

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

FORMAL ADVISORY ETHICS OPINION 16-02
(February 2, 2016)

**THE USE OF JUDICIAL TITLES AND PHOTOGRAPHS
BY PART B JUDGES**

Overview

The Judicial Ethics Advisory Committee (JEAC) has been asked for guidance on the propriety of Part B judges using judicial titles and photographs in connection with extrajudicial activities.

Factual Scenarios

1. A Part B judge wishes to use the word, “Honorable” or its abbreviation, “Hon.”, with or without the concomitant use of the word “Retired”, or its abbreviation, “Ret.”, in print or electronic advertisements for his or her private mediation service.
2. A Part B judge wishes to use the word, “Judge” with or without the concomitant use of the word “Retired”, or its abbreviation, “Ret.”, in print or electronic advertisements for his or her private law practice.
3. A Part B judge wishes to use a photograph of him or herself in judicial robes, whether in connection with 1. and 2. above, or not, in print or electronic advertisements for his or her private mediation service or private law practice.

Overview of Applicable Rules

The Application Section of the Arizona Code of Judicial Conduct includes a category of judge entitled, “Part B. Retired Judges Available for Assignment.”

Article 6, Section 20, of the Arizona Constitution provides, in part, that “Any retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court.”

Part B of the Application Section of the Code contains a list of rules a retired judge available for assignment to judicial service need not comply with (Rules 3.2, 3.3, 3.4, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, and 4.1(A)). For purposes of this opinion, Part B judges can participate in educational, religious, charitable, fraternal, or civic organizations and activities, accept appointments as private fiduciaries, serve

as private arbitrators and mediators, engage in the private practice of law, engage in various financial, business or other remunerative activities, and accept compensation for extrajudicial activities, without the restrictions imposed on full-time judges.

Rule 1.2 of the Code, entitled “Promoting Confidence in the Judiciary”, provides as follows: “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.” Comment 5 to Rule 1.2 states that “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, or fitness to serve as a judge.”

Rule 1.3 of the Code, entitled “Avoiding Abuse of the Prestige of Judicial Office”, provides, “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.” Comment 1 to Rule 1.3 provides, “It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.” Comment 4 to Rule 1.3 provides, “A judge who writes or contributes to publications of for-profit entities should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this rule or other applicable law. In contracts for publication of a judge’s writing, the judge should retain sufficient control over the advertising to avoid such exploitation.”

Discussion

Fully Retired Judges

Judges who fully and completely retire from judicial service are not subject to the Arizona Code of Judicial Conduct for conduct occurring on and after the effective date of their retirement. Fully and completely retired judges may use truthful, non-misleading, statements concerning prior judicial service in post-retirement commercial and other activities.¹ For example, a fully and completely retired judge

¹Of course, fully and completely retired judges who remain members of the State Bar of Arizona are still subject to the Arizona Rules of Professional Conduct and fully and completely retired judges are also subject to the rules and regulations that relate to any other license they maintain.

could refer to herself in an advertisement for her private arbitration and mediation services as “Former Judge on the Maricopa County Superior Court, 1995-2015”, or “Retired Maricopa County Superior Court Judge”. Using “Judge”, “Honorable” or “Hon.”, even in conjunction with “Former”, “Retired” or “Ret.”, could be misleading or otherwise problematic depending on the circumstances, but that would be an issue for the State Bar of Arizona under Rule 7.1 of the Arizona Rules of Professional Conduct (or other applicable rules) if the former judge remained a member of the State Bar. *See* Formal Opinion 95-391 (April 24, 1995) of the American Bar Association Standing Committee on Ethics and Professional Responsibility, entitled “Use of the Title “Judge” by Former Judge in the Practice of Law”. The committee stated, “We believe that the use of the title “Judge” in legal communications and pleadings, as well as on a law office nameplate or letterhead, is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield. In fact, there appears to be no reason for such use of the title other than to create such an expectation or to gain an unfair advantage over an opponent. Moreover, the use of judicial honorifics to refer to a lawyer may in fact give his client an unfair advantage over his opponents, particularly in the courtroom before a jury.”²

Retired Judges Continuing Judicial Service

Use of Judicial Title

Part B judges have retired from full-time judicial service, but are still part-time judges. The Code accommodates their retirement from full-time judicial service by reducing the number of rules they must comply with as set forth in Part B of the

