

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 98-06
(Reissued August 6, 1999)

**Propriety of Pro Tem Judge Serving as Private
Arbitrator or Mediator in the Same Case**

Issues

1. A pro tem part-time Superior Court judge, appointed pursuant to A.R.S. §12-141, *et seq.*, also acts as a non-court-appointed private arbitrator or mediator. As the result of a private mediation in a domestic relations matter, the issues get resolved, and the parties ask the court to issue a minute entry, based upon their stipulation, that the private mediator be assigned as a pro tem judge to take testimony and grant and sign a final decree. If the court issues the order, may the mediator take testimony and sign the decree as a pro tem judge?

Answer: Yes.

2. The pro tem judge is hired as a non-court-appointed private mediator in a civil case involving a lawsuit for personal injuries. The case does not settle after the first mediation session. The parties stipulate to ask the court to assign the entire case to the mediator, who then acts as a pro tem judge in the case for all purposes, including further mediation and a jury trial, if necessary. Can the pro tem judge handle the case?

Answer: Yes, but see the answers to issues three and four as to restrictions on the payment of compensation of the mediator/pro tem judge.

3. The parties hire the pro tem judge for private mediation and want him or her to act as the judge in court. They sign a stipulation and ask the trial court to issue an order assigning the mediator as their pro tem judge. May the mediator serve as a pro tem judge and still get paid by the parties in this situation?

Answer: The mediator may be paid by the parties only for services rendered as a private mediator. Once the court issues the order, and the mediator takes on the status of a pro tem judge, he or she can only be paid as provided by law for services rendered as a pro tem judge; the pro tem judge cannot be paid by the parties while acting in that capacity.

4. May the parties in a lawsuit stipulate to a pro tem judge and voluntarily agree to pay him or her?

Answer: No.

Advisory Opinion 98-06

Facts

This advisory opinion request comes from an attorney who, as part of his practice, acts as a non-court-appointed private mediator. For more than ten years, he has also served as a pro tem part-time judge in the superior court pursuant to A.R.S. §12-141, *et. seq.*

This mediator/pro tem judge has been involved in the various situations listed in the statement of the issues in which he has acted as the private mediator and has also been asked by the parties to act as the pro tem judge, subject to approval of the court, in order to finalize the proceedings by the entry of a judicial decree or eventual judgment. In each instance, the mediator/pro tem judge is paid by the parties and not by the county or the state. Also, in each instance, there have been *ex parte* communications with each of the parties, pursuant to the mediation process; this has all been done with the full knowledge, approval, and consent of all of the parties. With this full knowledge, the parties stipulate to the assignment of the mediator as the pro tem judge to finalize the agreements reached during mediation or, as in the second issue, to further mediate the issues as the pro tem judge or to conduct a jury trial, if necessary.

Discussion

Canon 4F of the Arizona Code of Judicial Conduct (“code”), relating to conduct of a judge’s extra-judicial activities, prohibits a judge from serving as an arbitrator or mediator or otherwise performing judicial functions in a private capacity unless expressly authorized by law. As the commentary to this canon notes, a judge is not prohibited from “participating in arbitration, mediation or settlement conferences performed as part of judicial duties.” A pro tem part-time judge, however, is specifically exempted from the provisions of Canon 4F in the Application Section of the code. Section D of the Application Section defines a pro tem part-time superior court judge as “a person appointed pursuant to Article 6, Section 31 of the Arizona Constitution . . . who serves on less than a full-time basis under a separate appointment by a presiding judge for each period of less than full-time service or for each case heard.” A pro tem judge who meets this definition is not required to comply “at any time” with Canon 4F. *See* Application Section D(1)(b).

Thus, the code does not prohibit a pro tem part-time judge from also acting as a private arbitrator or mediator in his or her non-judicial capacity or prevent the pro tem part-time judge from making a private arrangement with the parties for his or her compensation for the arbitration or mediation services rendered.

Canon 3B(7)(d), relating to a judge’s performance of the duties of the judicial office in an impartial and diligent manner, provides, in part:

(7) 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. 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 concerning a pending or impending proceeding except that:

Advisory Opinion 98-06

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

Under the provisions of the Application Section of the code and Canon 3B(7)(d), each of the first two issues presented are answered in the affirmative. Since the private arbitrator/mediator has been specifically requested by the parties to serve in the capacity of pro tem judge, there does not appear to be any potential for the appearance of impropriety, unless it arises out of the *ex parte* communications occurring while the pro tem judge is acting in his or her capacity as an arbitrator or mediator. But, the code does not prohibit such *ex parte* communications and, in fact, even a full-time judge can engage in *ex parte* communications in an effort to mediate or settle pending matters *if* it is done with the consent of the parties. Consent is the key factor. Because all of the scenarios set forth in the issues presented by this request are to be done with the prior knowledge, approval, and specific consent of all parties involved, there is nothing in the applicable canons prohibiting such activities.

