



COMMISSIONERS

Camille S. Butrus, Chairman
Helen Shores Lee, Esq., Vice-Chairman
John H. Watson
Lewis G. Odom, Jr., Esq.
Russell Jackson Drake, Esq.

STATE OF ALABAMA
ETHICS COMMISSION

MAILING ADDRESS

P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS

RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104



James L. Sumner, Jr.
Director

Hugh R. Evans, III
Assistant Director
General Counsel

TELEPHONE (334) 242-2997
FAX (334) 242-0248

October 14, 1998

ADVISORY OPINION NO. 98-54

Frank W. Gregory
Administrative Director of Courts
Administrative Office of Courts
300 Dexter Avenue
Montgomery, Alabama 36104-3741

Revolving Door Applicability/Retired Circuit
And District Court Judges, Court Clerks
And Judicial Employees.

Retired circuit and district court judges,
retired circuit and district court clerks and
other retired state judicial employees
(excluding staff of the Administrative Office
of Courts) are not considered as having been
employed by the Administrative Office of
Courts, the Administrative Director of
Courts, or the Chief Justice and may,
therefore, enter into a contract with the
Administrative Office of Courts, the
Administrative Director of Courts, or the
Chief Justice after retiring from public
service.

For purposes of the Alabama Ethics Law, a
person is considered as having participated in
the negotiation of contracts when they
personally and meaningfully participated in
the negotiation of that contract. The Ethics
Commission will address this issue on a

case-by-case basis with the specific facts and details surrounding that individual's participation in that contract negotiation process.

Retired circuit or district court judges, retired circuit or district court clerks, or other state judicial employees (excluding staff of the Administrative Office of Courts) may volunteer their services to the Judicial Circuit or Court System with which they formerly served; provided, they are only reimbursed for actual expenses.

Retired circuit or district court judges, retired circuit or district court clerks, or other state judicial employees (excluding staff of the Administrative Office of Courts) may volunteer their services to a Judicial Circuit or Court System other than that on which they formerly served and may be reimbursed by payment of per diem, a mileage allowance, other travel expenses, or salary as provided for by contract.

Dear Mr. