

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-05

(Issued December 11, 2018)

JUDGE PRO TEMPORE SERVICE BY JUDICIAL EMPLOYEES AND BY FULL-TIME JUSTICES OF THE PEACE

ISSUES

1. May a judicial employee serve as a judge pro tempore?

Answer: Yes, with qualifications.

2. May a full-time justice of the peace (i.e., a justice of the peace compensated at the maximum level provided in A.R.S. § 22-125) serve as a judge pro tempore in a court other than the court to which he or she has been elected or appointed?

Answer: Yes, with qualifications.

FACTS

A justice of the peace inquires whether it is ethically permissible for court employees to serve as judges pro tempore – either for their employing courts or for other courts. The same inquirer asks about the propriety of a full-time justice of the peace serving as a judge pro tempore in a court other than the one to which he or she has been elected or appointed. As to both court employees and full-time justices of the peace, the inquiring judge asks whether compensation for pro tem service is appropriate.

In answering the questions posed, the committee presumes compliance with all legal requirements for serving as a judge pro tempore and with state or local laws regarding the compensation of public employees and officials – topics that are beyond the scope of this Opinion. The committee confines its analysis to the Code of Conduct for Judicial Employees (“Employee Code”) and the Code of Judicial Conduct (“Judicial Code”). Because there are material distinctions between court employees who serve as judges pro tem and full-time justices of the peace serving in that capacity, the two groups are addressed separately.

DISCUSSION

1. **Judicial Employees Serving as Judges Pro Tempore**

Canon 3 of the Employee Code requires judicial employees to “conduct activities outside of judicial employment to minimize the risk of conflict with the obligations of judicial employment.”

If a judicial employee serves as a judge pro tempore as part of his or her assigned job duties, that employee is not engaged in “activities outside of judicial employment” because his or her job duties encompass such service. As such, Rule 3.1 of the Employee Code is inapplicable in that setting. And if serving as a judge pro tempore is part of a judicial employee’s assigned duties, presumably no issues regarding compensation exist. *See, e.g.*, Employee Code, Rule 3.4(A) (judicial employees shall not “request or accept any payment in addition to the judicial employee’s regular compensation for assistance given as part of official duties.”).

Different considerations arise if a judicial employee serves as a judge pro tempore when such service is not part of that employee’s normal job duties. Rule 3.1 applies in that context because the employee is then engaging in “outside activities” -- i.e., activities that are beyond the scope of his or her normal job duties.

Under Rule 3.1, pro tem service may be approved unless it would have “a negative effect on the court or the ability to perform court duties” or unless it would be inconsistent with subsection B. As relevant here, subsection B prohibits an employee from engaging in “any business, secondary employment or volunteer activity” that is “conducted during the judicial employee’s scheduled working hours” or that places “the judicial employee in a position of conflict with the judicial employee’s official role in the judicial department.” Rule 3.1(B)(2) & (3). Thus, an employee whose job duties do not encompass serving as a judge pro tempore may not serve in that capacity during “scheduled working hours.”

Several overarching principles apply to all judicial employees serving as judges pro tempore. Much of the Judicial Code governs judges pro tempore, *see* Judicial Code, “Application,” but it is beyond the scope of this Opinion to address all such provisions. Instead, the committee focuses on those provisions relevant to determining whether appointment as a judge pro tempore is appropriate in the first instance and on concerns regarding the potential for improper influence.

Before an employee serves as a judge pro tempore, both the court and the employee must consider whether the employee has participated “personally and substantially” in the matter so as to warrant disqualification under Rule 2.11(A)(6)(b). If so, either the appointment should not be made or the employee must follow the remittal of disqualification procedure set forth in Rule 2.11(C).

Service as a judge pro tempore may require a judicial employee to issue orders and enter judgments in cases the employee has processed as, for example, a clerk at the filing counter. One day, the employee is a clerk accepting and docketing filings; the next day, the employee is on the bench deciding cases. Previous performance of clerical, non-

discretionary tasks in a case is unlikely to rise to the level of personal and substantial participation in that matter for disqualification purposes. *See* Opinion 94-02. Indeed, in discussing this issue in Opinion 94-02, the committee observed that in smaller jurisdictions, judges often perform ministerial or clerical tasks for lack of other personnel to do so. If, on the other hand, an employee has been privy to ex parte communications or has conducted independent factual research about a case while acting as court staff, he or she should either not serve as a judge pro tempore in that same matter or should provide the parties with notice and an opportunity to be heard, as contemplated by Rule 2.9(B) of the Judicial Code.

