

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: June 8, 2018

ADVISORY OPINION 18-940

PART-TIME JUDGE: PROHIBITION FROM PRACTICING IN SAME COURT

APPOINTMENT: EXERCISE OF APPOINTMENT AUTHORITY CANNOT CAUSE DISQUALIFICATION

DISQUALIFICATION: NONE IN CASE WHERE ATTORNEY FOR LITIGANT IS A PART-TIME JUDGE WHO HAS NOT PRESIDED IN A CASE IN 3 YEARS

DISQUALIFICATION: JUDGE CANNOT AVOID DISQUALIFICATION BY DISQUALIFYING ATTORNEY WHO TRIGGERS JUDGE'S DISQUALIFICATION

ISSUES

- I. May an attorney who is a “temporary” probate judge, appointed by the probate judge pursuant to a general statute of local application, practice law in the probate court? **Answer:** No, where the attorney is a part-time judge, not a judge *pro tempore* under the Alabama Canons of Judicial Ethics.
- II. May the probate judge appoint an attorney, who serves as a “temporary” judge, to also serve as a guardian *ad litem* or administrator *ad litem* in a case not assigned to the attorney in his or her capacity as a “temporary” judge? **Answer:** No, where the attorney is a part-time judge, not a judge *pro tempore* under the Canons.
- III. Should the probate judge recuse from a pending case because a “temporary” judge is representing the petitioner in the case when the attorney has not served in a judicial capacity in the preceding three years? **Answer:** If the judge is not disqualified under the totality of the circumstances, recusal is within the judge’s discretion.
- IV. May the probate judge disqualify the attorney who is a “temporary” judge and continue to preside in the case despite a recusal motion? **Answer:** Where the attorney is a part-time judge, not a judge *pro tempore* under the Canons, the attorney may not represent any party in the probate court.

FACTS

The probate court of a particular county has unique duties and expanded jurisdiction that require the judge have experience in multiple areas of the law and strong litigation and trial management skills. By statute, the probate judge must be an attorney.

The inquiring probate judge has authority by a general statute of local application to appoint “temporary” probate judges, in the probate judge’s sole discretion, to serve contemporaneously

with the probate judge in certain conditions. The probate judge has appointed the same nine attorneys every quarter, for a 90-day period, since the probate judge took office in 2001. Annually, surety bonds are procured for each, and they are compensated. The local statute's pertinent provisions are:

- A. If the probate judge is incompetent for any legal cause, incapacitated, absent or will be absent from sickness, or otherwise disqualified from acting as judge, the presiding judge of the Circuit Court shall appoint a lawyer to act as "temporary" judge to serve until the probate judge certifies the disqualifying circumstance no longer exists.¹
- B. The probate judge, in his or her discretion, may appoint "temporary" judges to serve contemporaneously with him or her upon finding them necessary because of calendar congestion, complexity of issues, the prospects of an unduly long trial, or caseload management. No temporary appointment shall be for a term longer than 90 days, and a "temporary" judge may be appointed for as many successive 90-day periods or fractions thereof as might be necessary, but shall not serve more than 100 days during any fiscal year.
- C. The decisions of a temporary judge are not subject to revision by the probate judge, and the probate judge is not responsible for any acts or decisions by a temporary judge.

The probate judge has assigned six "temporary" judges each to two nonconsecutive months on a rotating basis to preside over the weekly docket of mental-health involuntary-commitment probable-cause hearings. The other three "temporary" judges serve much less frequently, on an "as needed" basis, typically over non-mental-health involuntary- commitment dockets.

DISCUSSION

Alabama's "Compliance with the Canons of Judicial Ethics" defines a "part-time" judge, as a judge who serves on a continuing basis, and a "judge *pro tempore*," as a judge who is appointed to act temporarily as a judge. The differences between the two are significant. One critical difference is that a "part-time" judge may not practice law in the court on which he or she serves, see, e.g., Advisory Opinions 90-408 and 88-348, whereas a judge *pro tempore* may practice in the court on which he or she serves. These terms must be construed narrowly to effectuate the broad mandates of Canon 1 that a judge should uphold the integrity and independence of the

¹ It is noteworthy that, in early 2010, the presiding circuit judge issued a standing administrative order "pre-appointing," for temporary service when the probate judge is unable to sit, seven of the same nine attorneys the probate judge has been appointing since 2001.

judiciary and Canon 2A that a judge should respect and comply with the law and should conduct himself or herself at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary. See also E.W. Thode, *Reporter's Notes to Code of Judicial Conduct*, 102 (1973) (this proscription for part-time judges is designed to avoid the appearance of impropriety (Canon 2) or of a lack of impartiality that would arise in the absence of restrictions on the part-time judge who is a lawyer).

