

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 02-06
(September 21, 2002)

**Ethical Constraints on Lawyers Serving as
Pro Tem Limited Jurisdiction Judges**

Issues

1. May a lawyer appointed as a pro tem justice of the peace to hear preliminary criminal matters (initial appearances, preliminary hearings, warrants) on nights and weekends on a scheduled basis litigate criminal or civil matters in the same justice court?

Answer: Yes, but the pro tem judge may handle only initial appearances and arrest warrants, and may not appear as counsel at any initial appearances.

2. May a lawyer appointed as a pro tem justice of the peace to hear preliminary criminal matters on nights and weekends on a scheduled basis litigate criminal matters in the superior court?

Answer: Yes, unless the pro tem justice of the peace was involved in the case in the lower court.

3. Are all of the lawyers in a private firm subject to the same practice limitations as a lawyer from the same firm who serves as a part-time, pro tem justice of the peace to hear preliminary criminal matters on nights and weekends on a scheduled basis?

Answer: Yes.

4. Are all of the lawyers in a public law office (such as the county attorney, public defender or attorney general) subject to the same practice limitations as a lawyer from the same office who serves as a part-time, pro tem justice of the peace to hear preliminary matters?

Answer: No lawyer who works for any of these public offices may serve as a pro tem judge on criminal cases.

5. May a lawyer appointed as a part-time pro tem justice of the peace to fill in for the regular judge on a sporadic, on-call basis litigate civil or criminal matters in the same justice court?

Answer: Yes.

Facts

The presiding judge and court administrator of a medium-size county seek guidance concerning ethical restrictions on lawyers selected to serve as pro tem justices of the peace

Advisory Opinion 02-06

to hear certain types of cases who may wish to appear as counsel in the same courts. The inquiry stems from a recent determination by the Arizona Supreme Court that Article 2, § 31, of the Arizona Constitution requires that pro tem judges in all courts in the state be licensed to practice law in Arizona and otherwise qualified under Article 2, § 22. The supreme court's clarification of the effect of the relevant constitutional provision was announced this summer and resulted in Administrative Order No. 2002-66, which adopted new provisions of the Arizona Code of Judicial Administration requiring that pro tem judges in all courts be licensed to practice law, even though permanent justices of the peace and magistrates need not be lawyers. Until the court clarified the applicability of Article 2, § 31, many non-lawyers were appointed as pro tem justices of the peace in good faith reliance on a statute that on its face allowed such appointments. However, as the court noted in its order, a statute cannot remove qualifications that the constitution requires, and so Arizona's long-standing practice of appointing non-lawyers to serve as pro tem judges in lower courts came to an abrupt halt.

Limited jurisdiction courts throughout the state have been affected by the court's administrative determination. Many pro tem justices of the peace and magistrates had to be removed to comply with the constitutional requirement, and attempts to secure lawyers to replace these judges raise ethical issues for both the lawyers and the courts that seek to employ them. The issues will likely be felt most acutely in rural areas, where there are relatively few lawyers.

Discussion

Section D of the Application of the Code of Judicial Conduct ("Application") and the related commentary set forth the relevant ethical restrictions on the ability of a lawyer to appear in a court in which the lawyer also serves as a part-time pro tem judge. Those restrictions are extensive, but "[t]he purpose of Section D is to allow the greatest possible use of part-time pro tempore judges to augment judicial resources . . . while minimizing any potential for the appearance of impropriety." The need to augment judicial resources is being keenly felt throughout Arizona now that non-lawyers have been removed from service as judges in many of our limited jurisdiction courts.

Issue 1

The first question presented here can be answered by referring to Application, Section D(5), which states:

A part-time pro tempore judge who is appointed to perform judicial functions of a non-appealable nature on a continuing scheduled basis shall not appear as a lawyer in other proceedings involving the function of the court in which the service was performed, *but may appear as a lawyer in all other areas of practice before the court.* [Emphasis added.]

The commentary to Section D further states that the language of the section "is intended to allow, at a minimum, [certain] current practices," one of which is the following:

Advisory Opinion 02-06

A lawyer sits as a part-time pro tempore criminal judge in the after-hours and weekend initial appearance program and thereafter appears as a lawyer in the criminal divisions except that the lawyer does not appear in the initial appearance program on behalf of clients.

