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JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION: JE04-003

PROPRIETY OF AN ATTORNEY WHO
SERVES AS JUDGE PRO TEM
PRACTICING LAW IN THE COURT
WHERE THE ATTORNEY SERVES AS A
JUDGE

ISSUE

May an attorney who serves as a
judge pro tem practice law in the court
where the attorney serves as judge?

Answer: Yes.

FACTS

A justice of the peace states that the
justice court in a township uses pro tem
judges from a list of local attorneys who
have been approved to serve in that capacity.
Most if not all of the attorneys on the list
also practice, at least occasionally, in the
courts where they serve as pro tem judges.
The judge correctly describes this as a
practice that is widespread throughout
Nevada's limited jurisdiction courts. The
court in question appoints a panel of
attorneys every two years after lawyers
respond to an advertisement in the local
legal newspaper. Those lawyers on the
panel serve as judges up to twelve times per
year.

The local district attorney's office
has questioned whether this practice violates
the Nevada Code of Judicial Conduct. The
judge seeks guidance from the committee.

DISCUSSION

The Nevada Code of Judicial
Conduct sets forth the applicable standards
from which judges and candidates for
judicial office are provided guidance for
ethical conduct.

The following terminology from the
Nevada Code of Judicial Conduct is relevant
to this opinion:

"A pro tempore part-time judge
is a judge who serves or expects to
serve once or only sporadically on a
part-time basis under a separate
appointment for each period of
service or for each case heard."

See, Nevada Code of Judicial Conduct –
Terminology.

The Nevada Code of Judicial
Conduct provides:

"Anyone, whether or not a
lawyer, who is an officer of a judicial
system and who performs a judicial
function, including an officer such as
a magistrate, court commissioner,
special master or referee, is a judge
within the meaning of this Code. All
judges shall comply with this Code
except as provided below

A pro tempore part-time judge:
(2) A person who has been a pro

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tempore part-time judge shall not act 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 162 of the Rules of Professional Conduct.”

Sections A and E of the Application of the Code of Judicial Conduct.

The Nevada Code of Judicial Conduct established categories of judicial service. Those part-time judges who are defined as a “continuing part-time judge” or “periodic part-time judge” are specifically precluded from practicing law in the court on which the judges serve. Sections C and D of the Application of the Code of Judicial Conduct. Although a pro tempore part-time judge is precluded from acting as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto, he or she is not precluded by the Code from practicing law in the court on which the judge serves.

The Committee presumes that if the Code intended to prohibit pro tempore part-time judges from practicing law in their courts, the Application would have so stated as it does for continuing and periodic part-time judges. As described by the judge, the use of attorneys as pro tem judges in this particular justice court is on only a sporadic basis with an average of five appearances and no more than twelve in a year. Thus, these judges appear to fit within the definition of “pro tempore part-time judges.” However, the Committee cautions that courts which establish panels of judges risk an interpretation that such attorneys are serving “under a continuing appointment” and have thus become “continuing part-time judges” who may not practice law. See Nevada Code of Judicial Conduct –

Terminology and Application, Sections C and D.

In order to avoid this concern, the Committee encourages justice courts to expand their attempts to find judges who do not practice in the justice courts. Of course, any justice court is free to adopt rules, as has been done in one large Nevada urban jurisdiction, which flatly prohibit pro tem judges from practicing law in the justice courts where they serve.

Other jurisdictions have considered this issue. Their rulings appear to have depended upon the frequency of the attorneys’ service as pro tem judge. A committee of the Utah State Bar, for example, concluded that such practice would be prohibited where the pro tem judge served “regularly” and “frequently.” A former Canon of Judicial Ethics for the State of Utah was interpreted as follows:

“In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases, one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success. He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.”

Utah State Bar Ethics Advisory Opinion No. 26, May 11, 1976, quoting former Canon of Judicial Ethics No. 31.

The Nevada Code of Judicial Conduct reflects the reality that in many rural Nevada jurisdictions, the justice courts could not function without the assistance of pro tem judges who must also practice law in those courts in order to support themselves and their families. As noted elsewhere in our Rules, the rule of necessity may override other restrictions of these Canons. See for example, Canon 3E(1), Commentary.

Pro tem judges who practice law in the courts where they serve must at all times be mindful of Canon 2 of the Nevada Code of Judicial Conduct:

“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 2A.

Both the court and the lawyer-judge must avoid conduct that could lead a reasonable person to conclude that the lawyer-judge is receiving preferential treatment from the court and/or court staff.

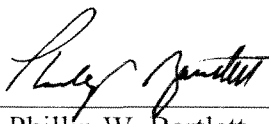
CONCLUSION

Lawyers who serve as pro tempore part-time judges may practice law in the courts where they serve as judges.

REFERENCES

Nevada Code of Judicial Conduct – Terminology; Sections A, C, D and E of the Application of the Code of Judicial Conduct; Nevada Code of Judicial Conduct Canons 2A & 3E(1), Commentary; Utah State Bar Ethics Advisory Opinion No. 26, May 11, 1976, quoting former Canon of Judicial Ethics No. 31

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Phillip W. Bartlett
Committee Chairman