

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 00-07
(December 20, 2000)

**Immediate Ethical Considerations
Upon Becoming a Judge**

Issues

1. When does a person become a judge subject to the provisions of the Arizona Code of Judicial Conduct?

Answer: It depends on whether one is elected or appointed.

2. What are the immediate ethical considerations necessary to the transition from being a non-judge to a full time judge?

Answer: A number of issues arise under Canon 4 that require immediate attention.

Introduction

The advisory committee regularly receives inquiries about the ethical issues that immediately affect new judges and questions about winding down law practices or other business activities. Our initial advice is that every new judge should become familiar with Canon 4 of the Code of Judicial Conduct and its related commentaries. This canon restricts a judge's extra-judicial activities in order to minimize the risk of conflict with judicial obligations. It requires a judge to conduct all such activities in a manner that will not cast doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties. A thorough understanding of the canon will help new judges avoid serious ethical problems as their careers develop.

Although this opinion will address some of the issues that arise under Canon 4, its primary purpose is to discuss the more immediate issues that face new judges. To do that we must first consider the issue of when a person who is elected or appointed actually becomes subject to the provisions of the code. There are important differences between being elected and being appointed to judicial office, and the transition from private citizen to judge will have a significant effect on what were formerly private activities and relationships with clients, partners and family members. The discussion that follows will address these issues only as they relate to full-time judges and not to part-time or pro tempore judges or judicial candidates.

Discussion

Issue 1

Article 6, § 12, of the Arizona Constitution provides that judges elected at a general election shall hold office “from and after the first Monday in January next succeeding their election. . . .” It would appear, therefore, that an “elected judge” does not become a judge subject to the code until he or she is entitled to “hold office” as specified in the constitution.

For judges selected by merit selection, and in all other situations in which a judge is appointed rather than elected to office, a person becomes a judge subject to the code on the effective date of his or her appointment. The governor’s appointment is made effective by the signing of a commission of office. *See* A.R.S. § 38-221. There is no later time period, such as there is for an elected judge, designating when such persons are to “hold office.”

The question may arise whether the governor, upon request or otherwise, could delay the effective date of an appointment so that an attorney could have more time to wind down a law practice or perhaps even try some cases. It appears that the governor may specify a delayed effective date for an appointment, and the latter date would signal the commencement of the term of office. *See* 1990 Ariz. Op. Att’y Gen. 111 (1990). If, however, the governor has not made the appointment within sixty days of the date in which the names of the nominees were sent to the governor, the chief justice of the supreme court shall make the appointment, Ariz. Const. Art. 6, § 37.

One may question whether the effective date upon which one becomes a judge is the date upon which one takes the oath of office. Article 6, § 26 of the constitution requires each justice, judge and justice of the peace to take an oath of office “before entering upon the duties of . . . office. . . .” The supreme court has stated that “election is not synonymous with the administration of the oath. This latter function is separate and its purpose is simply to place the mantle of responsibility on the person previously elected to the office.” *Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 (1999).

One, therefore, does not become a judge subject to the code by virtue of taking an oath. One becomes a judge after election on the date set forth in the constitution or by appointment on the effective date of the appointment.

Issue 2

A number of articles and publications discuss the ethical issues involved in becoming a judge and winding down a law practice. The two articles reviewed for this opinion are Candace Goldstein, *Becoming a Judge: Problems with Leaving a Law Practice*, 69 *Judicature* 2 (1995), and Cynthia Gray, *Ethical Issues for New Judges* (March 1999). In addition, this committee has dealt with numerous issues in the areas of extra-judicial activities and the practice of law in its published opinions.

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The article by Cynthia Gray suggests that in the interim between being chosen and taking the bench, a new judge should ask the following questions about his or her community involvement and take any necessary steps to comply with the judicial code:

- Are any of the organizations of which I am an officer or director conducted for profit? Canon 4D(3); Ariz. Op. 97-04.
- Are any of the organizations of which I am an officer or director likely to be engaged in proceedings that would ordinarily come before me? Canon 4C(4)(a); Ariz. Ops. 95-02, 97-03.
- Are any of the organizations of which I am an officer or director engaged frequently in adversary proceedings in the court of which I am a member or in any court subject to the appellate jurisdiction of my court? Canon 4C(4)(a); Ariz. Ops. 95-02, 97-03.
- Does my membership in any organization cast reasonable doubt on my capacity to act impartially as a judge? Canon 4A(1); Ariz. Ops. 95-02, 97-03, 97-06, 98-04.
- Do any of the organizations to which I belong practice invidious discrimination? Canon 2C; Ariz. Ops. 94-07, 94-13.
- Will my activities on behalf of any organization prevent me from properly performing my judicial duties? Canon 4A(3).
- Are any of the government committees on which I serve concerned with issues of fact or policy on matters other than the improvement of the law, legal system or the administration of justice? Canon 4C(2); Ariz. Ops. 90-11, 91-04, 94-09, 94-14, 95-16, 96-05, 96-08, 96-10, 97-03, 97-06.

Even for those organizations with which a judge may properly be involved, the judge may need to refrain from fund-raising activities in which she or he participated formerly. Canon 4C(4)(b); Ariz. Ops. 94-04, 94-15, 95-02, 95-20, 96-08, 97-08, 97-09, 97-10. Finally, the new judge should examine his or her financial activities and withdraw from any that fall into the following categories:

- Activities that may reasonably be perceived as exploiting the judge's judicial position. Canon 4D(1)(a); Ariz. Op. 97-07.
- Activities that involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves. Canon 4D(1)(b); Ariz. Op. 95-12.
- Activities that will require frequent disqualification. Canon 4D(4).

