

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: DECEMBER 8, 2023

ADVISORY OPINION 23-960

## PROBATE JUDGES: BUSINESS & FINANCIAL ACTIVITIES

### ISSUES

May a probate judge who is a professional land surveyor operate a land surveying business?

**Answer:** Yes.

### FACTS

Prior to taking office as probate judge, a probate judge was employed as a professional land surveyor. Since becoming a probate judge, the judge has maintained his professional land surveyor license. The judge is considering taking work as a professional land surveyor in the judge's spare time.

### DISCUSSION

Extrajudicial business activities by judges are governed generally by Canon 5C. Section C of the Compliance with the Canons of Judicial Ethics provisions exempts probate judges from compliance with Canons 5B(2), 5E and G, 6C, and 7. Because probate judges are not exempt from the provisions of Canon 5C, they must conform their business and financial activities to the requirements of Canon 5C.

The relevant portions of Canon 5C provide:

(1) A judge should refrain from financial and business dealings that 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.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

In short, a judge is not prohibited by the Canons of Judicial Ethics from engaging in extrajudicial business and financial activities unless such activities would reflect adversely on the judge's impartiality, interfere with the performance of the judge's judicial duties, exploit the judge's position, or cause the judge's disqualification in more than a minimal number of cases.

First, it is unlikely that the inquiring judge's extrajudicial employment as a professional land surveyor would reflect adversely on the judge's impartiality. A professional land surveyor measures land to determine property boundary lines of real property. However, disputes over boundary lines are within the jurisdiction of the circuit courts, not the probate courts. Ala. Code § 35-3-

1. Therefore, any disputes over boundary lines that would be measured by the inquiring judge would not come before the inquiring judge's court. It is possible that the inquiring judge might be hired to measure real property that is being conveyed and that a description containing the inquiring judge's measurements might appear on a deed that is recorded in the probate court. *See* Ala. Code § 12-13-41(11). However, the duty to record deeds is an administrative function of the office of probate judge, not a judicial function.<sup>1</sup> It would not reflect adversely on the inquiring judge's impartiality for deeds containing descriptions based on the judge's measurements as a professional land surveyor to be recorded in the probate judge's office.

Second, it is unlikely that the inquiring judge's taking employment as a professional land surveyor would interfere with the proper performance of his judicial duties. The inquiring

judge intends only to engage in his business as a professional land surveyor in his "spare" time—which the Commission presumes means outside of the probate office's normal business hours.<sup>2</sup> Canon 3A(5) requires a probate judge to "dispose promptly of the business of the court."<sup>3</sup> As long as a probate judge's extrajudicial business activities do not interfere with his or her ability to promptly dispose of the business of the probate court, then such activity would not interfere with the proper performance of the probate judge's judicial duties. If the inquiring judge limits his work as a professional land surveyor to times that are outside the normal business hours of the probate office—and assuming that the inquiring judge is able to promptly dispose of the business of the probate court within those normal business hours so as not to require him to spend additional time tending to that business—then the inquiring judge's work as a professional land surveyor would not interfere with the proper

<sup>1</sup> The Compliance section provides:

Judges whose duties are not exclusively judicial . . . cannot be subjected to a strict, literal compliance with the Canons of Ethics.

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C. Probate Judge. Probate judges in Alabama are charged with many administrative and executive duties not judicial in nature.

*But see* Canon 3 ("The judicial duties of a judge take precedence over all his [or her] other activities. His judicial duties include

all the duties of his [or her] office prescribed by law.")

<sup>2</sup> The office hours for the office of the probate judge are 9:00 A.M. until 4:00 P.M., except for Sundays and legal holidays, unless otherwise provided for by local law. Ala. Code § 12-13-36.

<sup>3</sup> Section C of the Compliance provisions replaces the original Canon 3A(5) with the quoted language. The language in both the original and the probate judge version is the same except that probate judges are not required to comply with the reporting requirements contained in the original 3A(5) that are applicable to all other judges.

performance of his judicial duties. However, should the judge's extrajudicial business activity become too time consuming that it begins to cause delay in cases or judicial decisions, then the judge would be required to refrain from the extrajudicial business activity. Advisory Opinion 89-382; *see also* Canon 3 ("The judicial activities of a judge take precedence over all his [or her] other activities.")

Third, should the inquiring judge decide to go forward with his professional land surveying business, he may not exploit his judicial position in furthering his business. A judge exploits his or her judicial position when he or she takes advantage of aspects of the judicial office that are not available to the general public or other similarly-situated individuals or uses the prestige of his or her judicial office to advance the judge's interests. Therefore, the judge may not utilize his office or other judicial resources for matters related to his professional land surveying business and unrelated to his judicial duties. For example, when creating the business, the judge may not use the physical or mailing address of the probate office as the physical or mailing address of his professional land surveying business, nor should the judge utilize his judicial email account to communicate with clients or others

about matters related to his professional land surveying business. Additionally, the judge may not advertise or promote—*e.g.*, handing out business cards or other branded merchandise that identifies the judge as a professional land surveyor—his professional land surveying business within the probate office. The judge should take great care to ensure that his business as a professional land surveyor is kept separate and apart from his position as probate judge so that the prestige of his office is not exploited for his own private, personal gain. *See* Canon 2C (A judge "should not lend the prestige of his [or her] office to advance the private interests of others.")<sup>4</sup>

Finally, the judge should remain aware of other applicable Canons that may affect his business as a professional land surveyor. Canon 5C(6) provides, "Information acquired by a judge in his [or her] judicial capacity should not be used or disclosed by him in financial dealings or for any purpose not related to his judicial duties." For example, the probate judge should not survey land that is subject to any proceedings before the probate court. Canons 6 and 6A govern the compensation that a judge may receive while engaged in extrajudicial activities. Furthermore, the judge should remain aware of Canon 2's mandate that a judge avoid

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<sup>4</sup> For example, if the judge is hired to conduct a land survey and is later asked to testify in a boundary dispute, the judge

should not allow himself to be referred to by his judicial title during his testimony or at any other point during the proceeding.

even the appearance of impropriety in all of his or her activities.

Based on the foregoing, it is the opinion of the Commission that, because the judge's extrajudicial business activity of engaging in a professional land surveying business does not reflect adversely on the judge's impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position, the judge is not prohibited by the Canons from engaging in extrajudicial business activity as a professional land surveyor, as long as the judge's activity continues to remain in compliance with the provisions of Canon 5C(1) and other applicable Canons.

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#### **REFERENCES**

Alabama Canons of Judicial Ethics 2, 2C, 3, 5C(1)–(3), 5C(6), 6, 6A, and *Compliance with the Canons of Judicial Ethics* § C.

Ala. Code §§ 12-13-36, 12-13-41(11), and 35-3-1.

Alabama JIC Advisory Opinion 89-382.

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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