Turning now to issues three and four regarding compensation for the services rendered, we find nothing in the code which addresses the issue as to whether the parties in a lawsuit may stipulate to a pro tem judge and voluntarily agree to pay him or her. However, under Rule 82(b)(1), Rules of the Supreme Court, this committee has the authority to render advisory opinions on proper judicial conduct, not only with respect to the provisions of the code, but also, with respect to “any other requirement of law applicable to judges. . . .” Therefore, we now consider the Arizona statutory and constitutional provisions applicable to judges and pro tem judges.

As originally enacted in 1971, A.R.S. §12-142, relating to, among other things, the salary of a pro tem judge, provided, in part:

C. The salary of a judge pro tempore shall be paid for the period of the appointment based on an annual salary equal to that of a superior court judge.

In 1993, the Arizona Legislature amended this paragraph to read as follows:

C. The salary of a judge pro tempore shall be paid for the period of the appointment based on an annual salary equal to that of a superior court judge. A judge pro tempore may agree in advance to donate any or all of his services.

The amended statute allows a pro tem judge to donate his or her services to the court system but does not specifically prohibit the pro tem judge from accepting voluntary payment from the parties. However, for the reasons discussed below, we believe that the Arizona Constitution and the conflict-of-interest statutes *do* prohibit either a full-time judge or a pro tem part-time judge from accepting compensation from the parties to a judicial proceeding.

Advisory Opinion 98-06

First, Article 6, Section 31, Arizona Constitution, authorizes the legislature to provide for the appointment of pro tem judges and states, in part, that, “[w]hen serving, any such person shall have all the judicial powers of a regular elected judge of the court to which he is appointed. A person so appointed shall receive such compensation as may be provided by law. . . .”

Second, A.R.S. §38-501, *et seq.*, relating to conflict of interest of public officers and employees, provides:

No public officer or employee may receive or agree to receive directly or indirectly compensation other than as provided by law for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is pending before the public agency of which he is a public officer or employee.

A.R.S. §38-505(A). “Public agency”, is defined as including “[a]ll courts.” A.R.S. §38-502(6)(a). “Public officer” means all elected and appointed officers of a public agency. A.R.S. §38-502(8)

When the provisions of Article 6, Section 31 are read together with the provisions of the conflict-of-interest statutes, it is clear that, when acting in a judicial capacity as either a full-time or pro tem part-time judge, a person is acting as a “public officer” and is prohibited from receiving, directly or indirectly, “compensation other than as provided by law.” Therefore, even though the code does not address the issue, it is our opinion that the constitutional and statutory provisions quoted above mandate that, even though the parties to a lawsuit may stipulate to a pro tem judge, they may *not* pay that person for his or her services while serving in a judicial capacity as a pro tem part-time judge. Under those circumstances, the pro tem part-time judge can either agree in advance to donate any or all of his services pursuant to A.R.S. §12-142 or the pro tem part-time judge can receive payment from the state and county pursuant to A.R.S. §12-143 for his or her services while acting in a judicial capacity.

Canon 4H allows a judge to receive compensation for “extra-judicial activities” permitted by the code “if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.” A pro tempore part-time judge is exempted from the provisions of Canon 4H by Section D of the Application Section of the code, and the code has no application to either the services rendered or the compensation received by the pro-tem judge while serving in the capacity of a non-court-appointed private arbitrator or mediator. However, when acting as a pro tem judge, the “activity” is a “judicial” activity and is controlled by the code; the payment of compensation is controlled by constitutional and statutory provisions.

Finally, we believe it appropriate to point out another statutory provision that may restrict private payment for some mediation or alternative dispute resolution proceedings. A.R.S. §12-134 provides:

Advisory Opinion 98-06

A. A court may refer cases to mediation and other alternative dispute resolution procedures to promote the resolution of cases filed in the court.

B. The board of supervisors in each county, in cooperation with the presiding judge of the superior court in the county, may establish a reasonable fee for alternative dispute resolution services provided by the court in the county. If a judicial officer provides the alternative dispute resolution services, a fee shall not be imposed. The superior court in each county shall transmit the fees collected pursuant to this section to the county treasurer for deposit in the local alternative dispute resolution fund established pursuant to §12-135.01.

It appears that these restrictions will apply to any situation in which a person is acting as either a pro tem judge or a private mediator when the mediation process is instituted by the court pursuant to this statute.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3B(7) (d), 4F, 4H and Application Section D (1993).

Other References

Arizona Constitution, Article 6, §31.

Arizona Revised Statutes §§ 12-141, 12-142(C), 12-143, 38-502 and 38-505.

Rules of the Supreme Court, Rule 82.

Revision History

Originally issued on December 30, 1998.

Revised and reissued on August 6, 1999.