

OPINION OF OFFICE OF CITY ATTORNEY

DATE: APRIL 8, 2009

TO: HONORABLE ROSENDO MORALES  
JEFF PHILPOT, CITY MANAGER  
SONIA CUELLO, CITY CLERK

RE: OPINION REGARDING CANONS OF JUDICIAL CONDUCT AS IT RELATES TO  
POSITION OF POLICE OFFICER AND ELECTED POSITION OF CONSTABLE

This office has been asked by the City Manager to research and write an official opinion of the Office of City Attorney. By background, Ernesto Lugo has been employed as a police officer of the City of San Luis, and continues in that employment. In 2006 Mr. Lugo ran for, and was elected to, the paid position of Constable for the Somerton Justice Court, Yuma County, Arizona. At present time Mr. Lugo has been assigned as a police officer to tend to Municipal Court of the City of San Luis. He remains a city employee under the Police Department in this assignment and is not an employee of the Court itself. This not unlike the relationship of the Yuma County Sheriff's Department to the Yuma County Superior Court or the relationship of the Arizona Department of Public Safety and its officers to the Arizona Supreme Court or the Arizona Court of Appeals. The question has been raised by Judge Morales of the San Luis Municipal Court of whether the position of Constable and the position of police officer violate Canon Four of the Arizona Code of Judicial Conduct, as adopted by Rule 81 of the Rules of the Supreme Court of Arizona.<sup>1</sup>

Canon Four provides in part:

“Canon 4. A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

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<sup>1</sup> In making this opinion, it is not the role of the City of San Luis to determine who may or may not be a judicial officer of the Somerton Justice Court, nor provide advice in that regards. The Justice Court is part of the unified judicial system of Arizona and its supervision is under and pursuant to the rules and administrative procedures of the Arizona Supreme Court. The legal advisors to the Court are the Office of the Attorney General of the State of Arizona and the Office of County Attorney for Yuma County, Arizona. Rather the role of the City is limited as to who may or may not be a police officer for the City of San Luis. This opinion is narrowly focused on that issue.

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this code.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities except that a judge may be an announced speaker at a fund-raising event benefitting indigent representation or public institutions of legal education. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

(4) A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(a) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(b) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of office

for that purpose, but a judge may be listed as an officer, director, or trustee of such an organization, so long as the listing is not used for fund-raising purposes. Except as permitted by paragraph (C)(3) above, a judge should not be a speaker or the guest of honor at an organization's fund-raising events, but may attend such events.

(c) A judge should not give investment advice to such an organization, but a judge may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this code, manage and participate in:

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

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

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under § 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds the statutory minimum for financial disclosure, the judge reports it in the same manner as the judge reports compensation in § 4H.

#### E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

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.

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report compensation for extra-judicial activities as required by law.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in §§ 3E and 3F, or as otherwise required by law.

J. Wedding Ceremonies.

- (1) The performance of wedding ceremonies by a judge is a discretionary function rather than a mandatory function of the court.
- (2) A judge shall not interrupt or delay any regularly scheduled or pending court proceeding in order to perform a wedding ceremony.
- (3) A judge shall not advertise his or her availability for performing wedding ceremonies.
- (4) A judge shall not charge or accept a fee, honorarium, gratuity or contribution for performing a wedding ceremony during court hours.
- (5) A judge may charge a reasonable fee or honorarium to perform a wedding ceremony during non-court hours, whether the ceremony is performed in the court or away from the court. “

Canon 4A provides the general purpose of this Canon. It is to require that Judges refrain from outside activities which would affect the integrity of the judicial process and make the process or give the image of process one of the Court being something other than a neutral objective tribunal. See Matter of Fleischman , (1997) 188 Ariz. 106, 933 P.2d 563. As stated in the Commentary to Canon 4A:

“Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See § 2C and accompanying commentary. “

Please understand the focus of the Canon is on the Judge, not other court officers. This is not to say a Judge shouldn't ensure that court officers adhere to the Canons of Judicial Conduct. However, there is a difference between a Judge and other persons working in the Court. See definition of “court personnel” in the Terminology section which is part of the Preamble to the Code of Judicial Conduct.

