

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 17-931

PART-TIME MUNICIPAL JUDGE'S PRACTICE OF LAW: PROVIDING LEGAL SERVICES UNDER DIRECTION OF CITY LEGAL DEPARTMENT FOR QUASI-GOVERNMENTAL ENTITY THAT REGULARLY FILES LAWSUITS IN WHICH CITY IS A DEFENDANT

ISSUES

- I. May a part-time municipal judge continue to represent a quasi-governmental entity where the entity's legal services are directed and managed by the city's legal department, which also provides the prosecutors in the judge's court, and where the city is one of the defendants in the lawsuits the entity's counsel routinely files? **ANSWER:** No.
- II. If the part-time municipal judge may no longer provide legal services to the quasi-governmental entity, what role may the judge play in the entity? **ANSWER:** The Commission must limit its advice to specific proposed conduct.
- III. If the part-time municipal judge may no longer provide legal services to the quasi-governmental entity, what do the Canons permit the judge to do in winding up the matters pending before the judge's judicial appointment? **ANSWER:** The judge may provide only incidental information to successor counsel to safeguard the interests of the judge's former client and in the interest of the proper administration of justice.

FACTS

A quasi-governmental entity is a public corporation incorporated by the city and governed by a board of directors, four appointed by the city council and three by the mayor. It was established, pursuant to provisions of the Code of Alabama, to acquire tax-delinquent properties, surplus properties of local governments, and other properties for urban renewal. Although the city provides funding, the board acts as an autonomous entity. The part-time municipal judge, before being appointed to judicial office, provided contract legal services to the entity under the direction and management of the city's legal department. The city municipal-court prosecutors are attorneys in that department. As a matter of administrative, common law, and statutory routine, the city is a defendant in the lawsuits routinely filed by the quasi-governmental entity.

DISCUSSION

I. Although part-time judges are an exception to Canon 5F's prohibition against practicing law, part-time judges who practice law must adhere to other provisions of that Alabama Canons of Judicial Ethics that apply to them.

Canon 1 provides: "A judge should uphold the integrity and independence of the judiciary." Furthermore, "[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.” *Id.* The Commentary to Canon 1 explains why a judge must be truly independent:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. . . . [V]iolation of the Canons diminishes public confidence in the judiciary and thereby does injury to the system of government under the law.

In addition, Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all his or her activities, i.e., both professional and personal. Canon 2A requires a judge to conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Commentary to these provisions declares:

A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must, therefore, accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 5C(1) requires in part that a judge refrain from financial and business dealings that would tend to reflect adversely on his or her impartiality; interfere with the proper performance of his or her judicial duties, e.g., frequent disqualification; or exploit his or her judicial position.

The Commission’s advisory opinions do not offer clear guidance in the factual context here. See Advisory Opinion 99-743 (after appointment as a part-time municipal judge, Canon 2’s prohibition against any appearance of impropriety requires the judge to cease representing the city-council members in a lawsuit filed against them by the mayor). But see Advisory Opinions 86-266 (a part-time municipal judge’s employment by the city’s insurance carrier to represent the city does not raise an appearance of impropriety because the judge was retained regularly by the insurance carrier to represent other insureds prior to being retained to represent the city); 82-131 (the Canons do not prohibit a part-time municipal judge from serving as attorney for that city’s Board of Education). See also New York Advisory Opinions 99-23 (a part-time town justice may not represent a private client in a property-tax-assessment-reduction proceeding brought against the town; such representation is inconsistent with the position of town justice and could project an appearance of impropriety); 89-85 (a town justice should not represent a client on one side of a transaction with the town of which the justice is an officer, i.e., real-estate negotiations with the town, because such representation creates an appearance of a conflict of interest and thus, an appearance of impropriety by the justice).

Thus, we turn to Canon 1's mandate that the provisions of the Canons be construed and applied to further the objective of preserving the integrity and independence of the judiciary. One aspect of Canon 1's requirement that a judge act to preserve an independent judiciary is the effective separation of the judiciary from the executive branch. Here, the fact that the part-time municipal judge's provision of legal services would be under the direction and management of the city's legal department, which also serves as the prosecutor in every case in the jurisdiction of the municipal court, would erode the independence of the municipal court.

In addition, the judge would be disqualified from all municipal cases because the city is the prosecutor, but is also a defendant in the lawsuits filed by the judge as the attorney for the quasi-governmental entity. Such arrangement presents a reasonable question as to the judge's impartiality under Canon 3C(1), regardless whether the judge would have any actual bias or whether the city is a defendant truly adverse to the judge's client. The public simply could not be expected to understand such nuances.

“An independent and honorable judiciary is indispensable to justice in our society,’ and this requires avoiding all appearance of impropriety, even to the point of resolving all reasonable doubt in favor of recusal.” In re Sheffield, 465 So. 2d 350, 357 (Ala. 1984) (quoting Canon 1). Thus, the Commission advises the judge may no longer represent the quasi-governmental entity.

II. Under Rule 18, Rules of Procedure of Judicial Inquiry Commission, the Commission may provide advisory opinions concerning only whether certain specific actions proposed or contemplated by a judge may constitute a violation of the Canons. Because the Commission is not authorized to issue broad guidelines on general topics, the Commission cannot address any permissible participation by the judge in the activities of the quasi-governmental entity. The Commission encourages a request for advice based on specific participation contemplated by the judge.

III. In regard to the inquiry concerning winding-up the quasi-governmental entity's matters pending before the judge's judicial appointment, the Commission reiterates the limitations espoused in Advisory Opinion 13-920. Although those limitations were recognized in the context of Canon 5F's prohibition against a full-time judge's practicing law, the Commission finds them appropriate in the instant context.

Although a judge is prohibited from rendering legal advice regarding the future representation of the client, a judge may provide incidental information to successor counsel to safeguard the interests of the judge's former client and in the interest of the proper administration of justice. See J. Shaman, et al., Judicial Conduct and Ethics §7.10A (4th ed. 2007). For example, a judge may respond to new counsel's questions as to historical facts not readily apparent from the file, factual details within the judge's

peculiar knowledge, and similar matters of clarification. New York Advisory Opinions 96-128; 95-20. See, e.g., Nevada Advisory Opinion 98-3 (a judge may provide a written, verbatim transcription of her otherwise illegible notes in her former case, provided she does not discuss the notes, transcription, or any other matter with the current prosecutor).

Finally, the Commission advises that, should the judge's law partner continue to represent the quasi-governmental entity, the judge should not share in any fees the law firm earns as a result of such representation. However, the judge may accept fees for legal services the judge performed pursuant to the legal-services contract with the quasi-governmental entity prior to accepting the appointment as part-time municipal judge.

REFERENCES

Alabama Canons of Judicial Ethics: Canons 1, 2, 2A, 3C(1), 5C(1), 5F; Commentary, Canon 1; Commentary, Canon 2.

Alabama Advisory Opinions 13-920; 99-743; 86-266; 82-131.

Rules of Procedure of Judicial Inquiry Commission, Rule 18.

In re Sheffield, 465 So. 2d 350, 357 (Ala. 1984).

New York Advisory Opinions 99-23; 96-128; 95-20; 89-85.

Nevada Advisory Opinion 98-3.

J. Shaman, et al., Judicial Conduct and Ethics §7.10A (4th ed. 2007).

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 18 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.