

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: September 15, 2017

ADVISORY OPINION 17-934

- I. CIRCUIT JUDGE'S APPOINTMENT IN ADMINISTRATION-OF-ESTATE CASE OF DISQUALIFIED SPECIAL MASTER, I.E., PROBATE COURT'S SPECIAL ADMINISTRATOR
- II. JUDGE'S COMMUNICATIONS WITH POTENTIAL SPECIAL MASTER

ISSUES

- I. Under the Alabama Canons of Judicial Ethics, may a circuit judge who is presiding in the administration-of-estate cases removed from the probate court, appoint a special master who was the special administrator appointed by the probate court? **Answer:** No.
- II. Is the appointing judge limited by the Canons in his/her initial discussion with a potential special master? **Answer:** Yes.

FACTS

The inquiring circuit judge has been assigned multiple cases involving the administration of substantial, complex estates of a deceased husband and wife. When the estates were in the probate court, the probate judge appointed a "special administrator," pursuant to § 43-2-47, Ala. Code (1975), which provides:

(a) The judge of probate may . . . appoint a special administrator, authorizing the collection and preservation by him of the goods of the deceased until letters testamentary or of administration have been duly issued.

(b) Every such special administrator has authority to collect the goods and chattels of the estate and debts of the deceased, to give receipts for moneys collected, to satisfy liens and mortgages paid to him and to secure and preserve such goods and chattels . . . ; and for such purposes, he may maintain civil actions as administrator.

(c) Such special administrator may also, under the direction of the probate court, sell such goods as are perishable or wasting, after the same have been appraised, upon such notice as the judge of probate may prescribe.

(d) Upon the grant of letters testamentary or of administration, the authority of such special administrator ceases, and on demand he must deliver to the rightful executor or administrator all the assets of the deceased . . . and render an account on oath of all his proceedings to the probate court.

Probate of the estates has been transferred to the circuit court. The inquiring judge is considering appointing a special master, pursuant to Rule 53, Ala. R. Civ. P., and inquires whether the probate court's special administrator is a potential candidate under the Canons.

DISCUSSION

I.

Canon 3B(2) states that 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.” A special master appointed by a judge falls within the purview of this provision. See Rule 52, Ala. R. Civ. P. See also Garmon v. Alabama State Bar, 570 So. 2d 633 (Ala. 1990) (a master acts as an arm of the circuit court). Thus, Canon 3B(2) requires a judge to assure that he/she appoints a master who would not be disqualified if that master were the judge. Advisory Opinions 06-868; 01-775. Cf. Advisory Opinion 96-616. In addition, there is a question under the Canons as to whether a judge may appoint a master who would create an appearance of impropriety if assigned to a particular case. See Advisory Opinions 06-868; 01-775.

The “special administrator” appointed by the probate court would be disqualified from serving as a special master in the circuit-court cases because he/she would have personal knowledge of disputed evidentiary facts concerning the proceeding, Canon 3C(1)(a), and because, having been involved in the litigation, his/her “impartiality might reasonably be questioned.” Canon 3C(1). Neither disqualification is remittable under the procedure of Canon 3D. In addition, the judge’s appointment of the “special administrator” as the master would create an appearance of impropriety, which is prohibited by Canon 2.

II.

If a special master is to be used, it is critical that an appropriate individual be identified to serve. To this end, the appointing judge or the judge’s staff may contact any potential special master to discuss preliminaries, such as necessary experience, skills, and knowledge to handle the matter for reference; willingness to serve; time availability; technical capability; potential disqualification and conflicts; and compensation. In addition, an important factor may be, depending on the role of the special master, the ability of the judge and the special master to work together, including taking into account the master’s legal philosophies. The judge can investigate all of these issues in personal interviews conducted by the judge (and counsel for the parties, in the judge’s discretion), as required prior to selecting the best candidate to serve in a particular case.

During these initial communications, the judge should only generally describe the case and its status and the master’s proposed duties—without commenting on the merits of any issue, the judge’s theories of the case, the strategies of the attorneys, the judge’s credibility assessment of witnesses, or the validity and quality of evidence; without indicating any predisposition with respect to any issue; without explaining his/her actions taken in court with statements that are not in the official court record; and without disclosing any non-public information that the judge acquired in his/her judicial capacity. Pre-appointment contact between a potential master and the judge does not give rise to the concerns about ex parte communications; thus, Canon 3A(4) has no application. Moreover, the judge is not required to disclose the preliminary discussions with a potential special master to the parties and/or their attorneys.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2, 3A(4), 3B(2), 3C(1), 3C(1)(a), 3D.

Alabama Advisory Opinions 06-868; 01-775; 96-616.

§ 43-2-47, Ala. Code (1975).

Rule 52, Ala. R. Civ. P.

Garmon v. Alabama State Bar, 570 So. 2d 633 (Ala. 1990).

This opinion is advisory only and is based on the specific facts and question 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.