

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 23-955

PART-TIME RETIRED JUDGES: EMPLOYMENT AS MEDIATOR, ARBITRATOR, AND PRIVATE JUDGE

ISSUES

Is a part-time active retired judge prohibited by the Alabama Canons of Judicial Ethics from serving as an arbitrator or mediator in the circuit in which he or she serves as a judge?

Answer: No, unless doing so would reflect adversely on the retired judge's impartiality, interfere with the proper performance of the retired judge's judicial duties, or exploit the retired judge's judicial position.

Is a part-time active retired judge prohibited by the Alabama Canons of Judicial Ethics from serving as a private judge in the circuit in which he or she serves as a judge?

Answer: Retired part-time judges are required to "respect and comply with the law" as required by Canon 2A.

FACTS

A circuit judge who has recently retired serves on a part-time active basis pursuant to an appointment by the Chief Justice. The judge presides over a small docket of cases specifically assigned by the presiding judge of the circuit and the judge does not expect to be assigned any additional cases. The judge will no longer have an active docket once these cases are concluded, although the judge will still be available for appointment by the Chief Justice.

The judge intends to develop a practice devoted to alternative dispute resolution (ADR) methods—i.e., mediation, arbitration, and serving as a private judge.

DISCUSSION

I.

First, the inquiring judge asks whether a part-time active retired judge may serve as a mediator or arbitrator within the circuit in which the judge serves. The Compliance provisions of the Canons pertaining to retired judges provide:

Retired and supernumerary justices or judges, who are serving part time on the Supreme Court or on either of the courts of appeals or on any circuit or district court in the state, in an active duty status, shall be required to comply with all of these Canons, except Canon 5C(3), D, E, F, G, and Canon 6C.

§ D(2), *Compliance with the Canons of Judicial Ethics*. Because part-time active retired judges are exempt from compliance with Canon 5E, which prohibits judges from acting as arbitrators or mediators, a retired part-time judge may serve in those capacities.

A part-time active retired judge's serving as an arbitrator or mediator is an extrajudicial financial activity

under Canon 5C(1). Thus, a retired judge may serve as a mediator or arbitrator, even in the circuit in which the retired judge serves as a judge, unless doing so would “tend to reflect adversely on his [or her] impartiality, interfere with the proper performance of his [or her] judicial duties, or exploit his [or her] judicial position.”

II.

Additionally, the inquiring judge asks whether a part-time active retired judge may also serve as a private judge in the circuit in which they serve as a judge. A part-time active retired judge’s employment as a private judge would also be an extrajudicial financial activity subject to the restrictions in Canon 5C(1). Therefore, a part-time active retired judge may serve as a private judge, even in the circuit in which they serve as a judge, unless doing so would “tend to reflect adversely on his [or her] impartiality, interfere with the proper performance of his [or her] judicial duties, or exploit his [or her] judicial position.” Canon 5C(1).

However, part-time active retired judges are still expected to comply with Canon 2A which provides, in pertinent part, “A judge should respect and comply with the law.” § D(2), *Compliance*. The qualifications for those who may act as a private judge in Alabama are listed in Ala. Code § 12-11A-2. That statute provides:

(a) Persons who may act as private judges shall:

(1) Have been, *but are not actively serving as*, a judge of a district, circuit, or probate court and have served in the capacity of judge for at least six consecutive years.

Ala. Code § 12-11A-2(a)(1) (emphasis added).

The Commission’s advisory authority extends only to the application of the Alabama Canons of Judicial Ethics to the proposed conduct of a judge. Rule 18, Ala. R.P. Jud. Inq. Comm’n. The Commission may not provide advice on the interpretation or application of Alabama statutes. That authority lies with the Alabama Attorney General. The Commission encourages the inquiring judge to seek an opinion from the Attorney General regarding the application of Ala. Code § 12-11A-2 to part-time retired judges. The Commission also encourages the inquiring judge to seek advice from the Alabama Ethics Commission regarding the application of the Alabama Ethics law. If it is determined that a retired part-time judge is “actively serving” as a judge, or that serving in both capacities would violate the Alabama Ethics law, then a retired judge would be prohibited from also serving as a private judge under Canon 2A.

REFERENCES

Ala. Code §§ 12-11A-2, 12-11A-2(a)(1) (Westlaw, Current through the end of the 2022 Regular and First Special Sessions).

Alabama Canons of Judicial Ethics 2A, 5C(1), 5E, and § D(2), *Compliance with the Canons of Judicial Ethics*.

Alabama Rules of Procedure for the Judicial Inquiry Commission 18.

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 Alabama 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; email: jic@jic.alabama.gov.