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August 6, 2008

ADVISORY OPINION NO. 2008-20

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Conflict Of Interest/Probate Judge Creating
New Position And Moving Spouse Into That
Position At A Higher Rate Of Pay

The Conecuh County Probate Judge may not
create a new position, known as Recording
Clerk, and move his spouse, who currently
serves as the Probate Clerk, into the new
position at a higher rate of pay without
violating the Alabama Ethics Law.

Dear Mr. Nix:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTION PRESENTED

May the Conecuh County Probate Judge create a new position, known as Recording Clerk, and move a current employee who serves as the Probate Clerk into the new position, when the request includes a job description for the new position and a beginning grade classification for the employee's pay, and if the current employee is moved into the new position, would receive an increase in pay, when that employee is the Judge's spouse?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Richard D. C. Nix is the attorney for Conecuh County, Alabama. The Conecuh County Probate Judge wishes to make a request in writing for the "support and immediate action" of the Conecuh County Commission to approve a "restructuring of his office". The Judge's proposal is to create a new position known as "Recording Clerk" and to move the current employee who serves as the Probate Clerk into the new position. His request includes the job description for the new position and a beginning grade classification for the employee's pay. The current employee to be moved into the new position would receive an increase in pay, thereby, and happens to be the Judge's spouse.

On behalf of the Conecuh County Commission, Mr. Nix poses the following questions:

- 1) May the Conecuh County Commission or the Conecuh County Merit Board approve the Probate Judge's request, if made?
- 2) If the Probate Judge's request is approved, could the Judge be found to have violated the Alabama Ethics Law?

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

"(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2."

Section 36-25-1(12) defines a family member of the public official as:

"(12) FAMILY MEMBER OF THE PUBLIC OFFICIAL. The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official."

Section 36-25-5(a) states:

“(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.”

The Ethics Law prohibits the use of office for the personal benefit of a public official, a public employee, a family member of the public official or public employee, or a business with which he or she is associated.

The spouse of a public official is a family member as defined by law.

Under the questions and scenario presented, the Conecuh County Commission or the Merit Board would not be in violation of the law, and could on their own motion, restructure the office (provided it is done with absolutely no input, advice, encouragement, influence, etc., of the Probate Judge) without the law being violated.

However, under the facts as presented, the Judge, having made the proposal, would be in violation of the Ethics Law if the office is restructured, his spouse moved into the new position and given a pay increase.

Based on the facts as provided and the above law, the Conecuh County Probate Judge may not create a new position, known as Recording Clerk, and move his spouse, who currently serves as the Probate Clerk, into the new position at a higher rate of pay without violating the Alabama Ethics Law.

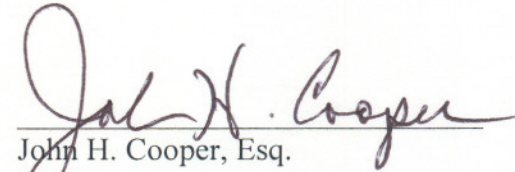
CONCLUSION

The Conecuh County Probate Judge may not create a new position, known as Recording Clerk, and move his spouse, who currently serves as the Probate Clerk, into the new position at a higher rate of pay without violating the Alabama Ethics Law.

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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on August 6, 2008.



John H. Cooper, Esq.
Chair
Alabama Ethics Commission