

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 03-06
(November 18, 2003)

**Use of Pro Tem Judge's Title on Legal
Stationery and in Advertising**

Issue

Is it appropriate for attorneys currently serving as pro tempore judges to list their judicial titles on legal stationery and in advertising soliciting business?

Answer: No.

Facts

Many courts throughout the state rely on pro tem judges to help handle their large caseloads, and many lawyers have served in these positions over the years. Now, pursuant to Article 2, Section 31, of the Arizona Constitution and Supreme Court Administrative Order No. 2002-66, all pro tem judges, including those serving in non-record courts, must be licensed to practice law in this state. *See* Op. 02-06 (ethical constraints on lawyers serving as pro tem judges in limited jurisdiction courts). Because of the large number of practicing attorneys serving in these roles, a superior court judge has asked whether part-time pro tem judges may list their judicial title on their legal letterhead, and this committee is also aware that some currently serving pro tem judges have mentioned their judicial service in advertisements soliciting legal business.

Discussion

Obviously, the primary purpose of listing oneself as a judge pro tem on legal letterhead and in advertising is to impress current and prospective clients. There are two distinct issues suggested by such a practice: one concerns *accuracy* and the other concerns *exploitation of the judicial office*.

1. Accuracy

Pro tem judges must make only accurate representations of their judicial status. We are aware that the Code of Judicial Conduct does not contain an express general prohibition against misrepresentations. Even so, we believe that Canon 1A (requiring judges to uphold the integrity and independence of the judiciary) and Canon 2A (requiring judges to act at all times in a way that promotes public confidence in the integrity and impartiality of the judiciary) impose upon all judges the duty to avoid misrepresenting their status or qualifications. *Compare with* ER 7.1(a), Rules of Professional Conduct, Supreme Court Rule 42 (lawyers may not make false or misleading communications about their services). In addition, Canon 2 obligates judges to avoid impropriety and the appearance of impropriety

Advisory Opinion 03-06

in all activities. (Although Canons 2A and 2B do not apply to a pro tem part-time judge at all times, they do apply while the person serves as a judge. Section D(1)(a) of the Application of the Code of Judicial Conduct, referred to as “Application.” We believe that while a pro tem judge is currently authorized and available to accept assignments as a judge, he or she is serving as a judge for purposes of this opinion.) Misrepresentation certainly qualifies as impropriety.

A potential problem with lawyers advertising themselves as judges pro tem is that the use of the judicial title might suggest far more to the public than warranted by pro tem judicial status. It is doubtful that most members of the public know the difference between a permanent judge and a pro tem judge, and even those who are aware of a difference would be hard-pressed to explain the distinction in any detail. Pro tem judges are not selected in the same way as permanent judges, and they do not necessarily attend the same orientation, training, and judicial conferences as do permanent judges. Permanent judges are not allowed to practice law. Canon 4G. Similarly, full-time, pro tem judges cannot practice law during full-time judicial service. Application, Section E. By contrast, part-time pro tem judges who carry on the practice of law often serve sporadically, taking just a few cases a year. For all of these reasons, a statement that a lawyer is a pro tem judge, when made to laypersons to attract or keep legal business, is likely to mislead a significant portion of the intended audience.

We note a difference between what a lawyer/judge pro tem may do in commercial advertising and what such a person may do in running or applying for judicial office. When running or applying for office, pro tem judges may list a judicial title, provided they include enough information to convey an accurate impression of their service. Prior service as a pro tem judge is relevant to one’s qualifications for seeking a full-time judicial position. In Op. 98-03, however, this committee dealt with a pro tem judge who ran for the superior court and distributed flyers listing himself as “judge.” We disapproved of the candidate’s flyer because it was potentially misleading, but in doing so we allowed complete and accurate references to the judicial title:

Although there would appear to be no prohibition against the candidate setting forth his part-time, pro tem status in his list of qualifications, he should not simply use the title “judge” in his campaign literature without explanation since this is misleading to voters. In this instance, the candidate’s campaign literature should clearly explain that he is currently in private practice and that he sits as a part-time, pro tem judge, and cannot imply that he is currently a “judge” seeking re-election or election to a new division.

