

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: March 4, 2014

ADVISORY OPINION 14-926

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### ISSUES

- (1) Is a part-time municipal judge accountable under the Canons of Judicial Ethics when the judge, court employees, and/or contract probation services engage in a pattern and practice of failing to afford constitutional rights to defendants and follow standard procedures required by the rules of court and statutes? **Answer:** Yes.
- (2) Does the fact that the judge is a part-time judge, the fact that the judge has neither hiring nor firing authority over the city magistrate-clerk, or the fact the judge is not consulted in the selection of the private probation company nor in the terms of the contract with that company alleviate the judge's ethical accountability for the actions of the clerk or the private company employees, if the judge knew or should have known in performing his/her responsibilities, that the clerk and/or the private company employees were failing to perform their duties in a manner consistent with the high standards required of judges and the court? **Answer:** No.
- (3) Can a municipal court judge ethically continue to sit as municipal judge where the procedures of the court present multiple concerns regarding the violation of defendants' fundamental constitutional rights and the judge or court personnel consistently fails to comply with the standard procedures required by the courts and statutes to ensure fairness and justice for all? **Answer:** No.

### FACTS

In the facts presented, the Commission notes the following areas of concern to which a municipal judge shall be attentive:

#### A. COURT RECORDS

That orders of the court are duly signed by the judge in a timely manner; that blank orders are never signed by the judge to be filled in by staff; that

execution of orders not be delegated to staff by use of signature stamps; that all plea agreements, waivers of counsel, and other forms be properly executed and maintained; that counsel be appointed for indigent defendants where appropriate; that all orders and records of the court be retained by the court clerk as required by law; that the amount of fines imposed and court costs and fees assessed be limited to those allowed by law; that proper corrective action be taken upon discovery that the amount of such fines, costs, or fees was excessive and that traffic tickets be timely forwarded to the Department of Public Safety as required by law.

#### B. PROBATION

That probation be used only when a suspended sentence is imposed following conviction of an offense; that probation be imposed only after a properly executed order of conviction has been entered; that all probation orders be executed by the judge at the time the defendant is placed on probation and advised of the conditions of probation; that periods of probation be neither imposed nor extended beyond the time authorized by law; that petitions for revocation of probation be processed in accordance with due process requirements, including proper notice to the defendant; and written findings of the grounds for revocation of probation be recorded .

#### C. COUNSEL, INCARCERATION, AND PRE-TRIAL DIVERSION

That incarcerated defendants be provided timely initial appearance hearings as provided by law; that defendants be informed of their right to counsel; that defendants be given a reasonable time to secure an attorney prior to arraignment or a decision on pre-trial diversion; that any bond set should be reasonable, with consideration of the defendant's ability to make bond; that defendants not remain incarcerated beyond a court date due simply to administrative failures in the court; that defendants not be incarcerated for nonpayment of fines, costs, and restitution without the judge first conducting an inquiry as to the reasons for nonpayment; that defendants not be incarcerated for failure to pay fines, costs, and restitution beyond the maximum time allowed by law for such incarceration; that incarcerated defendants be properly credited on fines and costs with time served; that defendants not be incarcerated for nonpayment of fines, costs, and restitution, where the defendant has failed to pay because of indigency; and that any

finding of contempt for nonpayment of fine, costs, and restitution be based on a petition for contempt and a hearing after notice.

#### D. PRIVATE PROBATION

That private probation or other services used by the court be reviewed on a consistent basis to ensure there is no usurpation of the authority of the court, and to prevent such agencies from creating the perception that they have the authority to make the final determination of conditions of probation or to incarcerate offenders for noncompliance with court orders; that such agencies not be delegated the authority to make indigency determinations or other determinations relative to incarceration for noncompliance; and that all actions regarding probation be subject to review by the judge to ensure that such actions do not violate an offender's rights of due process or equal protection of the law.

#### E. JUDICIAL ENGAGEMENT

That sufficient time is committed by the judge to the court to insure that the judge and the other officials of the court protect the due process rights of all individuals appearing before the court.

### DISCUSSION

The Alabama Canons of Judicial Ethics relating to the above issues cover five basic areas: (1) a judge's responsibility to know, apply, and comply with the law; (2) a judge's responsibility for his or her own conduct so that both the judicial system and the public have confidence the judicial duties are being performed by a judge pursuant to the high standards of integrity and competence of judges; (3) a judge's responsibility to assure litigants they will be heard and heard expeditiously, especially in criminal matters; (4) a judge's responsibility to perform not only his or her administrative responsibilities, but to ensure the proper performance of administrative responsibilities of other court officials; and (5) a judge's duty to see that not only his staff but other court officials observe the same high standards that apply to the judge. The relevant canons are as follows:

#### Canon 1:

*A judge should uphold the integrity and independence of the judiciary.*

*An independent honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.*

Canon 2A:

