

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 08-892

EXTRA-JUDICIAL BUSINESS ACTIVITY:
MARKETING NON-LEGAL SERVICES AND
SOFTWARE PRODUCTS FOR AN ALABAMA
CORPORATION TO HEALTHCARE
PROVIDERS

ISSUE

May two judges enter into a “marketing agreement” with an Alabama corporation to personally market its accounting and consulting services and software products primarily to healthcare providers for more efficient billing of healthcare services? **Answer:** No, the judges should not be personally involved to any degree in marketing services or software.

FACTS

A district judge in a metropolitan area and a circuit judge of a two-county rural circuit propose to form a corporation for “a specialized marketing business” and enter into a “marketing agreement” with an Alabama corporation to market its accounting and consulting services and software products. The targeted clientele would be primarily in the healthcare industry, particularly hospitals. The software enables healthcare providers to more efficiently bill insurance companies, Medicare, Medicaid, and self-paying patients.

The judges’ titles would not be used in any manner or mode to promote the business. The marketing plan would be designed to minimize any potential conflict. The software products do not target the legal community and, if any such products were developed while the judges are on the bench, they would not market them. In addition, the judges would not market to any potential client in their respective jurisdictions. Although they plan eventually to hire other marketing employees, the judges would personally market the services and software. They assert that the proposed business would not require them to expend time to the extent that it would interfere with their judicial duties.

DISCUSSION

Canon 5C, which governs financial activities of a judge, provides in pertinent part:

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.^[1]

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

¹ The 1972 American Bar Association Model Code of Judicial Conduct contained two versions of Canon 5C(2). The preferred version stated that “a judge may hold and manage investments, including real estate, and engage in other remunerative activity, *but should not serve as an officer, director, manager, advisor, or employee of any business.*” Alabama chose the alternative version. It was intended only as a stop-gap standard in jurisdictions not willing or able to provide adequate salaries for judges. See E. Wayne Thode, *Reporter’s Notes to the Code of Judicial Conduct* 22-23, 80-83 (1973). As the Model Code Canon 5C(2) Commentary (1972) noted, “The remedy, however, is to secure adequate judicial salaries” and once adequate salaries are provided, the preferred standard should be adopted so the potential conflicts and possible appearances of impropriety that exist in the alternative standard can be eliminated. Thode, *supra*, at 22-23, 82-83.

See also Canon 2 (“[a] judge should avoid impropriety and the appearance of impropriety in all his activities”); Canon 2C (a judge “should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him”); Canon 3 (“[t]he judicial activities of a judge take precedence over his other activities”); Canon 3A(5) (a judge should dispose promptly of the business of the court); Canon 3B(1) (a judge should diligently discharge his administrative duties); Canon 5 (“[a] judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties”); and Canon 5F (“[a] judge should not practice law”).

In addition, Canon 6 requires scrutiny of the proposed compensation, as follows:

A judge may receive compensation and reimbursement of expenses for the . . . extra-judicial activities permitted by these canons, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. COMPENSATION.

Compensation should not exceed a reasonable amount. Nor should it exceed what a person who is not a judge would receive for the same activity.

B. EXPENSE REIMBURSEMENT. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

The application of these provisions is, of course, fact-specific. *See, e.g.*, Advisory Opinions 02-798 (a circuit judge who serves on a local bank’s board of directors is prohibited, pursuant to Canons 2C, 5C(1), and 5C(3), from making business calls for the purpose of soliciting and retaining business for the bank); 99-723 (a judge may serve on the board of directors of a bank located in the court’s jurisdiction where the board meets monthly, the judge’s service would not cause disqualification from a significant number of proceedings, and the remuneration is commensurate with that normally paid for such service); 96-619 (a judge may write to public librarians and boards of education to solicit the purchase of a children’s book the judge authored 20 years earlier if the judge does not use his title or office or otherwise exploit his judicial position in such letters, interfere with the proper performance of his judicial duties, or reflect adversely on his impartiality); 96-604 (where a circuit judge would not personally sell or recommend law-related software he developed to attorneys practicing in his court, where the software would be ordered and distributed through a closely-held family corporation, and where the software would be marketed using the corporate name without any identification of the judge with the product, “the marketing of such a software program would not violate Canon 5 unless, of course, the judge uses his position to market the program or allows the marketing process to interfere with the proper performance of the judge’s official duties”); 95-553 (a probate judge may hold a position as an elected member on the state board of the Alabama Farmer’s Federation and ALFA Insurance if he can do so within the constraints of Canons 3, 5C, 5D, and 6); 89-382 (a judge may be employed as a data-processing consultant by an institution of higher learning that is located outside the judge’s jurisdiction and that has never had and is not likely to have any cases before the judge unless the activity would interfere with the proper performance of the judge’s judicial duties or reflect on the judge’s impartiality); 87-312 (it would be almost impossible for a judge to engage in the business of federal and state tax-return preparation without violating the provisions

of Canon 5C); 78-40 (it would be impossible for a district judge to sell real estate for a licensed broker without in many respects placing himself in violation of Canon 5C(2)); and 78-34 (same).

Thus, in determining whether the proposed extra-judicial activity of personally marketing services and software is permitted by the canons, the Commission considers whether such activity would interfere with the judges' full compliance with Canon 5C(1)'s requirements that the proposed activity neither reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, nor exploit their judicial position; Canon 2's requirement that they avoid impropriety and the appearance of impropriety; Canon 2C's mandate that they avoid lending the prestige of their office to advance the private interests of others or conveying or permitting others to convey the impression that they are in a special position to influence them); Canon 3's requirement that their judicial activities take precedence over their other activities; and Canon 5's duty to regulate their extra-judicial activities to minimize the risk of conflict with their judicial duties. *See also* Canon 3A(5)'s requirement that a judge promptly dispose of the business of the court; Canon 3B(1)'s mandate that a judge "diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials"); Canon 3A(5) Commentary ("Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end."). *Compare* Advisory Opinions 78-40 (a judge's engagement in the sale of real estate for a licensed real estate broker would tend to interfere with the proper performance of the judge's judicial duties) and 02-798 (a judge's making business calls as a member of a bank board for the purpose of soliciting business

would exploit the judicial position and interfere with the proper performance of judicial duties if performed during usual business hours) *with* Advisory Opinion 99-723 (a judge's service on a bank's board of directors that meets monthly and is not involved in the daily operations of the bank does not appear to cause interference with the proper performance of the judge's judicial duties). *See also* Advisory Opinion 89-382 ("[I]f the activity becomes too time consuming and causes the judge to delay cases or judicial decisions or if it causes him to change court dates, the activity would interfere with the performance of his judicial duties and should be avoided.").

Consistent with the dictates of the cited canons and the Commission's prior advisory opinions, the Commission concludes that the requesting judges are prohibited from engaging in the proposed marketing agreement.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2, 2C, 3, 3A(5), 3B(1), 5, 5C(1) - (3), 5D, 5F, and 6A and B, and Commentary, Canon 3A(5).

Alabama Advisory Opinions 02-798, 99-723, 96-619, 96-604, 95-553, 89-382, 87-312, 78-40, and 78-34.

1972 ABA Model Code of Judicial Conduct, Alternative Canon 5C(2) and Canon 5C(2) Commentary.

E. Wayne Thode, *Reporter's Notes to the Code of Judicial Conduct* 22-23, 80-83 (1973).

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