The following are stated concerns necessitating the prohibition of part-time judges practicing in the court which they serve, as collected in Gray and Biro, *An Ethics Guide for Part-Time Lawyer-Judges*, American Judicature Society, 54, 55 (1999):

- a. A part-time attorney could have an advantage in cases in which he or she is involved as an attorney or at least appear to have an advantage. (Hawaii Advisory Opinion 3-96).
- b. Attorneys regularly appearing before the part-time judge would treat the judge differently when they are adversaries in cases. (Florida Advisory Opinion 95-8.)
- c. The part-time judge could feel pressure to make rulings favorable to attorneys who are his or her opposing counsel in cases in the hope of receiving less aggressive treatment or certain advantages in negotiations when they are adversaries. *Id.*
- d. Court employees may give preferential treatment to the part-time judge when he or she is acting as an attorney. (Mississippi Bar Advisory Opinion 38 (1977).)
- e. A part-time judge will be in a position to influence the disposition of cases in which he or she is involved as an attorney (South Carolina Advisory Opinion 11-1987) or at least a party might believe that the lawyer has special stature or other advantages in the court in which the lawyer acts as a judge. (Arizona Advisory Opinion 92-16.)
- f. If a part-time judge practices in the court on which he or she serves, the part-time judge automatically causes his or her own disqualification in all matters handled by him or her and all matters related thereto. (Alabama Advisory Opinion 88-348.)
- g. The public may have difficulty effectively distinguishing in which capacity a part-time lawyer judge is acting if the judge practices in the court on which he or she serves. The burden to distinguish when a part-time lawyer judge is acting as a judge and when he or she is acting as a lawyer should not be placed on the public. (Mississippi Bar Advisory Opinion 38 (1977).)

Here, the pertinent local-application statute's use of the word "temporary" does not determine whether the appointed judges are "part-time" or "*pro tempore*." Rather, the determination of which category and accordingly which rule applies to an individual judicial offer depend upon the facts of the particular judicial service. A part-time judge serves on a continuing or periodic basis, such as one-half of each working day or every Monday. Thode, *supra*, at 102. See also

ABA Model Code of Judicial Conduct, “Application,” Sections III. and IV. (2007) (a “continuing part-time judge” serves repeatedly on a part-time basis, under a continuing appointment; a “periodic part-time judge” serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter). A judge *pro tempore* is appointed to act as a judge on a temporary basis; he or she may act as judge for one proceeding or for one week or for some other limited term. Thode, *supra*, at 102. See also *ABA Model Code*, “Application,” Section V. (a *pro tempore* judge serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard).²

Here, all the “temporary” judges have been appointed on a continuous basis since 2001. At least six have been repeatedly and regularly assigned to at least eight scheduled dockets per year. The other three “temporary” judges appear to have been “on-call” and available under on a continuous basis since 2001. In construing the local-application statute’s terminology “temporary” narrowly to effectuate the broad mandates of Canon 1 and Canon 2A, the Commission advises that the “temporary” judges are in fact part-time judges.

As part-time probate judges, the “temporary” judges may not practice law in the probate court. Accordingly, the probate judge may not appoint them to serve as a guardian *ad litem* or administrator *ad litem*. Moreover, in any pending case in which a “temporary”/part-time judge is acting as an attorney, that part-time judge/attorney must immediately withdraw as counsel unless the probate judge rescinds his or her order appointing that attorney as a “temporary” judge.

² As examples of the application of these terms, see Advisory Opinions 01-784 (an attorney who serves sporadically (several times a year) as a municipal judge on appointment and call by the mayor when the full-time municipal judge is absent or disqualified is a judge *pro tempore*); 95-573 (an attorney serving for a limited time on a voluntary and unremunerated basis as a special circuit judge to dispose of criminal cases appealed from municipal court is a judge *pro tempore*; an “on-call” substitute judge is a “part-time” judge); 95-572 (an attorney selected from a long list of attorneys to sit as a special judge while the judges of the court are on other court business or vacation is a judge *pro tempore*; the attorney is not “on call” and may refuse the request to sit); 90-408 (an “on-call” substitute municipal judge, appointed with four other attorneys and approved by the mayor to serve as substitute judges whenever the need arises, agreed to be available upon the mayor’s call serves on a continuing basis and is a part-time judge). See also New Mexico Advisory Opinion 14-02 (a judge who serves under a continuing annual contract and is appointed by the municipal judge to serve less than ten days per year, not on regular basis—in contrast to a separate appointment or contract for each period of service or for each case—is a part-time judge).