*A judge should respect and comply with the law[.]*

Canon 2A:

*A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*

Canon 2B:

*A judge should . . . avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.*

Canon 3:

*A judge should perform the duties of his office . . . diligently.*

*The . . . judicial duties include all the duties of [the judge's] office prescribed by law.*

Canon 3A(1):

*A judge should be faithful to the law[.]*

Canon 3A(1):

*A judge should . . . maintain professional competence in [the law].*

Canon 3A(4):

*A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law[.]*

Canon 3B(1):

*A judge should diligently discharge his administrative responsibilities[.]*

Canon 3B(1):

*A judge should . . . maintain professional competence in judicial administration[.]*

Canon 3B(1):

*A judge should . . . facilitate the performance of the administrative responsibilities of . . . court officials.*

And Canon 3B(2):

*A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.*

The Commission notes these canons emphasize and re-emphasize the importance of promoting public confidence in the integrity, impartiality, and independence of the judiciary. Any conduct or nonfeasance by the judge that exhibits a pattern and practice of inattention, carelessness, or a *laissez-faire* attitude on the part of the judge or court officials undermines the public's confidence in its judicial system, which in turn undermines deference to the judgments and rulings of courts. See Commentary, Canon 1. Nothing in the law or the canons excuses part-time judges from exercising the diligence required to protect that confidence. In fact, the section "Compliance with the Canons of Judicial Ethics," at the end of the canons, exempts a part-time judge from complying with only certain provisions of Canon 5 and Canon 6.

The Commission recognizes that many municipal courts meet only once or twice each month for a short period of time, rarely more than several hours even in the busiest part-time courts, and that frequently the only full-time court employee or official is the court clerk, who may also be designated a magistrate. Although the judge may be employed in a part-time capacity, he or she has a legal obligation to assure that all court officials be in compliance with their duties to the court and to constitutional and statutory law and procedural legal and ethical rules. Even recognizing the part-time nature of the office, one who accepts the office of part-time judge also accepts the corresponding responsibilities and must devote sufficient time to his or her judicial and administrative duties to remain in compliance with the Canons of Judicial Ethics.

The importance of municipal courts in the scheme of state court systems has long been recognized. In 1977, in a disciplinary action against a municipal judge for failure to

perform his duties, the Supreme Court of New Jersey emphasized the role such courts have in the overall system of state courts, as follows:

[T]he local courts of first instance are the very foundation of the enforcement of the criminal law; that upon them rests the primary responsibility for the maintenance of peace in the various communities of the State, for the safety on our streets and highways, and most important of all, the development of respect for law on the part of our citizenry, upon which in the last analysis all of our democratic institutions depend. [Former Chief Justice Vanderbilt] said “(t)his is the underlying reason why I have repeatedly called the municipal courts the most important in our state.”

In the Matter of Yengo, 72 N.J. 425, 342, 371 A.2d 41, 46 (N.J. 1977) (citations omitted). The same can be said of Alabama. More citizens are familiar with our court system through interaction with municipal courts than any of the other courts in our state.

Alabama law is clear: a municipal judge is the chief judicial officer of the municipality and bears primary responsibility for the administration of the court. See ALA. CODE § 12-14-30(d)(2012). The municipal judge, as do other judges, has the inherent authority to control the administration of the court, including the conduct of court officials and all other persons connected with a judicial proceeding before the court. See ALA. CODE § 12-1-7(4)(2012). He or she is thus given judicial authority over the court personnel, private or public, in the performance of their court duties. No exception is made for part-time judges. They too must remain vigilant in exercising this authority to see that the standards required in the canons are upheld. See Canon 3B(2).

Courts in other states have construed the above quoted canons to apply in judicial disciplinary cases in many of the areas of concern listed above. Pertinent to the concern for a part-time judge’s failure to follow court rules or the law are the following cases. In In re Zoarski, 632 A.2d 1114 (Conn. 1993), where the judge had set bail higher than authorized by law or court rules, the Supreme Court of Connecticut emphasized that a judge’s disregard for the rules of court demonstrates disrespect for the law. Thus, a judge violates Canon 2A where he or she violates court rules and procedures and fails to know, apply, and comply with the law. In addition, the Supreme Court of Indiana, noted the effect of a judge’s failure to follow court rules: “[a] court’s indifference to clearly stated rules breeds disrespect for and discontent with our justice system.” Crawford v. State, 770 N.E.2d 775 (Ind. 2002) (citing Canon 2A). How can government demand respect of

the laws by its citizens when its tribunals ignore those very same laws. See also In re Jocobi, 715 N.E.2d 873 (Ind. 1999) (Canon 2A is violated by failing to follow proper procedures).

