

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 81-01
(December 14, 1981)

**Contract and Compensation for Writing Book
On Civil or Criminal Practice and Procedure**

Issues

1. May a sitting full-time judge enter into a contract with a publishing company to write a book on Arizona civil or criminal practice and procedure?

Answer: Yes.

2. May a sitting full-time judge receive compensation and reimbursement for expenses in connection with the writing and sale of a book on Arizona civil or criminal practice and procedure?

Answer: Yes.

Discussion

Issue 1

It is the opinion of the Advisory Committee that a sitting full-time judge may properly enter into a contract with a publishing company for the writing of a book on the subject of Arizona civil or criminal practice and procedure, provided that such activity does not interfere with the judicial responsibilities of the judge, does not take place during normal court hours, and provided further that no court facilities, personnel, equipment or supplies are used in connection with the work.

Canon 4 of the Code of Judicial Conduct, 17A, A.R.S. Sup. Ct. Rules, Rule 45, provides in part that:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

- A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

Commentary to Canon 4 of the American Bar Association Code of Judicial Conduct provides that,

As a judicial officer and person specially learned in the law, the judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including the revision of substantive

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and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct*, 19 (1973).

Additionally, the *Reporter's Notes* set forth that, "A judge is encouraged to participate in quasi-judicial activities to the extent that participation does not interfere with the proper performance of his judicial duties, and with the further qualification that these activities should not cast doubt on his ability to decide impartially issues that may come before him." *Id.* at 74.

Finally, in his analysis of the then new ABA Code of Judicial Conduct, Dean Robert B. McKay of the New York University School of Law wrote,

Perhaps the Traynor Committee's most important decision in formulating the new Code was the agreement to develop separate categories for judicial, quasi-judicial, and extrajudicial activities "to provide a rational system for dealing with the many facets of a judge's activities." In thus recognizing that the life of a judge is multi-faceted, the committee was able to encourage activities, labeled quasi-judicial, for improvement of law, the legal system, and the administration of justice. In one of the relatively few instances in which mandatory language is not used, the Code uses the permissive "may" to describe the quasi-judicial activities in which a judge may engage "if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him."

Although some aspects of this canon appeared in old Canons 5, 23, 24, 31, and 33, most is new, particularly the affirmative representation that judges should participate in improving the law, the legal system, and the administration of justice. Canon 4 is designed not only to permit, but to encourage such activities so long as there is no interference with the essential judicial function. Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, Utah L. Rev. 391, 393-94 (1972).

Issue 2

It is the opinion of the committee that a sitting full-time judge may properly receive compensation and reimbursement for expenses in connection with the writing of a book on Arizona civil or criminal practice and procedure, provided that the source of such payment does not give the appearance of impropriety and that the compensation is reasonable for all persons engaged in similar activity. Specifically, Canon 6 of the Code of Judicial Conduct, 17A, A.R.S. Sup. Ct. Rules, Rule 45, provides that:

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the

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judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
- B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

The *Reporter's Notes* further provides, "The committee was of the opinion that a judge could properly accept compensation or reimbursement of expenses for permitted quasi-judicial and extra-judicial activities. Suggestions that compensation be banned for all outside activities were rejected as were suggestions for an arbitrary ceiling on compensation payments." Thode, *supra*, at 93.

Canon 5C(1) of the Code of Judicial Conduct, 17A, A.R.S. Sup. Ct. Rules, Rule 45, provides that: "A Judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves."

The *Reporter's Notes* points out that, "The aim is to prevent the appearance to litigants, lawyers, and the public that patronizing the business in which a judge is actively involved will work to the advantage of the litigant, or that failure to patronize the business will work to his disadvantage." *Id.* at 81.

It is the opinion of the committee that receipt by a judge for compensation and reimbursement of expenses in connection with appropriate writings on legal subjects does not violate Canon 5 of the Code of Judicial Conduct.

Further comment on this issue by Dean McKay states,

The committee found no substantial difficulty in permitting a judge to write or lecture on a legal issue, even to the extent of commending present law or proposing a new solution 'without compromising his capacity to decide impartially the very issue on which he has spoken or written.' This is an important clarification of an issue on which there has been honest doubt by honorable judges. It would have been illogical to impose silence on judges whose opinion on matters of law reform should be available to those who decide. As a consequence, judges may participate in cases on which they have already spoken in disagreement with the law they are asked to enforce. There is no reason to assume that a judge who has recommended change in a law will refuse to apply the disfavored statute or rule in accordance with prevailing doctrine. McKay, *supra*.

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The propriety of a judge receiving compensation for his legal writings is further supported by the opinion of Walter P. Armstrong, Jr., a member of the Special Committee on Standards of Judicial Conduct which drafted the ABA code, setting forth that, "Canons 4 and 5 presuppose that a judge may receive compensation for quasi-judicial and extra-judicial activities, and Canon 6 makes this explicit, provided the amount is reasonable and the source does not give the appearance of influencing him in his judicial duties or other impropriety." Walter P. Armstrong, *The Code of Judicial Conduct*, 26 Southwestern L.J. 708, 721 (1972).

Finally, Raymond L. Wise, in his work on legal ethics further supports the appropriateness of compensation to judges for their writings on the law by stating,

A judge is clearly entitled to engage in both quasi-and extra-judicial activities. Canon 4 provides guidelines for the quasi-judicial activities and Canon 5 for the extra-judicial activities.

Both kinds of conduct may be extensive, subject always to the requirements of Canon 2 to avoid impropriety and its appearance, and of Canon 3 to perform the duties of his office impartially and diligently.

It is equally clear that a judge is entitled to be paid reasonable compensation for both quasi- and extra-judicial activities, if it is no more than would ordinarily be paid to a non-judge. Likewise he is entitled to reimbursement for expenses reasonably incurred in the course of such activity, including, where appropriate, the reasonable expenses for his wife." Raymond L. Wise, *Legal Ethics (1979 Supplement)* at 657-58.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2, 3, 4, 5C(1) and 6 (1975).

Other References

E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct*, American Bar Association (1973).

Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, Utah L. Rev. 391, 393-94 (1972).

Raymond L. Wise, *Legal Ethics (1979 Supplement)*, New York: Matthew Bender (1979).

Walter P. Armstrong, *The Code of Judicial Conduct*, 26 Southwestern L.J. 708, 721 (1972).