

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 90-06
(March 27, 1990)

**Ethical Constraints on Lawyers Serving as
Hearing Officers or Commissioners**

Issues

1. May justice court small claims division hearing officers appointed pursuant to A.R.S. § 22-506 practice: (a) in the superior court which has appellate jurisdiction over the particular justice court where the lawyer serves as an uncompensated hearing officer; (b) before the justice of the peace of the precinct in which he is appointed as a hearing officer; and (c) before another justice of the peace in the precinct in which he is appointed as a hearing officer?

Answer: Yes, in all three situations.

2. May an attorney who is appointed by the presiding judge as a family law referee or court commissioner pursuant to A.R.S. § 12-298, who is restricted to cases brought pursuant to Title IV(D) of the Social Security Act practice: (a) in the superior court of the State of Arizona; (b) in the superior court in the county in which he serves; and (c) before the presiding judge of the superior court in the county in which he serves?

Answer: Yes, if the attorney is appointed a referee; no, if appointed a commissioner.

3. Would the fact that the attorney who is appointed as a family law referee or court commissioner acts as petitioner's counsel in non-Title IV (D) cases brought for support under the provisions of the Uniform Reciprocal Enforcement Support Act affect that individual's ability to serve as a family law referee or court commissioner in Title IV(D) cases. *See* 42 U.S.C. § 651 *et seq.* dealing with the enforcement of child support obligations under federal law.

Answer: Yes, if the attorney is appointed a referee; no, if appointed a commissioner.

4. May an attorney who is appointed by the presiding juvenile court judge as a judge pro tempore of the juvenile court practice before that same judge in non-juvenile matters?

Answer: No.

Discussion

The compliance section of the Code of Judicial Conduct, 17A A.R.S., Rule 81 of the Rules of the Supreme Court, provides as follows:

This Code shall govern all of the justices and judges of all the courts in Arizona's judicial system performing judicial functions, including an officer

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such as a court commissioner, justice of the peace and city or town magistrate. All judges should comply with this Code except as provided below:

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

...

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

These portions of the Compliance Section pertain to the following analysis of the issues described above.

Issue 1

1. The statutory scheme for small claims matters is designed so that the proceedings are informal. A small claims hearing officer functions much like an arbitrator, and by statute, they are appointed pursuant to A.R.S. § 22-506 to serve without pay.

Small claims division hearing officers perform a valuable pro bono service for the community. They fall into the part-time judge classification of Rule 81(A) inasmuch as their pro bono participation constitutes less compensation than a full-time judge, and their service is on a basis allowing time for another profession.

Accordingly, the strictures of the Compliance Section precluding part-time judges from practicing law "in the court on which he serves or in any court subject to the appellate jurisdiction of the court," applies but is of little moment for two reasons. First, attorneys at law are not permitted to practice in the small claims division except upon written stipulation by the parties. A.R.S. §§ 22-512(B) and (C). Thus, small claims division hearing officers would be precluded from appearing in the small claims division except by stipulation of the parties. Because there is no appeal from a small claims division decision, and the hearing officer's decision is final, there is no preclusion under the Compliance Section from his practicing law in superior court, there being no appellate jurisdiction from the small claims division vested therein.

We find no basis for precluding the small claims hearing officer from practicing in the justice court in view of the separation of the small claims division and its function and distinctness from the overall justice court operation. Of course, any such practitioner must abide by other rules of judicial ethics and legal ethics which may come into play as a result of the hearing officer's activities. Obvious examples would include small claims division cases involving the hearing officers' legal clients or adversaries.

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Issue 2

Referees and commissioners are appointed by the Superior Court Presiding Judge under A.R.S. § 12-298 and are paid "reasonable compensation . . . fixed by the presiding judge." From the compensation aspect they fall within the Rule 81(A) definition of a part-time judge. The applicability of the rule, however, differs depending upon whether the person is appointed as a referee or appointed as a commissioner. By statute, A.R.S. § 12-298(C), a referee is granted the powers of a master under Arizona Rules of Civil Procedure 53, 16 A.R.S. Accordingly, referees make recommendations to the superior court which the court may adopt, modify in whole or in part, or recommit to the referee with instructions. Referees do not render decisions. The rule does not apply to referees. Masters do not come within the scope of Rule 81(A) and because A.R.S. § 12-298(C) equates referees with masters, their role in superior court is not that of a part-time judge.

Commissioners appointed under A.R.S. § 12-298 have all the powers granted to court commissioners under Rules of the Supreme Court 91, 17A A.R.S. Their role is clearly judicial in nature and they must abide by Rule 81. The rule states that a part-time judge "Should not practice law in the court on which he serves." There is only one superior court in Arizona. Const., Art. 6, § 13. An individual, while serving as a court commissioner, may not practice in the superior court as that is "the court on which he serves." Nor may he practice in justice court or city court as the court on which he serves exercises appellate jurisdiction over those courts.

Issue 3

An attorney who is appointed as a family law referee can act as counsel to a petitioner in Title IV(D) cases as Rule 81(A) does not apply to referees as discussed above.

An attorney who is appointed as a court commissioner cannot so act.

Issue 4

The juvenile court is part of the superior court; it is not a separate entity. An attorney who is serving as a judge pro-tempore of the juvenile court cannot practice before the superior court while so serving.

Concluding Comment

We note also that Advisory Opinion 88-01 discussed the applicability of the Canons of Judicial Ethics to part-time judges and judges pro tempore. Those individuals are subject to the restrictions set forth in this opinion while so serving.

Applicable Code Sections

Arizona Code of Judicial Conduct, 17A A.R.S., Supreme Court Rules, Rule 81(A), Compliance Section (1985).

Other References

Arizona Revised Statutes, §§ 12-298(C), 22-506, and 22-512(B) and (C).

Arizona Constitution, Article 6, § 13.

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Arizona Judicial Ethics Advisory Committee, Opinion [88-01](#) (May 20, 1988).

Arizona Rules of Civil Procedure 531, 26 A.R.S.

Rules of the Supreme Court 91, 17A A.R.S.

42 U.S.C. § 651 *et seq.* (Title IV(D) of the Social Security Act).

Notice

The Arizona Supreme Court has approved several changes in the Application Section of the code as a result of this opinion. Readers are urged to consult the current version of the code.