

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 02-07
(October 30, 2002)

**Municipal Official Serving as Part-time Pro Tem
Judge in Adjoining Jurisdiction**

Issues

1. May the mayor of a town serve as a part-time, pro tem municipal judge in an adjoining town?

Answer: Yes, subject to exceptions noted below.

2. May the mayor of a town serve as a part-time, pro tem justice of the peace in the justice court precinct that geographically includes the town?

Answer: Yes, subject to exceptions noted below.

Facts

An attorney serving as the mayor of a small town in a predominantly rural area requests an opinion concerning his ability to serve as a part-time judge in a different community. He is interested in seeking part-time, pro tem judicial positions in the municipal court of an adjoining town and the justice court that covers the same geographic area.

The attorney does not see a conflict between his elective position and the anticipated part-time, pro tem judicial positions in either the adjoining municipal court or the justice court, although he is concerned about a potential separation of powers issue because of the Arizona Supreme Court's decision in *Matter of Walker*, 153 Ariz. 307, 736 P.2d 790 (1987). To avoid conflicts, if any, between his elective office and the justice court position, he would not take any criminal cases involving the town's police department.

Discussion

In the *Walker* case, the Commission on Judicial Conduct (then the Commission on Judicial Qualifications) recommended that H. W. Walker be removed from his position as justice of the peace in Santa Cruz County for violating various canons of the 1985 Code of Judicial Conduct. (The code was amended in 1993, and some of the canons were renumbered; however, the canons relevant to this advisory opinion are the same as those at issue in *Walker*). Walker filed a petition with the Arizona Supreme Court to reject the findings of fact, conclusions of law and recommendations of the commission.

Walker was selected by the town council of Patagonia to replace a member who had resigned, and he assumed office as a member of the town council of Patagonia while he was serving as justice of the peace in Santa Cruz County. Walker's duties as a councilman

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included discussing and adopting proposed ordinances and resolutions, voting on the hiring of the town attorney, voting on the hiring of the police chief, voting on the hiring of the marshal, who supervised the operation of the police department, and voting on the hiring of the town magistrate.

The Town of Patagonia was within Walker's justice court jurisdiction, and the court found that it was possible that in his capacity as justice of the peace Walker could be called upon to hear criminal charges arising out of activities in and around Patagonia. In addition, Walker could be faced with hearing civil matters that would require him to interpret Patagonia ordinances or which could, occasionally, involve testimony from Patagonia police officers. Finally, Walker could also be faced with hearing civil matters in which the town attorney appeared as counsel for private parties and not in his official capacity.

The court found that Walker violated both Canons 1 and 2 of the Code of Judicial Conduct by holding office as justice of the peace and town council member simultaneously. The court analyzed the separation of powers doctrine and concluded that when a judge participates in enacting the law that he is later called upon to interpret in deciding cases before him, the separation of powers doctrine has been violated. The court further found that when a judge acts as both legislator and adjudicator, the judge also violates Canon 1 because, in so doing, the judge compromises the independence of the judiciary. The court determined that even if actual impropriety has not occurred in such circumstances, the public is nonetheless presented with the appearance of an improper display of unchecked power in violation of Canon 2. Additionally, the court found that it would be difficult for a judge to maintain even the appearance of impartiality when he makes decisions on the hiring of city employees who may later appear before him in court in some capacity.

We find material distinctions between the *Walker* case and the present request. In *Walker*, the justice of the peace was a full-time justice of the peace, subject to all of the provisions of the code and, in his capacity as a member of the town council, he had to undertake activities different from those in which the present requestor would be involved. For instance, in sitting as a part-time, pro tem judge for the adjoining town, the present requestor would not be interpreting local ordinances that he helped enact as a member of the town council of which he is the mayor since there is no overlapping jurisdiction between the municipal court of the town of which the requestor is the mayor and the adjoining municipal court.

Sitting as a part-time, pro tem justice of the peace, however, is more problematic. By statute, justices of the peace have "exclusive original jurisdiction of all civil actions when the amount involved, exclusive of interest, costs and awarded attorney fees when authorized by law, is five thousand dollars or less," A.R.S. § 22-201.B., and "concurrent original jurisdiction with the superior court . . . when the amount involved . . . is more than five thousand dollars and less than ten thousand dollars." A.R.S. § 22-201.C. A municipal court "has jurisdiction of all cases arising under the ordinances of the city or town, and has jurisdiction concurrently with justices of the peace of precincts in which the city or town is located, of violation of laws of the state committed within the limits of the city or town." A.R.S. § 22-402.

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Since municipal court jurisdiction is not made statutorily exclusive of justice court jurisdiction for cases arising under the ordinances of a city or town, cases could possibly arise where the requestor, sitting as a justice of the peace, would be called upon to interpret an ordinance of the town of which he is serving as the mayor. However, since he would be sitting on a part-time, pro tem basis only, we do not see this as a complete disqualification as we did in Opinion 88-03. There, we found that a town coordinator, equivalent of a town manager, could not serve as town magistrate of the same town and that a town mayor could not serve as a part-time town magistrate of the same town without violating *Walker* and Canons 1 and 2. Here, the requestor would have to recuse himself when confronted with a conflict between his judicial duties as justice of the peace and his legislative duties as town mayor in order to avoid violating *Walker* and Canons 1 and 2, but would have no overriding disqualification from serving as a part-time, pro tem justice of the peace in cases where this disqualifying conflict is not present.

This being said, we caution the requestor to be particularly diligent in disqualifying himself in any situation where there may be a potential conflict, or appearance of conflict, between his duties as mayor and his duties as a judge. The requestor has advised us that the town council over which he presides as mayor does not make hiring and firing decisions over most municipal employees and that the council hires only two people—the town magistrate and the town manager, who has ultimate hiring and firing authority over all employees. Nevertheless, and by way of example only, if a town law enforcement officer, town employee, town magistrate, or other town official of the town of which the requestor is the mayor should appear before him in his capacity as either municipal judge of the adjoining town or as justice of the peace, the requestor should recuse himself to avoid the appearance of impropriety.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1 and 2 (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion [88-03](#) (May 11, 1988).

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