Other specific areas of concern that have warranted discipline include a judge's forcing a defendant to enter a guilty plea in the absence of counsel and also refusing to set appeal bonds when required to do so. Inquiry concerning a Judge, 432 S.E.2d 728 (Ga. 1995). In another disciplinary case, In re C006F, 680 N.E.2d 528 (Ind. 1977), the court held the judge violated the canons when he gave the defendant a choice between proceeding without counsel or being found in contempt. In Mississippi Commission on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000), the judge's Canon 2A violations included improperly sentencing a defendant under the wrong statute and improperly extending a defendant's probationary period beyond the maximum allowed.

In addition, a judge can violate the duty to maintain professional competence under Canon 3A by failing to keep abreast of changes in the law. This canon places an affirmative duty on the judge to keep abreast of the law pertaining to his court. See, e.g., In re Williams, 987 S.W.2d 837 (Tenn. 1998) (a non-lawyer judge failed to take steps necessary to correct his deficiencies); Office of Disciplinary Counsel v. Karto, 760 N.E.2d 412 (Ohio 2002) (the judge violated his duty to maintain professional competence in the law by using an outdated Code to sentence juveniles).

Judges have also been held to violate the canons when they have allowed others to perform their judicial duties or delegated the performance of their judicial duties to others. In Mississippi Commission on Judicial Performance v. Hopkins, 590 So. 2d 857 (Miss. 1991), a judge was found to have willfully engaged in misconduct when he improperly allowed clerks and other officials to take actions exceeding their authority. In another case, In re Smith, 559 S.E.2d 584 (S.C. 2002), the judge was disciplined for failing to sign various court orders issued in his name. In particular regard to a judge's practice of signing blank court orders and orders of probation is the opinion in In re Wilder, 516 S.E.2d 927 (S.C. 1999). There, a judge was held to have violated the canons when he signed blank arrest warrants for his staff to complete. Similarly, this Commission advises that, when a judge delegates to others his or her judicial duties, such as the duty to determine a defendant's ability to pay court-ordered fines and costs, he, like the judge in Wilder, fails to perform the duties of his office. For additional pertinent case law, see In re Seal, 585 So. 2d 741 (Miss. 1991); In re Briggs, 595 S.W.2d 270 (Mo. 1980); In re Perea, 711 P.2d 894 (N.M. 1986).

Canon 3B mandates that a judge require of his staff and other court officials the same high standards that apply to him. Courts have held judges accountable for failing to do so. While the canons do not define “staff,” the term has been extended to those who work with the judiciary, including court clerks, bailiffs, secretaries, etc. See Utah Ethics Advisory Opinion 97-6 (1997).

Of course, the Commission does not intend to indicate that a single error of law, without more, constitutes a violation of the canons. However, when a judge or his staff persists in a pattern or practice of engaging in such conduct, that pattern and practice shows such a disregard for the law as to establish either the judge’s bad faith or lack of competence in his or her knowledge of the law. See In re Hammermaster, 985 P.2d 924 (Wash. 1999) (recognizing that a repeated pattern of failing to protect a defendant’s constitutional rights can constitute misconduct). See also In re Sheffield, 465 So. 2d 350 (Ala. 1984).

In specific regard to municipal courts, the Commission recognizes there may be particular difficulties for the judge in exercising his or her authority over court personnel who are employed by the municipality and answerable to the municipality. It is the judge’s responsibility, however, to enforce the constitutional rights of those who appear in his or her court in matters of adjudication of guilt, imposition of sentence, provision of probation, revocation of probation, and incarceration for failure to pay by indigent defendants; to ensure the orders of the court are just that—orders of the judge; and to enforce applicable procedural rules and policies to guarantee the court’s records are properly maintained. The judge has the authority and duty, when necessary, to monitor compliance with all judicial orders and to enforce those orders. ; to monitor compliance with those orders; and to enforce those orders with remedial measures, if necessary. The judge must exercise that authority to uphold the integrity, impartiality, and independence of the judiciary and the court system, as required by Canons 1, 2, and 3. When the judge accepts the office of part-time municipal court judge, he or she accepts the responsibilities of the proper operation of his or her court. If the court cannot be maintained consistent with these canons, the judge cannot serve and there can be no court.

In summary, case law is replete with instances in which judges have been held accountable under the canons for their failure to faithfully perform their duties, both adjudicatory and supervisory and to ensure like performance of the duties of court personnel. Such personnel would extend to any person or entity providing services to the court. Municipal judges, even though they may serve only on a part time basis, must be held to the same high standards as all other judges.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2A; 2B; 3; 3A(1); 3A(4); 3B; 3B(1); 3B(2); 5; 6; Commentary, Canon 1.

In re Sheffield, 465 So. 2d 350 (Ala. 1984).

ALA. CODE §§ 12-1-7(4); 12-14-30(d) (2012).

In re Zoarski, 632 A.2d 1114 (Conn. 1993).

Inquiry concerning a Judge, 432 S.E.2d 728 (Ga. 1995).

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