Questions about independence and impartiality also arise when court staff serve as judges pro tempore. Rule 2.4 of the Judicial Code prohibits external influences on judicial decision-making. Specifically, Rule 2.4(B) states that a judge (and, by extension, a judge pro tempore) “shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”

In many courts, judges directly supervise staff members who serve as judges pro tempore. This creates the potential for actual or perceived influence over the pro tempore judge’s performance of judicial duties. An employee serving at the pleasure of the appointing judge may be reluctant to make decisions or exercise discretion in a manner contrary to the supervising judge’s wishes. Similarly, an appointing judge may seek to direct how the employee serving at the pleasure of that judge makes decisions or exercises direction. However, both providing such directives and following such directives would run afoul of Rule 2.4(B). This is not merely an academic concern. The Texas State Commission on Judicial Conduct recently publicly admonished three hearing officers for strictly following directives issued by judges to whom the underlying cases were assigned not to issue personal bonds under certain circumstances. *See Matter of Licata*, CUC No. 17-0352, *Matter of Hagstette*, CJC No. 17-0350, *Matter of Wallace*, CJC No. 17-0351. Although the Texas Commission considered it a mitigating factor that the hearing officers were “motivated by direct instructions from individual judges who played a role in [their] continued employment,” it nonetheless concluded the hearing officers were swayed by outside interests and failed to exercise their obligation “to consider all legally available bonds.”

2. Full-Time Justices of the Peace Serving in Other Courts

Justices of the peace may serve in other precincts in the same county or in adjoining justice court precincts without formal appointment as a judge pro tempore. A.R.S. § 22-114. In addition, justices of the peace may serve as municipal court judges or magistrates under statutorily enumerated circumstances. *See* A.R.S. § 22-402(c)(1), -403(B). Notwithstanding such statutory authority, justices of the peace who serve in courts other than their own must also ensure compliance with the Judicial Code.

“The judicial duties of a judge take precedence over all of a judge’s other activities.” Judicial Code, Rule 2.1. Judges must be available to “hear and decide matters assigned to the judge,” Rule 2.7, “must be available to decide matters that come before the courts,” Rule 2.7 cmt. 1, must “devote adequate time to judicial duties, [and] be punctual in attending court and expeditious in determining matters under submission,” Rule 2.5 cmt. 3, and must perform their duties “competently, diligently, and promptly,” Rule 2.5(A). “Prompt disposition of the court’s business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters.” Rule 2.5, cmt 3. Taken together, these rules require judges to give precedence to the judicial duties they have been elected (or appointed) to perform over any judicial duties they may choose to perform. *See also* A.R.S. § 11-413(A) (dictating required hours of operation for county offices).

Applying an earlier version of the Judicial Code, the committee concluded that “a judge’s regular absence from the court during working hours is likely to adversely affect the efficient administration of the court. A full-time justice of the peace, therefore, should not regularly absent himself or herself from court to serve as an associate municipal court judge in another county.” Opinion 06-04. Although the Judicial Code has since been changed, the key guiding principle remains: to ethically serve a secondary judgeship, a justice of the peace must be able to “devote adequate time to dispose of all judicial matters in both courts promptly, efficiently and fairly.” Opinion 06-04. *See also* Rule 3.4, cmt 1 (Although there is value in judges accepting appointments relating to the law, the legal system, or the administration of justice, even in such instances, “a judge should assess the appropriateness of accepting an appointment, paying particular attention” to “the availability and allocation of judicial resources, including the judge’s time commitments.”). Applying an earlier version of the Judicial Code, the committee also issued an opinion suggesting that the propriety of service in a second court during court hours of the first court may turn on whether service in the second court is compensated. *See* Opinion 88-06 (“A judge shall not charge a fee for performing a wedding ceremony during court hours”); *see also* Rule 3.16(D) (codifying this aspect of Opinion 88-06). Regardless of whether that specific suggestion remains true under the current Judicial Code, to ethically serve a secondary judgeship, a justice of the peace must be able to devote adequate time to dispose of all matters in both courts promptly, efficiently and fairly.¹

¹ Other than Rule 3.16(D), the Judicial Code does not address the issue of judges’ compensation from multiple sources. Various statutes relate to compensation of justices of the peace. Interpretation and harmonization of those statutes is a legal question that is beyond the committee’s scope. The Arizona Attorney General may be a resource for guidance on this issue. *See* <https://www.azag.gov/opinions> (last visited November 29, 2018) (stating that AG opinions are available to any public officer of the state on questions of law relating to their office).

The same considerations apply to a justice of the peace serving as a judge pro tem for a tribal court. The committee is aware of no constitutional or statutory impediment to such service. Accordingly, the committee concludes a justice of the peace may serve as a tribal judicial officer, subject to these same qualifications discussed above regarding the primacy of duties owed to the justice court.
