

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 95-17  
(August 25, 1995)

**Criminal Defense Attorneys Serving as Pro Tem Judges**

**Issues**

1. May criminal defense attorneys under contract with the county to represent indigent defendants serve as pro tem judges in criminal cases?

**Answer:** Yes.

2. May a criminal defense attorney serve as a pro tem judge on the criminal bench at any time?

**Answer:** Yes.

**Facts**

Opinion 95-08, regarding public lawyers serving as pro tem judges, does not directly answer whether attorneys in private practice who have contracts with the county to handle indigent defense criminal cases may serve as pro tem judges. The county has numerous attorneys under contract who handle criminal, juvenile, probate, and major felony cases.

Even if an attorney does not have an indigent defense contract, would it be ethical for a criminal defense attorney to serve as a judge pro tem on the criminal bench? The concern is that an attorney's opponent on Monday may show up as the judge in another case on Friday.

**Discussion**

Turning first to the latter question, it is answered by Section D(3) of the Application provisions of the Code of Judicial Conduct:

A pro tempore part-time judge who serves once or only sporadically in a specialized division of a court or in a court without specialized divisions may appear as a lawyer in such specialized division or court during such service.

Such occasional use of lawyers in private practice as pro tem judges almost always involves a use in the area of specialty of the serving lawyer. It involves, therefore, the risk that an opponent one day may be a judge on another day. Because our supreme court has indicated in the commentary to Section D that its purpose was "to allow the greatest possible use of part-time pro tempore judges to augment judicial resources," that a lawyer may be serially judge and opposing lawyer cannot serve to disqualify one from service as a pro-tem judge. We believe this commentary indicates that Opinion 87-21 of the Arizona State Bar Committee on Rules and Professional Conduct, issued before the amendments to the Application provisions, was incorrect in its contrary conclusion. The apparent premise of that

## Advisory Opinion 95-17

opinion that criminal defense advocacy is inconsistent with—gives "an appearance of impropriety" to—judicial neutrality is itself inconsistent with the concept of pro tem service, that lawyers can render valuable service to the public by using the knowledge acquired as advocates to resolve fairly the disputes of others.

Service as a criminal defense attorney and as an occasional pro tem criminal court judge being permissible, we see nothing in the Code that would preclude judicial service because public funds are used to pay for criminal defense services. Unlike prosecutors where the client is always the state and where service as a pro tem judge in any criminal case would involve judging a dispute where one party is the judge's continuing client, the criminal defense attorney's client is the indigent defendant, not the public entity making payment. If public payment does not disqualify one from serving the criminal defendant without conflict, it does not disqualify from serving as a judge.

Although we have decided here that contract public defenders are not ethically precluded from serving as pro tem judges, we must point out that this is a permissive standard and does not somehow give contract attorneys a right to sit as pro tem judges. Each jurisdiction may determine as a matter of policy the circumstances under which it will allow contract attorneys to serve as pro tem judges, consistent with the Application Section of the Code of Judicial Conduct.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Application of the Code, Section D (1993).

### **Other References**

Arizona Judicial Ethics Advisory Committee, Opinion [95-08](#) (May 3, 1995).

Arizona State Bar Committee on Rules and Professional Conduct, Opinion 87-21 (Sept. 18, 1987).