

NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE

OPINION 2012 - 1

ISSUE

An attorney, who is seeking election as a part-time municipal court judge, but has also been appointed to serve as a substitute part-time municipal court judge during the current judge's absence and has served for several years on a part-time basis as the current judge's substitute, inquired if Section A(1) of the Compliance With the Code of Judicial Conduct portion of the North Dakota Code of Judicial Conduct prohibits a part-time judge from practicing law when a candidate for judicial office.

ANALYSIS

In relevant part, Section A1 of the Compliance portion of the North Dakota Code of Judicial Conduct states:

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

A. Part-Time Judge. ... A part-time judge:

(1) except when using the judge's office or title, or when a candidate for judicial office, is not required to comply with Sections ... 4G; ...

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Sections ... 4 G; ...

N.D.Code Jud. Conduct, Compliance A(1).

Section 4 G of the North Dakota Code of Judicial conduct states:

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

N.D.Code Jud. Conduct, §4G.

I. Candidate for Judicial Office.

There is no issue raised as to whether the attorney requestor is a candidate for judicial office.

“Candidate” is defined in the North Dakota Code of Judicial Conduct as:

... a person seeking selection for or retention in judicial office by election or appointment.

N.D. Code Jud. Conduct, Terminology.

The attorney is currently serving as a substitute part-time judge and is seeking election to this office. Therefore he must comply with Section A1 of the Compliance portion of the Code.

II. Part-Time Judge or Judge Pro Tempore.

A first reading of Section A1 appears to require a part-time judge to comply with the general prohibition contained in Section 4G of the Code not to practice law. Section A1 could possibly be interpreted as containing two exceptions to allowing a part-time judge to practice law, when using the judge’s office or title or when a candidate for judicial office. Whereas Section B1, relating to judges pro tempore, allows a judge pro tempore to practice law.

A “pro tempore judge” is defined in the North Dakota Code of Judicial Conduct under the Commentary to the Terminology section as:

A pro tempore 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.

N.D. Code Jud. Conduct, Terminology, Commentary.

A “part-time judge” is defined by the Code as:

... a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full time judge.

N.D. Code Jud. Conduct, A1, Compliance.

In this fact situation, the attorney has served as a substitute judge for the current municipal court judge for several years and is currently appointed as municipal judge while the current judge is absent. The City’s web site describes the attorney as an “Alternate Municipal Court Judge” (since 2005) and notes that he has his own law practice. The attorney requestor has served as a substitute municipal court judge on a continuing and periodic basis for several years as opposed to once or sporadically, and therefore fits within the definition of a “part-time judge.” Section A1 does apply to this attorney requestor.

III. How should N.D. Code of Judicial Conduct, Section A1, Compliance, be read?

As stated previously, upon first reading, Section A1 appears to include candidates for judicial office in its exception to the allowance of the practice of law by part-time judges. In other words this section appears to allow part-time judges to practice law, but prohibits those same part-time judges from practicing law if they are a candidate for judicial office. The Committee, however, believes this section should be read to state that a part-time judge, when a candidate for judicial office, is not required to comply with Section 4G which prohibits a judge from practicing law. The only exception to the allowance of the practice of law by a part-time judge would be when the judge is using the judge's office or title. The phrase "except when using the judge's office or title" which is set off by a comma in this section of the code, contains the only exception to the general rule that a part-time judge is not required to comply with Section 4 G. The phrase "or when a candidate for judicial office" relates to and qualifies the term "part-time judge." Section A1, without the exception, would read: "A part-time judge ... when a candidate for judicial office, is not required to comply with Section ... 4G;..."

The ABA's Model Code of Judicial Conduct identifies three categories of part-time judges, none of who are required "at any time" to comply with the prohibition on the practice of law. ABA Model Code of Jud. Cond., Application, III to V, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_application.authcheckedam.pdf. Other jurisdictions have recently amended their judicial conduct code sections relating to part-time judges making clear a part-time judge is not required to comply "at any time" with the prohibition of a judge practicing law. *See, e.g.* Minn. Code Jud. Cond., Application III (A)(2), ("A continuing judge who serves repeatedly on a part-time basis under a continuing appointment, is not required to comply ... at any time with Rule 3.10 (Practice of Law) ...") (same for periodic part-time judge"); In re Oklahoma Code of Judicial Conduct, (Title 5, Ch.1, App.4), SCBD No. 5704, ___ P.3rd ___, 2010 WL 5129087 (Okla. Jan. 11, 2011) (Code includes references to three categories of part-time judges, none of whom are required "at any time" to comply with the prohibition on the practice of law).

Going back as far as the 1924 Canons of Judicial Ethics, judges who were authorized to practice law part-time were cautioned that they should not "seem[] to utilize [their] judicial position to further [their] professional success." Charles Gardner Geyh, Roscoe Pound & The Future of the Good Government Movement, 48 So. Tex. L. Rev. 871, 878 (2007) (quoting Cannons of Judicial Ethics (1924), Canon 31)). Even in the modern era, there is recognition that a part-time judge position usually does not provide sufficient remuneration to justify requiring a part-time judge to cease the practice of law. *See, e.g.*: N.H. Adv. Comm. On Jud. Ethics Op. 2002-ACJE-07, 2003 WL 26073786 (Oct. 27, 2003) ("The committee recognizes that New Hampshire is one of few states that employ part-time judges. This arrangement should preserve opportunities for part-time judges to make an adequate living while carrying out their judicial duties. Otherwise, the state could not attract excellent candidates to its part-time judiciary.")

The Canons and Sections of the Code are "rules of reason." N.D. Code Jud. Conduct pmbl. Applying reason to the interpretation of Section A1, Compliance, it is clear that a candidate for judicial office who is currently a part-time judge, is not required to comply with the prohibition from practicing law contained in Section 4G of the North Dakota Code of Judicial Conduct. It would be an absurd result to require a candidate for a part-time judge position to not practice law, yet allow a part-time judge, who is not a candidate, to practice law. There is no reasonable explanation to exclude part-time judges who are candidates for a judgeship from practicing law.

CONCLUSION

The Committee unanimously concludes that, although Section A1 of the Compliance portion of the North Dakota Code of Judicial Conduct is awkwardly written making this section confusing, the phrase “when a candidate for judicial office” relates to and qualifies the earlier reference in Section A1 to “a part-time judge” and is not an exception to this rule allowing a part-time judge to practice law as is the phrase “except when using the judge’s office or title”. It follows from this construction that a part-time judge, when a candidate for judicial office, is not prohibited from practicing law.