

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 06-02
April 25, 2006

Prompt Disposition of Judicial Matters

Issues

The Commission on Judicial Conduct (“the Commission”) has submitted the following seven questions:

1. What is the meaning of the phrase "prompt disposition of the court's business" in Canon 3B(8)?
2. Does Canon 3B(8) apply to all judges and judicial officers?
3. What is the relationship, if any, between "prompt disposition of the court's business" and the so-called sixty-day rule found in Rule 91(e), Rules of the Supreme Court of Arizona?
4. At what point is a matter presumed submitted for purposes of calculating the sixty-day rule?
5. What is the extent of a judge’s ethical responsibility under Canon 3B(8) and Rule 91(e) when the conduct of a judicial employee is the cause of the judge’s failure to rule on a timely basis?
6. Is the answer to question 5 affected by knowing that the judicial officer has no authority to direct, discipline, or terminate the judicial employee whose conduct has resulted in the judge’s violation of the canon and rule?
7. What considerations must a judge take into account in order to comply with Arizona Revised Statutes (“A.R.S.”) sections 11-424.02(A) and 12-128.01(A)?

In addition to these questions, the Maricopa County Justice of the Peace Association has submitted the following three related questions:

1. Has a justice of the peace, who has no supervisory authority over court clerks and has no authority to assign work to them, violated Canon 3B(8) if the judge receives a matter requiring a decision in an untimely manner from a court clerk?
2. Has a justice of the peace, with the same lack of control over court staff and case processing, failed to follow the law codified at A.R.S. § 11-424.02 if a court clerk does not provide the pleading in question to the judge until after the sixty day time period has expired?

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3. Has a justice of the peace, with the same lack of control over court staff and case processing, violated an ethical canon if a court clerk sets a hearing outside of a recognized time standard? Is the judge ethically liable if the hearing is set by a clerk, without the judge's knowledge, beyond the required time frame?

Facts

As the Judicial Ethics Advisory Committee, we are empowered only to give advice regarding the applicability of ethical canons to specific conduct. We do not determine the applicability of either Arizona Supreme Court rules or Arizona statutes. Therefore, we will not opine regarding possible violations of Arizona Supreme Court Rule 91(e) ("Rule 91(e)") or related statutes. Notwithstanding, we will discuss the interplay, or lack thereof, between Canon 3B(8) and Rule 91(e) and related statutes. Accordingly, we rephrase the submitted questions as follows:

1. What is the relationship, if any, between the requirements of Canon 3B(8) and those of related laws and rules?
2. What are the requirements of Canon 3B(8)?
3. How are violations of Canon 3B(8) determined?

Discussion

Given the complexity of the issues involved in this opinion, it is helpful at the outset to identify the various laws, rules and canons that relate to the responsibilities of a judge to conduct the business of a court in a prompt and timely manner. The state constitution states, "Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof. The supreme court shall by rule provide for the speedy disposition of all matters not decided within such period." Article VI § 21 Ariz. Const. This provision is reinforced by A.R.S. §§ 11-424.02(A) and 12-128.01 ("the related statutes") and Rule 91(e). Although we will not interpret what constitutes a "submitted matter" under Rule 91(e), we note that the rule has its origins in the 1912 constitution and that as late as 1995, the Arizona legislature had qualified the term "submission" as "[w]here briefs are filed, the action shall not be deemed submitted until the time for filing the briefs has expired." Ariz. R. Civ. Proc. 39(1) (abrogated Oct. 10, 2000). Lastly, Canon 3B(8) of the Code of Judicial Conduct ("the Code"), requires that "A judge shall dispose of all judicial matters promptly, efficiently and fairly."

The relevant issues in this discussion arise out of the Commission's perplexity when enforcing Canon 3B(8) in light of Rule 91(e) and the related statutes. Canon 3B(8) requires judges to rule "promptly, efficiently and fairly." This requirement relates to the ethical duties of judges with regard to the timely completion of their work and to their administrative responsibilities within the judicial process. *See* Canon 3B(8), American Bar Association, *Annotated Model Code of Judicial Conduct* 149 (2004). On the other hand, Rule 91(e) requires judges to make rulings within a specific time.

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Every matter submitted for determination to a judge of the superior court for decision shall be determined and a ruling made not later than sixty days from submission thereof, in accordance with Section 21. Article VI of the Arizona Constitution. Each superior court clerk shall report to the Administrative Director of the Courts, in writing, on the last day of March, June, September and December, in each year, all matters in that court submitted for decision sixty days or more prior to the date of such report and remaining undecided on the date of the report. The report shall contain the title of each action or proceeding, the matter submitted, the judge to whom submitted, and the date of submission.

