

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 97-04  
(April 22, 1997)

**Continuing Participation by Judge in Corporation  
Organized Before Taking the Bench**

**Issues**

1. May a judge be a director and officer of a company that invests in real estate when the only other shareholder is not a member of the family?

**Answer:** No.

2. Is a judge required to divest himself of stock ownership in a corporation that he organized many years before taking the bench?

**Answer:** No.

**Facts**

Several years prior to becoming a judge, an attorney incorporated a small company to invest in commercial buildings. As time went on, all of the investors, except for the attorney and one other person, dropped out of the company and sold their shares to the remaining shareholders. The attorney subsequently became a judge and now owns an equal share of the corporation with the other shareholder, who is not a member of his family. The judge is the president and treasurer of the corporation, and the other shareholder is vice-president and secretary.

**Discussion**

Canon 4D(2) of the Code of Judicial Conduct states that “[a] judge may, subject to the requirements of this code, hold and manage investments of the judge and members of the judge’s family, including real estate, and engage in other remunerative activity.” The next Canon, 4D(3), provides:

A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this code, manage and participate in:

- (a) a business closely held by the judge or members of the judge’s family, or
- (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.

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In commenting on these canons, legal scholars have noted that the rationale for the prohibition on business activity is to avoid having a judge spend too much time away from judicial matters, to avoid real or apparent exploitation of judicial office, and to avoid actual or apparent partiality. They question, however, whether prohibiting management of a small non-family business, while permitting unlimited passive investment, serves the rationale. Shaman, *et al.*, §7.14. We also note that there is a potential for financial setback that may accompany an appointment or election to a judgeship.

We have previously examined some of these considerations in advising that judges may not engage in a multi-level distribution business. Opinion 94-05. Our supreme court has recently emphasized the importance of Canon 4D(3). In *In Re Fleischman*, the court held, *inter alia*, that “[w]hen a judge gives business advice to a person or entity other than one closely held by the judge or members of the judge’s family, he or she serves as an advisor in violation of Canon 4D(3), even when the advice is limited to one contract.”

Although the logic of the prohibitions may be argued, our code makes a sharp distinction between passive and active business investment and between family only and non-family businesses. Our reading of the code gives us two definite answers to the issues: A judge may only serve as an advisor or officer of a corporation under the specific conditions set forth in Canon 4D(3); and, the judge is not required to dispose of the stock as long as he or she is not an officer or director of the corporation and can fully comply with the other provisions of Canon 4D.

There is no exception under our code that would allow the judge to continue as an officer of the corporation, nor are we aware of any ethical opinions from other states that allow a judge to act as an officer and director of a non-family owned business. To the contrary, opinions from other states comment on the impropriety of serving as a director of a bank or a small mortgage company. *See, e.g.*, Fla. Op. 73-12, N.M. Op. 87-1, La. Op. 23. We adopted a similar position in Opinion 92-05.

Finally, we note that Section F of the Application Section of the Code of Judicial Conduct provides that upon becoming a judge, a person must come into compliance with Canons 4D(2) and (3) within one year.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 4D(2) and 4D(3) (1993).

### **Other References**

Arizona Judicial Ethics Advisory Committee, Opinions [92-05](#) (April 7, 1992); [94-05](#) (May 6, 1994).

Florida Committee on Standards of Conduct Covering Judges, Opinion 73-12, (Sept. 21, 1973).

Louisiana Committee on Judicial Conduct, Opinion 23, (Sept. 17, 1975).

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New Mexico Judicial Advisory Committee, Opinion 87-1, Judicial Advisory Committee (Jan. 2, 1987).

*In Re Fleischman*, Arizona Supreme Court No. JC-0003, filed March 13, 1997.

Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* §7.14 (2d ed. 1995).