



Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman
Hon. Thomas A. Donnelly
Prof. William T. MacPhearson, Jr.
Hon. Marie A. Baca

May 6, 1996

Re: Judicial Advisory Opinion 96-04

Dear

You have asked this committee to give you an opinion concerning a request you received from Judge _____ of the _____ Court to serve as a pro tem judge within the _____ Tribal Court. Judge _____ agrees to serve without pay and would act as pro tem judge during vacation time from his judgeship with the _____ Court.

You have also furnished us with a letter from Chief Judge _____ of the _____ Tribal Court indicating that he would like to have Judge _____ as a judge pro tem of his court but has decided that SCRA 21-500(I) prohibits such an undertaking. Judge _____ after setting out a strong argument for the benefits to both the Tribal Court and our state judges asks that the Supreme Court consider a rule change which "...would be a monumental policy statement regarding State-Tribal relations..."

SCRA 21-500 (I) states as follows:

No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

There seems no question that the clear wording of paragraph I prohibits a _____ judge (or any other judge) from serving as a pro tem judge in the Tribal Court.

Although SCRA 21-500 (I) does not appear in any of the model codes this paragraph follows prohibitions against acting as a fiduciary (paragraph E), service as an arbitrator or mediator (paragraph F) and practice of law (paragraph G) which were added to the model codes in 1972. Paragraph I would seem to be a logical progression of these other similar type of prohibitions which are found in most all state codes of Judicial Conduct. It should be noted also that these prohibited activities in SCRA 21-500(E)(F)(G) and (I) do not depend on whether the judge is compensated or not or whether he or she does the activity during office hours or on his or her own time.

In Judicial Conduct and Ethics Section 7.25, 2d ed. 1995, the reasoning for including a prohibition against a judge acting as an arbitrator and mediator in the 1972 Code is set out. It was determined by the drafters that the potential conflicts inhering in arbitration by judges were simply too great. Judges are appointed and paid for the purpose of resolving disputes, and that allowing what is essentially a private practice of the same profession necessarily exploits the judicial office. The judge acting as an arbitrator could be drawn into social and political controversies and the judicial office could be exploited in a effort to secure its dignity and prestige in support of an award.

The perception of the public in viewing a full-time state judge serving on another court should be considered. If we are paying him to be a full time judge why is he working a second job? Doesn't he have enough to do?, etc. As stated in the commentary to 21-300(B)(8):

The practices of a judge in the enjoyment of hours of personal holiday or recreation should leave no public perception that the business of the court is not a full-time demand or that the avoidance of delays in the administration of justice is not dependant upon active management of the judiciary.

It is noted that paragraph E, F and G state, "A judge shall not" while Paragraph I states, "No full-time (judge) may". If the Supreme Court wishes to revisit SCRA 21-500(I) it is our recommendation that specific requirement be set out in each case such as approval by the Supreme Court, time limitations on the days and hours of pro tem service, and the amount of compensation and per diem if any.

Very truly yours,

Frank H. Allen, Jr.
Chairman, Judicial Advisory Committee

FHA/mav

xc: Judge
Chief Judge