

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 07-886

EXTRA-JUDICIAL ACTIVITIES – APPOINTMENT TO A GOVERNMENTAL PROFESSIONAL LICENSURE AND DISCIPLINARY BOARD

ISSUE

Should a district judge serve as a member of a professional licensure and disciplinary board?

Answer: No.

FACTS

A district judge is considering an appointment as a citizen member to the Alabama Board of Examiners in Counseling, which functions pursuant to Ala. Code §§ 34-8A-1 to -24 (1975).

DISCUSSION

Canon 5, which pertains to extra-judicial activities, requires a judge to “regulate [her] extra-judicial activities to minimize the risk of conflict with [her] judicial duties.” Canon 5G specifically addresses extra-judicial appointments to governmental boards, stating, in part, “It is desirable that a judge should not accept appointment to a governmental committee, commission, or other 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 or unless required by law.” The activities of a professional licensure and disciplinary board or commission, such as the Board of Examiners in Counseling, fall within the disfavored category, i.e., involving issues of fact and policy that do not concern the improvement of the law, the legal system, or the administration of justice.

Pursuant to Canon 5G, the Commission has opined that a judge should not serve on state boards and commissions concerned, as here, with matters of public, non-legal benefit. *See* Advisory Opinion 97-635 (a Regional Citizen Review Panel under the Alabama Department of Human Resources), citing as examples, Advisory Opinions 85-237 (Alabama State Fair Authority); 77-17 (city board of education); 76-11 (county board of education). *See, e.g.,* Advisory Opinions 99-734 (city board of education); 97-663 (Board of Directors of the West Jefferson Amusement and Public Park Authority); 85-240 (County Districting Commission). *Cf.* Advisory Opinions 06-870 (membership on the State Commission on National and Community Service is discouraged, but not prohibited, as long as such service complies with Canons 2A, 3, and 5F); 97-681 (Canons do not prohibit membership on government commission where law providing for the commission specifically requires that membership includes two judges; legislature made public policy decision that judges are necessary members and implicitly determined that program relates to the administration of justice).

Although the Commission has consistently held that service in a governmental position that is concerned with issues other than the improvement of the law, the legal system, or the administration of justice should be avoided, such service is not absolutely prohibited under Canon 5G.

Thus, the judge must scrutinize the prospective appointment under other canons. Canon 2A requires a judge to “respect and comply with the law.” One such law is Ala.

Const. Art. VI, § 147(b), which states, “No judge, except a judge of probate court, shall ... hold any other office of public trust” If membership on the Board of Examiners is an “office of public trust,” a judge would violate Canon 2A by accepting an appointment to that board. See Advisory Opinions 06-870; 99-734; 85-240; 85-237. An additional concern is whether such membership is an “office of profit,” for a person shall not “hold two offices of profit at one and the same time under this state.” Ala. Const. Art. XVII, § 280; Ala. Code § 36-2-1(b) (1975). “The constitutional prohibition of § 280 ... is directed against the holding of two inconsistent offices, which would result in the same individual’s exercising power and discharging duties pertaining to different branches of the government.” *Johnson v. Board of Control of the Employees’ Retirement System of Alabama*, 740 So. 2d 999, 1008 (Ala. 1999). See Advisory Opinions 87-308; 77-17. See also *Van Antwerp v. Hogan*, 283 Ala. 445, 453, 218 So.2d 258, 265 (Ala. 1969) (being ineligible to hold any office of profit or trust under this state other than a judicial office, a judge will be removed from a second office of profit or trust, which he attempts to hold either by color of election or appointment).

The Commission is not authorized to give advisory opinions concerning the application of constitutional or statutory law; its opinion authority extends only to application of the Alabama Canons of Judicial Ethics. It is the Commission’s understanding that the question whether membership on the Board of Examiners constitutes an “office of public trust” or an “office of profit” may be presented to the Attorney General for an opinion.

Even if membership on a professional licensure and disciplinary board is legally permissible, however, a judge’s exercising power and discharging duties pertaining to a different branch of government would violate Canon 1’s requirement that a judge uphold the integrity and independence of the judiciary. The licensure and disciplinary responsibilities of the Board of Examiners of Counseling are clear responsibilities of the executive branch. A judge’s acceptance of those responsibilities would affect the public’s perception of the independence of the courts from the executive branch of state government.

The judge must further discern whether the board’s activities and responsibilities violate the mandate of Canon 2A that a judge “should conduct [her]self at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” as well as of Canon 3 that she perform the duties of her office impartially. “[N]on-judicial service tends to erode the appearance of impartiality which is essential to judging itself.” Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 9.04 (2000).

In addition, a judge must consider the provision of Canon 3 that the judicial activities of a judge take precedence over her other activities. See also Model Code of Judicial Conduct, Canon 4C(2) (1990), Commentary (“The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial.”). Extra-judicial activity on a professional licensure and disciplinary board

could burden judicial caseloads or embroil a judge in matters of controversy. The Commission finds that the potential for conflict and interference with the proper administration of justice is high.

It is the opinion of the Commission that the Canons prohibit a judge from serving as a citizen member on the Alabama Board of Examiners in Counseling

the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.

REFERENCES

Advisory Opinions 06-870, 99-734, 97-681, 97-663, 97-635, 87-308, 85-240, 85-237, 77-17, and 76-11.

Alabama Canons of Judicial Ethics, Canons 1, 2A, 3, 5, 5F, and 5G.

Ala. Const. art. VI, § 147(b), and art. XVII, § 280.

Ala. Code 1975, §§ 34-8A-1 to -24, and § 36-2-1(b).

Johnson v. Board of Control of the Employees' Retirement System of Alabama, 740 So. 2d 999, 1008 (Ala. 1999).

Van Antwerp v. Hogan, 283 Ala. 445, 453, 218 So.2d 258, 265 (Ala. 1969).

Commentary, Model Code of Conduct, Section 4C(2) (1990).

Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 9.04 (2000).

This opinion is advisory only and is based on the specific facts and questions submitted by