A pro tem judge who regularly handles initial appearances “perform[s] judicial functions of a non-appealable nature on a continuing scheduled basis,” and therefore may not appear as a lawyer in that same court to handle initial appearances. *See also* Application, Section D(4). However, the pro tem judge may appear as a lawyer in the court in all other criminal and civil matters.

The quoted example specifically permits a pro tem judge to handle *initial appearances* without being disqualified from appearing as a lawyer in the same court. A pro tem judge may also issue summonses or arrest warrants, either at the filing of a criminal complaint or later, pursuant to Rule 3.1, Ariz. Rules of Criminal Procedure. We believe, however, that *preliminary hearings* fall outside the scope of proceedings a pro tem may handle without disqualification. Section D(5) refers to “judicial functions of a non-appealable nature” which a pro tem may handle without losing the right to “appear as a lawyer in other proceedings involving the function of the court in which the service was performed” Under Rule 5.5 of the Arizona Rules of Criminal Procedure, a magistrate’s determination to bind a defendant over following a preliminary hearing is reviewable in the superior court on the record. While this is not a true appeal, it is the functional equivalent of one. In contrast, the release conditions set at an initial appearance may be reexamined *de novo* upon transfer of the defendant’s case to a different court. *See* Rule 7.4(b), Ariz.R.Crim.P.

Issue 2

As noted above, a pro tem judge may conduct initial appearances, and thereafter appear as a lawyer in the same court in both criminal and civil matters, provided that he or she does not appear in any initial appearance on behalf of a client. Application, Section D(5) and related commentary. Further, the pro tem judge would also be prohibited from “act[ing] as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 1.12(a) of the Arizona Rules of Professional Conduct.” Application, Section D(2). (To the extent it is relevant to the present issue, that rule would allow subsequent representation if all parties consented after disclosure.) In the absence of full disclosure and unanimous consent, a pro tem judge would not be able to represent a client in criminal proceedings if the judge had conducted an initial appearance in the same proceedings (or “in any other proceeding related thereto,” such as the case of a co-defendant). The prohibition applies not only in the court in which the pro tem judge serves, but also in any other court, including the superior court.

Issue 3

All lawyers in the law firm of a pro tem judge will be subject to the same practice limitations as the judge. The commentary to Section D of the Application provisions states, “The restrictions of Section D apply to the members of a pro tempore part-time judge’s law

Advisory Opinion 02-06

firm.” The Alabama Judicial Inquiry Commission recently reached a similar conclusion. Ala. Op. 02-790. The Alabama Commission reviewed opinions from several other states—including Arizona Opinion 92-16, the effect of which was stayed by the Arizona Supreme Court to allow for revisions to our Code of Judicial Conduct—and adopted what it considered the majority view.

Issue 4

All lawyers in a public law office—such as those employed by the county attorney, public defender, or attorney general—are subject to the same practice limitations as a lawyer from the same office who serves as a pro tem judge. Indeed, the restrictions on public lawyers are heavier than those on lawyers in private practice. In Opinion 94-08, which was later supplemented, this committee stated categorically “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.”

This view was supplemented and its effect modified in Opinion 95-08, issued the following year in response to comments and inquiries about the previous opinion. In the later opinion, this committee opined that an assistant attorney general or deputy county attorney “cannot act as judges pro tempore in any matter in which the state or any of its political subdivisions or agencies is a party.” As the committee noted, an assistant attorney general or deputy county attorney represents the State of Arizona, and therefore cannot be expected to remain impartial, as a neutral magistrate must be, in a proceeding in which the state is a party. Of course, the state or one of its subdivisions will be a party in *any* criminal proceeding, and so an assistant attorney general or deputy county attorney may never serve as a pro tem justice of the peace to handle initial appearances, preliminary hearings, or other criminal proceedings.

The analysis is different when the lawyer under consideration is a public defender, although the practical result is the same. A public defender, obviously, does not represent the state, but just as obviously represents clientele who are in opposition to the state. Just as a judge could not be neutral in the case of a *client*, a judge could not be neutral in the case of a *regular opponent*. This committee stated, in Opinion 95-08:

The appearance of impropriety in the arrangement is critical. We doubt that a criminal defendant would feel confident about our system of justice upon seeing someone act as a prosecutor one day, and then appear behind the bench as the judge in the same courtroom the next day. In our opinion, doubts about the fairness of treatment under this arrangement would be a quite reasonable reaction.

