

NOV 19 2013

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STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE REISSUED: November 19, 2013

AMENDED

ADVISORY OPINION: JE13-004

PROPRIETY OF A COURT EMPLOYEE
SERVING CONCURRENTLY AS A PRO
TEMPORE JUDGE

ISSUE

May a court employee such as the Court Administrator serve as a pro tempore judge in a justice or municipal court?

ANSWER

While the Committee found no Rule which explicitly prohibits a Court employee from serving as a pro tempore judge, the Committee believes that given the obligations under Rule 1.2 to insure appointments promote public confidence in the independence, integrity and impartiality of the judiciary and both the appointing and appointed judge, judges should avoid such appointments in accordance with Rule 2.13 where possible and where the number of qualified candidates makes appointments of Court personnel unnecessary.

FACTS

A Judge has inquired whether it would be a violation of the Nevada Code of Judicial Conduct ("NCJC") for a judge to appoint a court employee, such as the Court Administrator, to serve as a pro tempore judge in a justice or municipal court.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics*. Accordingly, this opinion is limited by the authority granted in Rule 5.

A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall for service. *See NCJC, Application III (A)*. A pro tempore part-time judge is a judge who serves or expects to serve sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. *See NCJC, Application IV (A)*. With various exceptions, the Canons also apply to the conduct of pro tempore judges. *See NCJC, Application IV (A)*.

Canon 2 of the NCJC states "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Rule 1.2 imposes upon judges the obligation to act at all times in such a manner. *See Nev. Code Jud. Conduct Rule 1.2*. The Commentary states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the



judge's ... impartiality...." See Rule 1.2, Comment [5]. This obligation applies equally to a jurist who serves as a pro tempore part-time judge. See *NCJC, Application III (B)(3)(d)*.

The Committee addressed a similar question in 2006, when it concluded that a District Court staff attorney could not serve as a temporary Family Court Master where his or her findings would be reviewed by the judge who supervises the attorney in a staff capacity. See *Advisory Opinion JE06-018*. Evaluating former Canon 2A, the Committee opined that the working relationship of the staff attorney and judge "would, in reasonable minds, create a perception that the ability of each to carry out their judicial responsibilities impartially is impaired...." *Id.* The Committee expressed concern that the close working relationship in the employment context placed a strain on their judicial functions and independence which created a perception that the judge's independence, integrity or impartiality was impaired.

The Committee believes this same concern of an appearance of impropriety and impairment of impartiality still exists under the revised Canons. Court employees could issue orders and enter judgments in their capacity as pro tempore judges on cases that are filed at the intake counter where the employee works. An employee may also feel pressured or compelled to decide cases in a certain manner in order to gain favor with or avoid offending a judge that supervises them in an employment capacity. The Committee also believes the working relationship of the parties creates issues with respect to potential ex parte communications and may require greater disqualification of either judge as a result of inadvertent receipt of information.

That being said, the Committee recognizes that nothing in the Canons

expressly prohibit such appointments, and that many of the concerns expressed are already addressed by the Canons that regulate all judges conduct. For example, Rule 2.2 requires judges to act impartially and Rule 2.4 prohibits a judge from being influenced by external factors. The Committee also recognized that other jurisdictions have relied on enforcement of these other Canons to mitigate concerns under Rule 1.2, and have reached opposite results. See *Advisory Opinion 94-11 (Arizona)*. However, the Committee believes the concerns expressed in its 2006 opinion remain valid, and found the limitations in Rule 2.13, which require the appointing judge to exercise appointing powers impartially and to avoid favoritism and unnecessary appointments, persuasive in guiding judges to make less controversial appointments where possible.

Given the reasonable likelihood that appointments of Court employees will create an appearance of impropriety and adversely affect public confidence in the judiciary, the Committee believes that where the pool of qualified applicants is of sufficient number that such appointments can be avoided, they should be. The Committee recognizes that in some rural jurisdictions Court employees may be the only qualified applicants and such appointments may occur out of necessity. However, the Committee cautions judges in those circumstances to be cognizant of the limitations imposed by Rule 1.2 and to avoid appointments which create the appearance of impropriety or do not otherwise promote public confidence in the judiciary.

CONCLUSION

The Committee believes appointments of Court employees as pro tempore part-time judges would, in a reasonable person's mind, create an

appearance of impropriety such that appointments of these personnel should be avoided, where unnecessary

REFERENCES

Nev. Code Jud. Conduct, Canon 1; Rule 1.2; Rule 2.2; Rule 2.4; Rule 2.13; Commentary [5] to Rule 1.2; *Rule 5 Governing the Standing Committee On Judicial Ethics; Application Section III and IV. See Advisory Opinion JE06-018; Arizona Supreme Court Judicial Ethics Advisory Committee Advisory Opinion 94-11.*

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.¹



Michael A.T. Pagni
Chairman

¹ This Opinion was re-issued to correct an error in the citation to Arizona Supreme Court Judicial Ethics Advisory Committee Advisory Opinion 94-11 (erroneously cited as Opinion 94-1).