While there may be reasons to allow a mention of a judicial office in a campaign brochure, those reasons do not apply when a lawyer seeks to attract or retain business. In a campaign for judicial office, a candidate may well have an opponent with an incentive to point out any inaccuracy. Commercial advertisements, however, have no such check upon their accuracy, and in their efforts to attract potential clients the advertisements are more likely to convey the inaccurate impression that the advertising lawyer is a judge like any

Advisory Opinion 03-06

other judge. As noted in Op. 94-05, which disapproved of a judge's participation in a multi-level marketing business, there is a basic problem with a judge's commercial activities if "the public will find it difficult to separate the private and governmental roles of the judge." We consider it highly likely that many members of the public will not be able to distinguish between the pro tem judge's private practice of law and the judge's governmental service.

We are also concerned that the use of the judicial title in advertising might be misleading in another way, by suggesting that the lawyer/pro tem judge is in some special position to influence the decisions or actions of other judges before whom the lawyer appears. The South Carolina advisory committee condemned the commercial use of a lawyer and part-time judge's judicial title in part because of the attorney's ethical obligation to avoid false or misleading communications about the lawyer or the lawyer's services. "[A] communication is false or misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve, or state[s] or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other laws." South Carolina Adv. Op. 20-2000. We agree, and from a practical standpoint, we see a high likelihood that reference to a pro tem judicial title in a commercial context would be inaccurate, misleading, or misconstrued by the target audience.

2. Exploitation

Pro tem judges are exempt from several provisions of Canon 4D, but Canon 4D(1)(a) is not one of them. Application, Section D(1)(b). Therefore, pro tem judges may not engage in financial or business dealings that "may reasonably be perceived to exploit the judge's judicial position." Further, Canon 2B, which applies to pro tem judges while they are available to accept assignments as judicial officers, states in relevant part:

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

This committee has long been wary of judges who appear to involve their courts or judicial titles in money-making ventures. *See* Op. 92-12 (judge violates Canon 2B by knowingly permitting the judge's picture to appear in a brochure published by a computer manufacturer that indirectly endorses equipment and services); Op. 94-05 (judge violates Canons 4 and 2A by involvement in multi-level distribution scheme); Op. 95-21 (judge violates Canon 2B by writing letter supporting counseling service to be used in grant applications); Op. 00-08 (judge violates Canons 4J and 4A by listing the court in the Yellow Pages of the telephone directory).

The South Carolina advisory committee concluded that a lawyer could not ethically state in a newspaper advertisement that he or she was a part-time judge or knowingly allow the newspaper's staff to do so based on the lawyer's answer to a survey questionnaire. In a brief opinion, the committee stated:

Advisory Opinion 03-06

A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. Rule 501, Canon 2(B), SCACR. Furthermore, in contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. Rule 501, Canon 2(B) Commentary, SCACR

Therefore, a part-time judge may neither include in a paid advertisement section of a local newspaper for attorney services the fact that he/she is also a part-time judge, nor may he/she include in a survey that the judge knows will be used to write the advertisement that he/she is a judge.

South Carolina Op. 20-2000. 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.

This opinion deals only with pro tem judges who are attorneys and not with former or retired judges, whether permanent or pro tem. We note, however, that the American Bar Association has taken the position that a former judge who returns to the practice of law may not continue to use the titles "judge" or "honorable" because the use of such titles are "misleading" and "may be misunderstood by the public as suggesting some type of special influence." ABA Standing Committee on Ethics and Professional Responsibility, Op. 95-391 (April 24, 1995). We also note that lawyers who serve or have served as pro tem judges are also governed by the Rules of Professional Conduct—*see, e.g.*, ER 7.1(a)(1) and (2), and 7.1(p), Rule 42, Rules of the Supreme Court—and may wish to seek guidance from the state bar as to what constitutes appropriate advertising.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1A, 2A, 2B, 4D(1)(a), 4G, 5B(1)(d)(iii), and Application, Sections D(1)(a) and (b) and E (1993).

Other References

Arizona Constitution, Article 2, § 31.

Arizona Rules of Professional Conduct, ER 7.1(a). Rule 42, Rules of the Supreme Court.

Arizona Supreme Court, Administrative Order No. 2002-66.

Arizona Judicial Ethics Advisory Committee, Opinions [92-12](#) (Sept. 11, 1992); [94-05](#) (May 6, 1994); [95-21](#) (Dec. 1, 1995); [98-03](#) (April 17, 1998); [00-08](#) (Dec. 21, 2000).

American Bar Association, Standing Committee on Ethics and Professional Responsibility, Opinion 95-391 (April 24, 1995).

South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion 20-2000.