Substitute the words “crime victim” for “criminal defendant,” and “public defender” for “prosecutor,” and the comment still holds true.

Advisory Opinion 02-06

The committee is aware of its opinion that criminal defense attorneys, including those under contract to provide indigent defense services, may sit as pro tem judges in criminal cases. Op. 95-17. However, there are pertinent differences between public defenders and private lawyers with defense contracts. Private lawyers may represent clients in all kinds of cases, not merely criminal matters, and so would not necessarily be as closely identified with criminal defense work as would a public defender. Also, there may be several lawyers under contract to provide indigent defense services, and the disqualification of one out of many of them for service as a pro tem judge may not cause a great hardship to the county's ability to provide legal defense to the poor. Disqualification of the county's entire public defender's office would be quite different. The public defender, and all deputy public defenders, are officers of the county which employs them. *See* A.R.S. §§ 11-581 and 11-583. Public defenders have as their primary duty the defense of indigents accused of crimes. A.R.S. § 11-584(A)(1). If a public defender were permitted to sit as a judge for initial appearances or other proceedings in criminal cases, that public defender, and all other lawyers in the same office, would be disqualified from representing any of the defendants who appeared before that judge. *See* Issues 2 and 3 above. Such a disqualification might—depending on how many initial appearances the judge had heard—have the effect of depriving an entire county of the benefits of its public defender's office.

A public defender may properly serve as a pro tem judge in non-criminal cases. Our Opinion 89-01, stating that public defenders may sit as pro tem judges in civil cases, was withdrawn in Opinion 94-08, but later supplemented and modified in Opinion 95-08. Opinion 95-08 advised that deputy county attorneys and assistant attorneys general may serve as pro tem judges in cases in which the state is not a party. If public lawyers representing the state may do so, there is no good reason to prevent a public defender from serving in the same capacity. However, for the reasons stated above, a lawyer in a public defender's office may not serve as a pro tem judge in criminal cases.

Issue 5

If the pro tem justice of the peace truly sits as a judge only sporadically, the Application section of the code allows such service because Section D(3) provides that “[a] pro tempore part-time judge who serves once or only sporadically in a specialized division of a court or in a court without specialized divisions may appear as a lawyer in such specialized division or court during such service.” The inquiry describes the pro tem judge's service as both “sporadic” and “on call,” and these terms are not synonymous. “Sporadic” means “at irregular intervals,” and in the context of the quoted provision also carries the implication of being “infrequent.” A judge who is “on call” is subject to being called in for duty; periods of being “on call” may be regularly scheduled, and may be frequent or infrequent depending on the needs of the court. Just because a judge serves only *on call* does not mean, in and of itself, that the judge's service is merely *sporadic*.

Application, Section D(4) can be seen as the complement to Section D(3). Whereas D(3) allows a lawyer to practice in a court in which the lawyer serves as a judge only sporadically, D(4) disqualifies a lawyer from practicing in a court or specialized division of the court in

Advisory Opinion 02-06

which the lawyer serves as a judge “repeatedly on a continuing scheduled basis.” A judge pro tem may be “on call” repeatedly on a continuing scheduled basis. Unless the judge’s service is truly sporadic, the judge is disqualified from appearing as a lawyer in the court or specialized division in which he or she serves.

Applicable Code Sections

Arizona Code of Judicial Conduct, Application, Sections D(2), (3), (4) and (5) and commentary (1993).

Other References

Arizona Constitution, Article 2, §§ 22 and 31.

Arizona Revised Statutes §§ 11-581, 11-583 and 11-584(A)(1).

Arizona Rules of Criminal Procedure, Rules 3.1, 5.5 and 7.4(b).

Arizona Rules of Professional Conduct, E.R. 1.12(a). Rule 42, Rules of the Supreme Court.

Arizona Supreme Court, Administrative Order No. 2002-66.

Arizona Judicial Ethics Advisory Committee, Opinions [89-01](#) (July 6, 1989); [92-16](#) (Dec. 8, 1992, *reissued* March 8, 1993, *stayed by order of Supreme Court* March 30, 1993); [94-08](#) (July 20, 1994); [95-08](#) (May 3, 1995); [95-17](#) (Aug. 29, 1995).

Alabama Judicial Inquiry Commission, Opinion 02-790 (Feb. 8, 2002).