

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 88-02
(May 11, 1988)

**Membership on Statutory Committee
Or State Hospital Advisory Board**

Issues

1. May a judge ethically serve as a member of the Fund Manager Committee in accordance with A.R.S. §38-848 (A)(2)?

Answer: No.

2. May a judge ethically serve as a member of the Arizona State Hospital Advisory Board in accordance with A.R.S. §36-217 (A)(4) and (5)?

Answer: No.

Discussion

The Advisory Committee was requested to consider the questions in view of Canon 5G of the Code of Judicial Conduct, which reads:

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

We do not consider the questions on the basis of Canon 5G inasmuch as the committee encountered a constitutional problem as to whether a judge is eligible to undertake the extrajudicial activity in question. This problem is set forth in greater detail in the discussion which follows:

The question, which the committee raises on its own motion, arises from the Arizona Constitution Article 6, § 28, which provides:

Justices and judges of courts of record shall not be eligible for any other public office or for any other public employment during their term of office, except that they may assume another judicial office, and upon qualifying therefore, the office formerly held shall become vacant. . . . (Addition approved, election November 8, 1960, effective December 9, 1960. Amendment approved election November 5, 1974, effective December 6, 1974).

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The source of the above constitutional provision was Arizona Constitution former Article 6 §§ 11 and 12. The historical note advises that: "The 1974 amendment substituted 'shall not be eligible for any other public office or for any other public employment.'"

The source of constitutional provision, i.e., Article 6, § 11 was interpreted by the Arizona Supreme court in *City of Phoenix v. Pensinger*, 73 Ariz. 420, 242 P.2d 546 (1952), to invalidate an amendment to the charter of the City of Phoenix which, in effect, constituted a majority of the judges of the Superior Court of Maricopa County as a nominating commission to submit a list of three duly licensed and practicing attorneys to the city manager from which he was to select the city magistrate. The court held:

The charter amendment attempts to make a majority of the judges of the Superior Court of Maricopa County a nominating board for candidates for appointment to the office of city magistrate of the City of Phoenix. This proposed duty cannot be imposed upon them nor could they in their official capacity perform the duty. It clearly appears that the questioned provision of the amendment is in direct conflict with the above-quoted constitutional clause. *Id.* at 421.

The Arizona Supreme Court in *State v. Osborne*, 14 Ariz. 185, 125 P. 884 (1912), held that an act which provided for an election canvassing board to consist of the governor, secretary of state, and chief justice of the supreme court, violated Article 6, § 11, of the constitution which makes judges of the supreme court ineligible to any office not a judicial one. See also *Stapleton v. Frohmiller*, 53 Ariz. 11 (1938), where the Arizona Supreme Court discusses the distinction between a public office and public employment which is also prohibited to judges by the Arizona constitutional section in question. The definition of "officer" or "public officer" is found at A.R.S. § 38-101(3), which provides:

"Officer" or "public officer" means the incumbent of any office, member of any board or commission, or his deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer.

Although §38-101(1) defines office, board or commission as one "the salary or compensation of the incumbent or members of which is paid from a fund raised by taxation or by public revenue," in light of *Pensinger*, supra, we do not believe the absence of a salary or compensation takes an otherwise public officer or employment outside the ambit of Article 6, § 28.

Canon 1 of the Code of Judicial Conduct requires that a judge uphold the integrity and independence of the judiciary. Canon 2 requires that judges avoid impropriety and the appearance of impropriety in all activities. Judges upon undertaking the judicial office are sworn to uphold the Constitution of the State of Arizona. Accordingly, we conclude that judges cannot ethically hold the extrajudicial offices in question.

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Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1, 2 and 5G (1985).

Other References

Article 6, §§ 8, 11, 12 and 28, *Arizona Constitution* (1974).

A.R.S. §§ 38-101(1) and (3) *City of Phoenix, v. Pensinger*, 73 Ariz. 420, 242 P.2d 546 (1952).

State v. Osborne, 14 Ariz. 185, 125 P. 884 (1912).

Stapleton v. Frohmiller, 53 Ariz. 11 (1938).