Arizona statutes establish financial consequences for superior court judges and justices of the peace who violate this rule and a corresponding certification procedure that provides an administrative procedure for implementing the rule. With regard to superior court judges, A.R.S. § 12-128.01(A) provides that

A superior court judge or commissioner shall not receive his salary unless such judge or commissioner either certifies that no cause before such judge or commissioner remains pending and undetermined for sixty days after it has been submitted for decision or there is submitted by the chief justice of the Arizona supreme court a certification that such superior court judge or commissioner has been physically disabled during the preceding sixty days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.

See also A.R.S. § 11-424.02(A) (identical requirement for justices of the peace). The certification requirements in these statutes relate solely to Rule 91(e), not ethics, and it is not for this committee to construe the language of these statutes. Whether certification occurs is a determination independent from the ethical requirements of Canon 3B(8). Certification that complies with these statutes will not necessarily preclude a finding that a judge violated his or her ethical duties. Similarly, a failure to provide such certification will not necessarily qualify as an ethical violation.

The Commission reports that it frequently encounters problems determining whether a judge has violated Canon 3B(8), especially when the judge claims to have been unaware that the matter had been pending and undetermined for longer than sixty days. It thereby impliedly questions whether a violation of Rule 91(e) must automatically constitute a violation of Canon 3B(8) and, again impliedly, whether such compliance constitutes a safe harbor. It is in this context that we consider the application of Canon 3B(8).

1. Relationship between Canon 3B(8) and Rule 91(e)

Canon 3B(8) and Rule 91(e) serve wholly different purposes. The preamble to the Code of Judicial Conduct notes that the Code "is intended to establish standards for ethical conduct of judges." As such, "[t]he code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary

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agencies. It is not designed or intended as a basis for civil liability or criminal prosecution.” *Id.* Thus, a violation of Rule 91(e) is not a *per se* violation of Canon 3B(8), although it may serve as a starting point for an investigation of a complaint based on an alleged violation of the sixty-day rule. Conversely, compliance with Rule 91(e) does not serve as a safe harbor by precluding a finding of an ethical violation. Rather, in order to determine whether a judge has violated Canon 3B(8), the chief inquiry is whether the delay was reasonable under the particular circumstances, which requires a case-by-case review of the facts and circumstances involved in each alleged violation.

In contrast to the Canon, Rule 91(e) and the related statutes are founded upon administrative concerns, and there is no necessary connection between the ethical duties of judges and the administrative regulations that apply to them. This is not to say that a violation of Rule 91(e) or the related statutes may not also constitute ethical misconduct, because the code generally requires a judge to apply the law. *See, e.g.*, Canon 3B(2) (“A judge shall be faithful to the law and maintain professional competence in it.”); Adv. Op. 92-10 (judge has “an ethical as well as legal obligation to apply the law”). However, a violation of the Rule or a related statute is not *necessarily* a violation of Canon 3B(8) as well.

Neither the Arizona Supreme Court nor any other state court dealing with ethical and administrative rules similar to ours has applied a specific time limit violation in a draconian manner in determining whether an ethical violation has occurred. *In re Weeks*, for example, involved the censure of a justice of the peace who repeatedly failed to dispose of matters under advisement within a reasonable time and who repeatedly filed false affidavits stating he had no cases under advisement for more than sixty days. 134 Ariz. 521, 522, 658 P.2d 174, 175 (1983). In approving the Commission’s recommendation to publicly censure Weeks, the Arizona Supreme Court noted his “*unreasonable* delay in deciding matters under advisement,” especially in light of the requirements of A.R.S. § 11-424.02. *Id.* at 525, 658 P.2d at 178 (emphasis added). The Court explained that delay for “no *justifiable* reason . . . reflects adversely on the entire judicial system.” *Id.* (quoting E. Wayne Thode, *Reporters Notes to the 1972 Code of Judicial Conduct* 54-55 (1973) (“*Thode*”)) (emphasis added). In addition, our Supreme Court found that the filing of false affidavits brought the “integrity of the entire judicial system into question” and was “prejudicial to the administration of justice” even though it was stipulated that it “was not done intentionally knowingly, or recklessly . . . but due to an oversight” on Weeks’ part. *Id.*

Similarly, *In re Braun* involved a justice of the peace who was “habitually tardy in the conduct of court business.” 180 Ariz. 240, 241, 883 P.2d 996, 997 (1994). In particular, the Commission found that Braun had failed to rule on a case for 16 months and had taken over one year to set another case for trial. *Id.* Furthermore, the Commission found that Braun had

failed to administer competently, fairly and diligently the day-to-day operations of the Justice Court, to the detriment of court staff and litigants, as evidenced by reports and complaints from court staff. Respondent has ignored the needs and interests of witnesses and litigants by his constant lateness and irregular calendar[.]