² *See also* Florida Bar Standing Committee on Advertising Opinion A-09-1 (June 25, 2009)(“The Committee is of the opinion that lawyers should not use the term “Judge” preceding their names, regardless of whether a modifier such as “former” or “retired” is used, when they are actively engaged in the practice of law after leaving the bench. Such a use is misleading, as the person is no longer a judge, and it may lead the public to believe that the person has an ability to exert improper influence in the judicial system. The Committee therefore finds it improper to use the term as a title, or to use the term in any way that states or implies that the former judge or justice has special influence. On the other hand, the Committee believes that lawyers may properly provide accurate and truthful information to the public about their prior judicial experience. For example, a former judge may include in advertisements an accurate and truthful statement that he or she is a “retired circuit judge”, “former county judge” or “former general magistrate.””

Application Section of the Code. Part B judges must still comply with a wide variety of rules, including Rules 1.2 and 1.3 set forth above.

The committee is cognizant of the commercial free speech rights of judges, lawyers and others engaged in such activity. On the other hand, Part B judges are still judges and must not abuse the prestige of judicial office to advance their personal or economic interests. The free speech rights of judges can be restricted to promote the efficiency of the public services they perform and to protect the due process rights of litigants. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (“[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general”).

The committee is of the opinion that a Part B judge abuses the prestige of judicial office by including a reference to himself or herself as a retired judge in the advertisement of non-judicial activities the Part B judge is otherwise permitted to engage in.³ In Arizona JEAC Formal Advisory Ethics Opinion 03-06 (Use of Pro Tem Judge’s Title on Legal Stationery and in Advertising)(November 18, 2003), the committee stated as follows concerning Part C and D pro tem judges: “A lawyer who includes his or her judicial title in commercial advertising, while serving as a judge pro tem, lends the prestige of the judiciary to advance his or her own private interests, and impermissibly exploits the judge’s office. The people of this state are entitled to have judges who are primarily motivated by public service and not by any desire to trade upon a judicial title.” To conclude that a Part B judge who can engage in other remunerative activities is not also lending (and abusing) the prestige of the judiciary to advance his or her own private interests and impermissibly exploiting the judge’s office by using the judicial title in such activities would create an illogical double standard – one favorable to Part B judges and one unfavorable to Part C and D judges.⁴

³ As an initial matter, it is highly unlikely the general public understands that a Part B judge is retired, but still a part-time judge. How can one be a retired judge, but still be a part-time judge? Is the judge retired or not? The nuances of Part B, Part C, and Part D judicial status in the Arizona Code of Judicial Conduct are not well understood even by judges and lawyers.

⁴ While this opinion focuses on Rule 1.3, the committee is also of the view that using the title of judge in private remunerative activities while continuing to serve as a part-time judge violates Rule 1.2. Using judicial status for self-promotion in private business activities does not promote public confidence in the independence, integrity, and impartiality of the judiciary.

The foregoing conclusion is supported by judicial ethics advisory opinions in other jurisdictions. For example, in Advisory Opinion 2015-1 (January 27, 2015), the Minnesota Board on Judicial Standards reached the following conclusion regarding senior judges in Minnesota (which are essentially the same as Part B judges in Arizona):

An advertisement about a senior judge's availability to provide ADR services may include accurate and truthful statements about the judge's prior judicial service. However, ads, business cards and stationery used for ADR or advertising purposes may not use the word "Judge" as a title. Rule 3.11 cmt. 1; *see also* Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discip., Op. [2013-3] at 2, 9 (June 6, 2013) (opining that a retired judge who serves temporarily on a court by designation of the chief justice of the Ohio Supreme Court, when engaged in arbitration, mediation, or other business activities, should not use a judicial title, including but not limited to "Judge X," "Honorable X," "Hon. X," "Former Judge X," "Retired Judge X," and "Judge X (Ret.)."⁵ In addition, ADR

⁵ The syllabus of Opinion 2013-3 of the Ohio Supreme Court Board of Commissioners on Grievances & Discipline (Use of Judicial Titles by Former Judges)(June 6, 2013) succinctly summarizes its conclusions. It states, in part, "Former judges may not use judicial titles while practicing law, engaging in law-related or other business activities, working in government or other public section positions, or providing charity or community services. Former judges serving as retired assigned, acting, and private judges may use judicial titles in case-related entries orders, decisions, and correspondence. Former judges are permitted to describe past judicial service and experience in communications such as biographical sketches, resumes, and curricula vitae."

