in county government which is incompatible with the duties set forth herein.

**Thurston County Code 2.06.030 – Standards of conduct.**

(A) In order to assure an appearance of fairness in matters considered by the examiner or by the board on appeal, no person shall have an ex parte (one-sided) contact with the examiner or board regarding such matter, and no person, including government officials and employees, shall attempt to interfere with or influence the examiner or board outside a public hearing; provided, that a county official or employee may, in the performance of his official duties, provide information to the examiner when the action is disclosed at the hearing or meeting.

(B) No examiner shall conduct or participate in any hearing or decision in which the examiner may have a direct or indirect financial or personal interest or in which such conduct or participation would violate any rule of law applicable thereto.

**Whatcom County Code 20.92.130 – No interference with the hearing examiner.**

No county official or any other person shall interfere with the hearing examiner or pro tempore hearing examiner in the performance of his or her designated duties.

**Disqualification and Recusal**

**Bainbridge Island City Code 2.14.030 - Disqualification of hearing examiner.**

1. The hearing examiner on his or her own initiative may enter an order of disqualification in the event of personal bias or prejudice or to preserve the appearance of fairness.
2. Prior to any hearing on a matter, a party may file an affidavit, which is a sworn statement in writing and under oath, stating that such party cannot have a fair and impartial hearing by reason of the hearing examiner's personal bias or prejudice. The hearing examiner shall rule on the affidavit prior to making other ruling and prior to the hearing. No party shall be permitted to file more than one such affidavit under this section in regard to any one proceeding.

### **King County Hearing Examiner, Rules of Procedure XIII**

An examiner should disqualify himself/herself from a proceeding in which the examiner's impartiality might reasonably be questioned. However, the fact that an examiner has considered the same or a similar proposal in another hearing, or has made a ruling adverse to the interests of a party in this or another hearing, or has considered and ruled upon the same or a similar issue in the same or similar context, shall not be a basis for disqualification.

A request for disqualification shall be granted whenever the examiner:

- Has a personal bias or prejudice concerning a party;
- Has served in a professional or business relationship with respect to the matter in issue, or is currently associated with a person who is or was so engaged; or
- Has directly, or through a family member or fiduciary relationship, a financial or personal interest in the outcome of the matter or issue.

In the application of this rule the examiner will be guided by the provisions and interpretations of Canon 3 of the Code of Judicial Conduct.

### **Ex Parte Communications**

#### **Thurston County Hearing Examiner Procedures, Section 3: Ex Parte Communication**

3.1 a. No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Examiner shall communicate ex parte, directly or indirectly, with the Hearings Examiner concerning the merits of that or a factually related petition or application.

b. The Examiner shall not communicate ex parte directly or indirectly with any person, nor his or her agent, employee or representative, interested in a particular petition or application that is pending before the Examiner with regard to the merits of that, or a factually related, petition or application.

c. If a prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed on the record and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

d. This rule shall not prohibit ex parte communications concerning scheduling, logistics, pre-hearing motions, and similar procedural matters. Such permissible ex parte procedural communications should be directed to the Examiner's clerk at 2000 Lakeridge Drive SW, Building 1, Olympia, Washington 98502-6090. Email communications on procedural questions are permitted.

## Conduct of Hearings

### **Bainbridge Island Hearing Examiner Rule 2.1 – Expeditious Proceedings**

It is the policy of the Hearing Examiner that, to the extent practicable and consistent with requirements of law, all hearings shall be conducted expeditiously. In the conduct of such proceedings the Examiner, City staff, and all parties, or their agents, shall make every effort at each stage of a proceeding to avoid delay.

If you have any questions regarding this information, please contact:

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Jessica Skelton	<a href="mailto:Jessica.Skelton@pacificallawgroup.com">Jessica.Skelton@pacificallawgroup.com</a>	206.245.1710
Kymerly Evanson	<a href="mailto:Kymerly.Evanson@pacificallawgroup.com">Kymerly.Evanson@pacificallawgroup.com</a>	206.245.1725

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