Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 95-08
(May 3, 1995)

Ethical Constraints on Public Lawyers Serving as Pro Tem Judges

(Supplement to Opinion 94-08)

Introduction

The Advisory Committee has received numerous comments and inquiries regarding Opinion 94-08. In that opinion, we advised that an assistant attorney general could not serve as a pro tempore appellate judge and that an assistant county attorney could not serve as a pro tempore city magistrate.

After reconsidering that opinion, the committee decided not to withdraw it but to supplement it with an additional opinion and thereby answer the questions regarding how Opinion 94-08 applies in various circumstances.

Discussion

To answer the questions about the application of Opinion 94-08, we must revisit the underpinnings of our opinion that attorneys employed by the executive branch may not act as judges.

Although Opinion 94-08 contains an analysis of the constitutional doctrine of separation of powers among the three branches of government, the opinion rests not on the Arizona Constitution itself but rather on Canon 1 of the Code of Judicial Conduct. Canon 1 provides: "A judge shall uphold the integrity and independence of the judiciary." We discussed constitutional doctrine in the context of explaining the requirement of an independent judiciary.

The commentary to Canon 1 explains why a judge must be truly independent:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. . . . [V]iolation of this code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

A judge cannot be independent if his or her client appears before the judge as advocate or party. If a judge acts as counsel for a party appearing before the judge, then his or her independence can reasonably be questioned.

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.

Canons 2 and 4 offer important guidance on whether the improper appearance of the arrangement bars government lawyers from serving as pro tempore judges. Canon 2 states: "A judge shall avoid . . . the appearance of impropriety in all of the judge's activities." Specifically, a judge must act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A. "The test for appearance of impropriety," the commentary to this provision advises, "is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Canon 4A is also relevant. It provides: "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge . . ." This rule encompasses a pro tempore judge's regular employment, which is an extra-judicial activity bearing on the judge's perceived capacity to act impartially.

Our analysis leads inevitably to the conclusion that an assistant attorney general or assistant county attorney, both employees or counsel for state government, cannot act as judges pro tempore in any matter in which the state or any of its political subdivisions or agencies is a party.

We do not believe, however, that every government lawyer is barred from serving as a pro tempore judge in every case. Whenever the state and its political subdivisions are not parties and otherwise have no substantial interest in the matter, a government lawyer may act as a pro tempore judge. For example, a government lawyer may preside over a civil case between private litigants. Similarly, government lawyers may act as arbitrators in any matter in which there is no conflict.

We find no material difference between part-time "contract" government lawyers and full-time government lawyers. Nor is there a meaningful distinction when the lawyer prosecutes in one county and judges in another. It is the fact that they represent the state or its political subdivision that disqualifies them.

We are aware that judges pro tempore perform important services that allow the judicial system to deal with a crushing caseload. This opinion, however, leaves unaffected the great majority of potential judges pro tempore—lawyers in private practice. And, as we state in this opinion, we decline to adopt a general rule that public lawyers may not serve as pro tempore judges. Many public lawyers remain eligible for such service in many cases without any violation of the Code. We therefore believe that the practice of using judges pro tempore may remain essentially intact.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1, 2, 2A and Commentary, 4 and 4A (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion 94-08 (July 20, 1994).