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Id. The Commission had given earlier warnings to Braun about his “tardiness and administrative problems,” but to no avail. *Id.* at 242, 883 P.2d at 998. In light of these facts, the Arizona Supreme Court suspended Braun without pay for thirty days. *Id.*

Supreme courts in other states also have addressed the ethical duty of promptness. *In re Jensen*, for example, involved a California judge who repeatedly failed to adhere to that state’s ninety-day requirement to dispose of pending matters. 593 P.2d 200 (Cal. 1978) (applying Cal. Const. art. VI § 19). The California Supreme Court censured him, noting that, in addition to the repeated delays, Jensen filed false affidavits stating he had no undetermined cases pending for longer than ninety days. *Id.*

Under similar circumstances, the California Supreme Court censured a judge who “repeatedly and unjustifiably delayed filing decisions in cases submitted to his court.” *In re Creede, Jr.*, 729 P.2d 79 (Cal. 1986). The judge had also filed false affidavits regarding his docket. *Id.* The court publically censured him because, even though “[t]here was no credible evidence of actual prejudice from the delays, which were partially attributable to an excessive workload and inadequate support staff . . . [the judge] could have taken steps to monitor his cases and to dispose more promptly of submitted matters.” *Id.*

The above-cited cases involved not merely alleged violations of promptness, but judges who filed false affidavits in order to receive their paychecks. *See, e.g., In re Weeks*, 134 Ariz. at 522, 658 P.2d at 175; *In re Jensen*, 593 P.2d at 200. In these cases, the court focused on the unwarranted delays and the falsity of the affidavits rather than the fact that the judge had missed a specific deadline. *Id.* Similarly, in finding that a judge had improperly delayed in disposing of matters, the court noted that such delays were unjustified in light of the surrounding circumstances or the judge’s repeated failures in this regard. *See id.* The technical violation of an administrative rule, such as Rule 91(e), was never put forward as the sole basis for imposing discipline. Similarly, while the Arizona Supreme Court has noted that statutes like A.R.S. § 11-424.02 may be relevant in deciding the reasonableness of any delay, *In re Weeks*, 134 Ariz. at 524, 658 P.2d at 177, the court there did not rely solely on violations of the statute, but on Weeks’ repeated delays and his failure to improve in spite of the Commission’s “conscientious effort to assist [Weeks] in developing office procedures to prevent unnecessary delay.” *Id.* at 525, 658 P.2d at 178. Thus, these cases illustrate that an ethical violation of Canon 3B(8) will be found only after a review of the particular facts of each case.

2. Requirements of Canon 3B(8)

The mandate of Canon 3B(8) is broader than Rule 91(e), as is clear from its language: Canon 3B(8) covers “all judicial matters,” and is not limited like Rule 91(e) to “matters submitted for determination.” Thus, the Canon applies to prohibit *unjustifiable* delay in all aspects of the adjudicatory process, including delays in holding hearings or trials, delays in routine trial rulings, and delays in decisions on submitted matters. *See* Canon 3B(8), ABA, *Annotated Model Code, supra*, at 150; Canon 3B(1)-(7). Canon 3B(8) also requires a judge to be efficient and fair, while the application of Rule 91(e) is limited to the timing of rulings on “submitted” matters.

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The commentary on Canon 3B(8) elaborates on the duty it imposes:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

The annotation to the Canon states that the “[f]ailure of a judge to dispose promptly of the business of the court when there is no justifiable reason for delay reflects adversely on the entire judicial system.” See Canon 3B(8), ABA, *Annotated Model Code, supra*, at 149 (citing *Thode* at 54-55). Thus, the intent of the Canon was not to “create a new and independent requirement of fair decision-making” so much as to “ensure that the interests in fairness, efficiency and economy were properly balanced.” *Id.* (citing Lisa L. Milord, *The Development of the ABA Judicial Code* 21 (1992)).