The new judge will have to keep informed about the personal economic interests of his or her spouse and minor children residing in the judge's household and inform family members about requirements of the code that relate to them. Canon 2B, 3E(2).

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The problems involved in winding up a law practice give rise to a number of issues that a newly chosen judge must consider. Canon 4G prohibits judges from practicing law. *See* Ariz. Ops. 95-03, 95-09; *see also In re Fleischman*, 188 Ariz. 106, 933 P.2d 563 (1997). There is no “winding-up exception” contained in the code, and we advise attorneys who are chosen for the bench to follow the advice suggested by the Pennsylvania Bar:

- Promptly contact all clients regarding the change in professional status.
- Discuss with the client the options available with regard to obtaining counsel if the matter cannot be concluded before the attorney becomes a judge.
- Assist the client in locating counsel with the necessary expertise.
- Return to the client files, property, and any part of a retainer fee not earned.

Pa. Bar Op. 88-252; *see also Duties at End of Representation*, ABA/BNA Law. Man. Prof. Con. 91:801.

The Code of Judicial Conduct does not prescribe how a new judge is to dispose of an interest in a law practice; however, the articles cited discuss a number of advisory opinions from other jurisdictions that suggest various means that would be consistent with the code.

In regard to fees, a new judge may receive legal fees earned by the judge prior to becoming a judge, or a proportionate share of fees earned by a professional association before the judge left the firm. Advisory committees have attached several conditions to a judge’s acceptance of fees earned before taking the bench:

- An agreement as to how much is owed the judge should be settled before the judge assumes the bench insofar as possible. Alaska Op. 84-215.
- The amount to which the judge is entitled must be fixed with reference to work that was performed before the attorney became a judge. Fla. Op. 86-7.
- The judge must not receive any part of a fee collected in connection with matters that were not pending with the firm at the time the judge left. Fla. Op. 86-7.
- The judge may not share in the profits of the firm earned after the judge’s departure. Neb. Op. 89-1.
- The judge may receive payment for work done on a contingent fee basis that was pending at the time the judge took office so long as the percentage the judge receives reasonably reflects the amount of work the judge did on the case. Admin. Office of U.S. Courts, of Selected Ops., § 2.7(b) (1995).

The principles set forth in this opinion are not meant to be exhaustive or to deal with the many gray areas that can arise in winding-up a law practice. It is hoped, however, that this opinion will guide and assist a newly chosen judge in giving careful and immediate attention to the provisions of the code with respect to issues that are often not thoroughly analyzed

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prior to election or appointment. Several other issues that will confront the new judge upon taking the bench with respect to the relationship with former partners, associates, clients and issues relating to disqualification are dealt with in other opinions of this committee.

Conclusion

It is important for the new judge to know precisely when the provisions of the Arizona Code of Judicial Conduct become applicable. It is also important that the new judge become familiar with the many issues that affect the judge's participation in extra-judicial activities and in the winding down of a law practice. If an issue arises that is not clearly covered by the code or the opinions issued by this committee, all judges are encouraged to contact the committee for an opinion.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2B, 2C, 3E(2), 4, 4A(1), 4A(3), 4C(2), 4C(4)(a), 4C(4) (b), 4D(1)(a), 4D(1)(b), 4D(3), 4D(4) and 4G (1993).

Legal References

Arizona Constitution, Article 5, § 12; Article 6, §§12, 26, and 37.

Arizona Revised Statutes, § 38-221.

Arizona Attorney General Opinion 1990-111.

In re Fleischman, 188 Ariz. 106, 933 P.2d 563 (1997)

Jennings v. Woods, 194 Ariz. 314, 982 P.2d 274 (1999).

Advisory Opinions

Administrative Office of the United States Courts, 2 Guide to Judiciary Policies and Procedures: Codes of Conduct for Judges and Judicial Employees, Compendium of Selected Opinions, § 2.7(b) (1995).

Alaska State Bar Ethics Committee, Opinion 84-215 (1984).

Arizona Judicial Ethics Advisory Committee, Opinions [90-11](#) (Dec. 7, 1990); [91-04](#) (May 24, 1991); [94-04](#) (April 1994); [94-07](#) (June 13, 1994); [94-09](#) (Aug. 1, 1994); [94-13](#) (Sept. 20, 1994); [94-14](#) (Sept. 22, 1994); [94-15](#) (Dec. 14, 1994); [95-02](#) (March 17, 1995); [95-03](#) (March 20, 1995); [95-09](#) (May 24, 1995); [95-12](#) (June 19, 1995); [95-16](#) (Aug. 28, 1995); [95-20](#) (Oct. 27, 1998); [96-05](#) (April 19, 1996); [96-08](#) (Aug. 15, 1996); [96-10](#) (Sept. 27, 1996); [97-03](#) (March 13, 1997); [97-04](#) (April 22, 1997); [97-06](#) (May 28, 1997); [97-07](#) (June 16, 1997); [97-08](#) (June 17, 1997); [97-09](#) (July 30, 1997); [97-10](#) (Aug. 8, 1997); [98-04](#) (June 8, 1998).

Florida Committee on Standards of Conduct Governing Judges, Opinion 86-7 (May 13, 1986).

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Nebraska Ethics Advisory Committee, Opinion 89-1 (1989).

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 88-252 (1988).

Other References

Candace Goldstein, *Becoming a Judge: Problems with Leaving a Law Practice*, 69 *Judicature* 2 (1995),

Cynthia Gray, *Ethical Issues for New Judges* (paper prepared for American Judicature Society under grant from the State Justice Institute, March 1999).

Duties at End of Representation, ABA/BNA Law. Man. Prof. Con. 91:801.