The duties of Constable are set forth in Article 3 of Chapter 1 of Title 20 of the Arizona Revised Statutes. A.R.S. § 22-131 provides:

**“§ 22-131. Constables; powers and duties**

**A.** Constables shall attend the courts of justices of the peace within their precincts when required, and within their counties execute, serve and return all processes and notices directed or delivered to them by a justice of the peace of the county or by competent authority. In addition to any other provision of law these duties may be enforced by the presiding judge of the superior court in the county, including the use of the power of contempt.

**B.** Constables shall attend the training prescribed in § 22-137.

**C.** Constables, with the consent of and at salaries fixed by the board of supervisors, may appoint deputies who are certified pursuant to § 41-1822, subsection A, paragraph 3, stenographers, clerks and assistants necessary to conduct the affairs of their offices. The appointments shall be in writing and filed in the office of the county recorder.

**D.** The provisions of law relating to sheriffs, as far as applicable, shall govern the powers, duties and liabilities of constables.

**E.** A constable who is duly elected or who is appointed by the board of supervisors has the authority of a peace officer only in the performance of the constable's official duties.”

As can be seen, the role is not unlike that of the role of the Sheriff with respect to the Superior Court. Also note subsection E in its provisions that in performing the duties of the office, a constable is acting as a peace officer.

Further, pursuant to A.R.S. §§20-136 and 20-137 the ethics, standards and code of conduct governing the position of Constable are not the Canons of Judicial Conduct, but those of the Constable Ethics Standards and Training Board. Unfortunately this Board does not have a website, and the standards adopted by this Board are not part of the Arizona Administrative Code. As a result this author was unable to review the standards adopted by this Board as an online document.

In reviewing Canon 4, it is hard to see how the position of police officer conflicts with being a constable. Both serve warrants, subpoenas, and other court orders and enforce laws of the State of Arizona. Both positions are, at their core, that of being a peace officer. Neither position involves being a tribunal. Those duties are reserved to the justice of the peace or other judge of another court. This author cannot see how functioning both as a police officer and a constable creates an image that the Justice of the Peace of the Somerton Justice Court or the Municipal Judge of the City of San Luis is not a neutral objective judicial official.

With respect to the position of being a police officer, there is a provision of the Personnel Policies which prohibit city employees from holding elective office. This particular provision, as written, is overbroad and unenforceable. See MUNICORP § 45.49. As stated in part in that section:

“... [A] police officer may be forced to resign where an “incompatibility of offices” arises. Such incompatibility arises where the statutory functions and duties of the offices conflict, as when one is subordinate to the other, subject to its control, or the officer is required to choose one obligation over another. For example, where a police officer is a member of the city council charged with overseeing the conduct of the police department, approving the department's budget, appointing and removing department heads, and creating and abolishing offices, the offices of police officer and council member are incompatible. On the other hand, where the offices are not incompatible, such as where a police officer is elected to a school board, his or her position as a police officer cannot be taken away on the basis of incompatibility or conflict of interests.”

This author does not see how the two offices are incompatible. As a result, it is the opinion of this office that a police officer of the City of San Luis may be an elected constable, and the City does not have the power to force the officer to choose which position he or she wishes to maintain.

## CONCLUSION

Canon Four of the Code of Judicial Conduct as adopted by Rule 81 of the Rules of the Supreme Court does not apply nor create a situation where a police officer of the City of San Luis cannot hold the elected office of Constable. This is for several reasons. First the Canons are primarily directed to judges, not subordinate personnel. Second, the two positions do not, in and of themselves, create an image of impropriety or affect the ability of a judge of either the justice court or a municipal court to be a neutral objective Trier of fact or law. Third, Constables have an independent set of standards governing their conduct. Fourth, the two offices are not incompatible, and do not violate the Personnel Policies of the City in a way that the City may take action.