

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 94-08  
(July 20, 1994)

**Ethical Constraints on Public Lawyers  
Serving as Pro Tem Judges**

**Issue**

1. May an Assistant Attorney General serve as a pro tempore appellate judge?

**Answer:** No.

2. May an Assistant County Attorney serve as a pro tempore City Magistrate?

**Answer:** No.

**Discussion**

In *Matter of Walker*, 153 Ariz. 307, 310, 736 P.2d 790, 793 (1987), the Arizona Supreme Court stated:

The separation of powers doctrine is a fundamental principle on which federal, state, and local governments are based. The doctrine protects the common interest of the public by requiring that those who make the law be different from those who execute and apply it. Comments, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U.CHIL.Rev. 993, 1001-02 (1986). Thus, the doctrine decreases the potential for a government to be controlled by one faction. *Id.* at 1002. To protect against unchecked power, it is necessary not only to have separate branches of government but also to have separate personnel in each branch. *Id.* at 1003.

*See also* Advisory Opinion 88-03 quoting from *Matter of Walker*.

In *State ex rel. Colorado River Comm'n v. Frohmiller*, 46 Ariz. 413, 52 P.2d 483 (1935), the court held that an assistant attorney general was as much an officer of the executive branch as the attorney general. Logic would extend the holding to include that an assistant county attorney is as much an officer of the executive branch as the county attorney.

Canon 1 requires that judges act to preserve an independent judiciary, one aspect of which is effective separation of the judiciary from the executive and legislative branches of the government. It, therefore, as noted in *Walker*, precludes a member of the executive or legislative branch from acting as a judge. This position is bolstered, as to courts of record, by Article 6, Section 28 of the Arizona Constitution which states: "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." While the constitution addresses the issue of a judge holding another public office, we believe that the corollary also holds true; no one holding another public office shall serve as a justice or judge of a court of record.

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The final issue is whether the proscriptions of the Arizona Constitution and Canon 1 apply as the persons involved are serving as judges pro tempore. We believe they do. In Opinion 93-03, we stated, "By virtue of the 'Application' section, the entire Code of Judicial Conduct covers pro tempore judges except for the handful of provisions from which pro tems are specifically exempted." These exceptions do not exempt Canon 1 for any judge. We believe it would be illogical not to apply the restrictions of the constitution to judges pro tempore of courts of record.

Based on the foregoing, a small group of lawyers are not eligible to serve as pro tempore judges, either on the court of appeals or other courts. These include all attorneys general, county attorneys, city attorneys and public defenders.

Advisory Opinion 89-01 which states that an attorney in a county public defender's office can sit as a justice of the peace is withdrawn.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canon 1 (1993).

### **Other References**

Arizona Constitution, Article 6, § 28.

*Matter of Walker*, 153 Ariz. 307, 736 P.2d 790 (1987).

*State ex rel. Colorado River Comm'n v. Frohmiller*, 46 Ariz. 413, 52 P.2d 483 (1935).

Arizona Judicial Ethics Advisory Committee, Opinions [88-03](#) (May 11, 1988); [89-01](#) (July 6, 1989); [93-03](#) (Sept. 2, 1993).