Assuming any of the “temporary”/part-time judges discontinues serving as a judge and is practicing law in the probate court, the Commission advises that the probate judge must reckon with the issue of disqualification from that attorney’s pending cases. Under the facts presented, the six appointees who have regularly served under continuous appointment since 2001 have been identified with the probate court and the current probate judge to such an extent that the probate judge’s impartiality might reasonably be questioned, thus disqualifying the probate judge under Canon 3C(1) from their current cases. See, e.g., Advisory Opinion 13-923 (the question of the judge’s impartiality could be impacted by how often the judge appoints a former partner in comparison with the appointment of other potential qualified appointees). Accordingly, if those attorneys practice in the probate court, the probate judge is disqualified from presiding in the cases of those six attorneys for a reasonable time period, i.e., until the judge’s impartiality may no longer be subject to reasonable question. This disqualification may not be remitted by the parties. Canon 3D. (Likewise, the probate judge may not appoint these attorneys as guardian *ad litem* or administrator *ad litem* during the disqualification period.)³

As for the question of disqualification regarding the other three “temporary” judges, the probate judge should survey the accompanying circumstances to determine whether the totality of the circumstances presents a reasonable question of impartiality for disqualification pursuant to Canon 3C(1). In regard to the particular case in which one of the “temporary” judges has not served on the probate court in three years, the Commission advises that the sole fact of the judge’s continual contracts since 2001 does not present a reasonable question as to the probate judge’s impartiality.

For the probate judge’s consideration in making future appointments, the Commission notes the principle that a judge *pro tempore* should avoid, if possible, from serving as judge and serving as an attorney during the same general time period. In American Bar Association Informal Op. 639 (1963), the question was whether an attorney may practice in a court, in which he or she holds an appointment by the county board as a temporary-acting judge, during the time that he or she is not actually serving in that capacity. (Because of the requirement that a bond must be furnished each time, it has been customary to make the appointment for the entire term of the county

³ Canon 3B(4) provides a judge “should exercise his power of appointment only on the basis of merit, avoiding . . . favoritism.” Consent by the parties to an appointment does not relieve the judge of this duty. Commentary, Canon 3B(4). In addition, any appointment should promote public confidence in the integrity and impartiality of the judiciary. Canon 2A. Thus, even an appearance of favoritism is to be condemned as much as the impropriety itself.

judge.) The ABA Committee on Professional Ethics and Grievances adhered to the following language from ABA Formal Op. 161 (1936), as to *pro tem* judges:

[A *pro tem* judge] should, of course, refrain from acting in one capacity in any matter concerning which he has acted directly or indirectly in the other, and scrupulously avoid conduct whereby he utilizes or seems to utilize his judicial service to further his professional success. However we think the Canon recognizes that one who assumes to act as judge on one day and as advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system.

The Committee concluded that “it would be preferable that the appointments be made only for the specific period during which the acting judge was required to serve, rather than for the full term of the regular judge.”

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2; 2A; 3B(4); 3C(1); 3D; and “Compliance with the Canons of Judicial Ethics.”

Alabama Advisory Opinions 13-923; 01-784; 95-573; 95-572; 90-408; and 88-348.

ABA Model Code of Judicial Conduct, “Application,” Sections III.-V. (2007)

ABA Formal Op. 161 (1936)

American Bar Association Informal Op. 639 (1963)

Arizona Advisory Opinion 92-16

Florida Advisory Opinion 95-8

Hawaii Advisory Opinion 3-96

Mississippi Bar Advisory Opinion 38 (1977)

New Mexico Advisory Opinion 14-02

South Carolina Advisory Opinion 11-1987

Gray and Biro, *An Ethics Guide for Part-Time Lawyer-Judges*, American Judicature Society, 54, 55 (1999)

E.W. Thode, *Reporter’s Notes to Code of Judicial Conduct*, 102 (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 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.