It should be noted that the Ohio Supreme Court amended the Ohio Rules of Professional Conduct effective June 1, 2014, to add the following provisions which supersede, in part, the advice in Opinion 2013-3:

Rule 8.2: JUDICIAL OFFICIALS

* * *

(c) A lawyer who is a retired or former judge or magistrate may use a title such as "justice," "judge," "magistrate," "Honorable," or "Hon.," when the title is preceded or followed by the word "retired," if the lawyer retired in good standing with the Supreme Court, or "former," if the lawyer involuntarily retired in good standing.

materials may not refer or allude to the judge's current status as a senior judge. *Id.* In addition, a senior judge may not appear in a robe in a photo advertising ADR services. *Id.*; Rule 1.3 cmt. 1.

Furthermore, in Judicial Ethics Opinion JE-115 (April 6, 2007), the Ethics Committee of the Kentucky Judiciary considered two questions relevant here. First, "Since serving as a mediator is allowed by Senior Judges[,] may I advertise myself as a "Senior Judge" or "Retired Judge"?" Second, "If not, may I state in my advertisement that I have "23 years of judicial experience" or "experienced as a trial and appellate judge"?" The committee responded as follows:

The Committee has concluded that the answer to question 1 is "no". First, a Senior Judge is not the same as a fully retired judge, because he or she continues to be governed by the Code of Judicial Ethics. Second, a Senior Judge advertising himself or herself as such would be promoting his or her self[-]interest, *i.e.*, the judge's mediation business. Canon 2D prohibits a judge from lending the prestige of judicial office to advance the judge's private interests. Canon 4(D)(1)(a) prohibits a judge from engaging in business dealings that may reasonably be perceived as exploiting the judge's judicial position. The Committee concludes that Senior Judges should not include a reference to themselves as "Senior Judge" in materials or statements designed to solicit mediation business, as this would amount to a special pleading that the Senior Judge's services were in some way different or better than those offered by others.

The Committee answers question 2 in the affirmative, and agrees that a Senior Judge may make strictly factual statements regarding his or her judicial experience in advertisements or similar promotion

(d) A lawyer who is a retired or former judge shall not state or imply that the lawyer's former service as a judge enables the lawyer to improperly influence a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comment

* * *

[4] This rule controls over any conflicts with Advisory Opinion 93-8 and Advisory Opinion 2013-3 of the Board of Commissioners on Grievances and Discipline.

materials. Thus, a Senior Judge is not prohibited from stating his or her judicial experience. There is no contradiction between the responses to questions 1 and 2, because a factual listing of judicial experience places the Senior Judge on a “level playing field” with others who are in the alternative dispute resolution business, and allows a prospective customer to select a mediator through the use of common criteria.

See also California Judges Association Opinion No. 12 (Use of Title “Judge”, “Retired,” on Letterhead)(February 1962)(A judge who does not intend to resume the practice of law may use “Judge, Retired” on his or her stationery. “However, the judge should not use such stationery in connection with the promotion of any business or charity.”).

Use of Judicial Robes

The committee also concludes that a Part B judge cannot use a photograph of the judge in judicial robes in connection with extrajudicial activities the Part B judge is otherwise permitted to engage in. This would clearly seek to invoke the prestige of judicial office to advance the personal or economic interests of the judge or others in violation of Rule 1.3. *Cf.* Arizona JEAC Formal Advisory Ethics Opinion 12-02 (Pro Tem Part-Time Judge – Need to Resign to Run for Non-Judicial Elective Office; Use of Photos as Judge in Campaign for Non-Judicial Office)(June 21, 2012)(“We conclude that a pro tempore part-time judge would abuse the prestige of judicial office by using photographs in a non-judicial campaign depicting him or herself in a judicial robe or sitting on the bench.”). *See also* Minnesota Board of Judicial Standards Advisory Opinion 2015-1 (January 27, 2015) as set forth above (“ . . . a senior judge may not appear in a robe in a photo advertising ADR services. . . . ”).

Advice

The committee is of the opinion that Part B judges may not ethically refer to themselves as judges, retired or otherwise, in connection with extra judicial activities they are otherwise permitted to engage in. Nor may they use photographs of themselves in judicial robes in connection with those activities. Part B judges may make accurate statements about their prior judicial experience in permitted extrajudicial activities such as “x years of judicial experience” or “experience as superior court judge” which is in the nature of biographical information that a customer would be entitled to know about a prospective service provider.