

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-02
(Issued May 14, 2018)

JUDGE'S OPERATION OF A BUSINESS SELLING FIREARMS

ISSUE

May an Arizona judge – through the judge's own small business – engage in the lawful selling of firearms to other Arizona judicial officers, court staff, and the judge's personal friends?

ANSWER

Yes, with qualifications.

FACTS

A judge has asked whether the Arizona Code of Judicial Conduct ("Code") permits him to start a small business limited to selling firearms to other Arizona judicial officers, court staff, and the judge's personal friends. The judge states that no website would exist for the business, and the only marketing would be through "word of mouth." The business would be conducted during the evening hours and on weekends, and neither court resources nor court premises would be used. The judge would obtain all necessary licenses.

DISCUSSION

I. Applicable Code Provisions

The Code provisions relevant to this inquiry include:

Rule 1.1 Compliance with the Law.

A judge shall comply with the law, including the Code of Judicial Conduct.

Rule 3.1. Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality or demean the judicial office;

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Rule 3.11. Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) 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; or

(4) result in violation of the other provisions of this code.

II. Analysis

The Code allows a judge to serve as an officer, manager, partner, or employee of a lawful business that is closely held by the judge or the judge's family members. Rule 3.11(B)(1); *see also* Rule 1.1 ("A judge shall comply with the law"). The Code does not distinguish between lawful business types or the products a lawful business sells. As long as the judge does not run afoul of the applicable Code provisions, he or she may participate in lawful business activity.

The Code does, however list certain circumstances that preclude a judge from participating in a lawful business or at least limit the judge's participation. In general, a judge is prohibited from participating in extrajudicial activities that "will interfere with the proper performance of the judge's judicial duties" or "that will lead to frequent disqualification of the judge." Rule 3.1(A), (B). These same prohibitions expressly apply to a judge's business activities. Rule 3.11(C)(1), (2). Likewise, a judge shall not conduct business activities if they involve the judge in frequent transactions or continuing business relationships with lawyers or litigants likely to appear before the judge's court. Rule 3.11(C)(3). In addition, a judge may not engage in business activities that result in a violation of any other provision of the Code. Rule 3.11(C)(4).

The inquiring judge has stated that any transactions would occur outside of court hours and off court premises. From the information presented, the judge's contemplated business would not appear to interfere with the proper performance of judicial duties. Selling firearms in and of itself is not likely to cause a judge to frequently be disqualified. There is, however, a potential issue if the judge engages in transactions with a lawyer or litigant likely to appear before his or her court. Rule 3.11(C)(3); Rule 2.11 (A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]"). Although not specified in the inquiry, to the extent the judge's friends include attorneys or litigants who are likely to appear before the judge's court, the judge should ensure that such transactions are not frequent or continuous, as that would violate Rule 3.11(C)(4) and possibly Rules 3.11(C)(2) and

2.11(A). Recusal or remittal of disqualification issues may also arise in that context. *See* Rule 2.11.

Under Rule 3.1(C), a judge shall not participate in an activity that would “undermine the judge’s independence, integrity, or impartiality or demean the judicial office.” The Committee has previously opined that a judge may not engage in a multi-level distribution business. Arizona Judicial Ethics Advisory Opinion 94-05. In that opinion, we advised that, “this type of selling or solicitation would involve a judge directly in a commercial activity that would invariably affect the way the public regards the judiciary in the local community.” *Id.* The opinion stated that determining whether a business activity runs the risk of undermining or demeaning a judicial office depends on the nature of the business and “the extent to which the judge personally solicits and closes sales or other transactions, such as distributorships.” *Id.*

The nature of the business here is unlike that at issue in Opinion 94-05. A small business that sells firearms through word of mouth marketing does not invoke the same activity and resulting concern that comes with soliciting distributors and sales in a multi-level distribution business. Selling a product in an arms-length transaction, based on word of mouth, in a relationship that ends after the sale is completed, is quite different from recruiting others to be in one’s distribution network. The Committee does not read Opinion 94-05 as a blanket prohibition against a judge soliciting business or closing sales -- done off court premises and outside business hours -- as long as the judge does not do so “unduly.” *See id.* Here, the inquiring judge has stated that he would not solicit business and that marketing would be strictly through word of mouth, meaning the concerns expressed in Opinion 94-05 are not implicated.

Finally, Rule 3.1(D) provides that when pursuing extrajudicial activities, a judge shall not “engage in conduct that would appear to a reasonable person to be coercive.” Sales to other judicial officers or to friends, without more, do not appear to raise any issue of coercion because the judge has no apparent position of power over the potential buyer. Sales to court staff, by contrast, are problematic because of the power differential – and the appearance of a power differential – between judges and court staff. A judge must take measures to ensure that such transactions are neither coercive nor have the appearance of being coercive.

CONCLUSION

The committee concludes that Arizona judges may operate a small business that does not advertise and that lawfully sells firearms to other judicial officers and personal friends, off court premises and outside business hours. When selling to court staff, the judge must ensure appropriate measures are taken to avoid the appearance of coercion.