A specific time frame is not established by Canon 3B(8), thereby allowing for the flexibility necessary to encompass the wide range of cases with which judges contend. In terms of ethics, "promptness" and "efficiency" can only be determined by a factual inquiry into the circumstances of each case. Under some circumstances, such as when urgent medical treatment is at issue, or in child custody matters, a determination made at the end of sixty days might not qualify as "prompt" under Canon 3B(8). In other circumstances, such as complex business contracts, a determination made after sixty days may well be "prompt" from an ethical standpoint, even if the judge risks being denied a paycheck under the statute requiring a certification of compliance with Rule 91(e).

3. How are violations of Canon 3B(8) determined?

In order to determine if a judge has violated Canon 3B(8), the chief inquiry is whether the delay was reasonable under the particular circumstances. Such a determination requires a case-by-case review of the facts and circumstances involved in each alleged violation. An ethical violation might not be found where the circumstances reveal an excusable, unintentional delay, a delay that occurred for reasons beyond the judge's control, or a delay about which the judge neither knew nor could have reasonably been expected to know. The latter situation might arise where a judge has no control over clerical staff and does not receive notice of a filing due to a clerical error. However, a factual inquiry into such a situation is still necessary in light of the commentary to Canon 3B(8) which notes that “[a]

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judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, *avoidable* delays and unnecessary costs.” Canon 3B(8), Commentary (emphasis added).

Other factors to consider include, but are not limited to, the duration of delay from the date the case was ripe for decision, the administrative and judicial workload of the judge, the judge’s other assignments, and whether the judge has displayed a pattern of unreasonably delaying matters. *See* Canon 3B(8), ABA, *Annotated Model Code, supra*. Again, however, the issue of whether a decision is ripe is a determination that must be made on a case-by-case basis. *See In re Weeks*, 134 Ariz. at 522, 658 P.2d at 175; *In re Jensen*, 593 P.2d at 200.

With regard to delays caused by a judge’s staff, the code mandates that “[a] judge shall require staff . . . subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.” Canon 3C(2). The code further provides that “[a] judge shall require staff . . . subject to the judge's direction and control to comply with the provisions of the code of conduct adopted for judicial employees by the supreme court.” Canon 3C(5). While the Code of Conduct for Judicial Employees does not have a specific timeliness directive equivalent to Canon 3B(8) or Rule 91(e), Canon 2A of the employee code provides that “[j]udicial employees shall respect and comply with the law.”

In order to determine whether a judge has violated Canon 3B(8), consideration must be given to what a judge knew or should have known given the extent of his or her control, or lack thereof, over a court administrator or clerk. A judge who does not make a “prompt” determination solely because of a clerical error may be found to have acted in accordance with the Canon. On the other hand, if the facts indicate that the judge is responsible to a significant degree for the delay—either because the judge ought to have inquired or known about a deadline, or because the judge failed to properly oversee the judicial employee—then the judge might be found to have violated Canons 3B or 3C.

For all the above reasons, we conclude that in order to determine whether a judge or justice of the peace has violated Canon 3B(8), the Commission must conduct a factual inquiry into the circumstances of each case. Furthermore, although violations of Rule 91(e) and related statutes may be relevant in such inquiry, they are not determinative.

Applicable Code Sections

American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), Canon 3B(8).

Arizona Code of Judicial Conduct, Canons 3B(1)-(7), 3B(8), 3C(2) and 3C(5) and related commentary.

Arizona Code of Conduct for Judicial Employees, Canon 2A (1997).

Legal References

Arizona Constitution, Article VI §§ 15 and 21.

Arizona Revised Statutes §§ 11-424.02(A) and 12-128.01(A).

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Arizona Rule of Civil Procedure 39(l).

Arizona Supreme Court Rule 91(e).

California Constitution, Article VI § 19.

In re Braun, 180 Ariz. 240, 241, 242 883 P.2d 996, 997, 998 (1994).

In re Jensen, 593 P.2d 200 (Cal. 1978).

In re Creede, Jr., 729 P.2d 79 (Cal. 1986).

In re Weeks, 134 Ariz. 521, 522, 524, 525 658 P.2d 174, 175, 177, 178 (1983).

Advisory Opinions

Arizona Judicial Ethics Advisory Committee, Opinion [92-10](#) (Sept. 1, 1992).

Other References

Lisa L. Milord, *The Development of the ABA Judicial Code* 21 (1992).

E. Wayne Thode, *Reporter's Notes, 1972 Code of Judicial Conduct* 54-55 (1973).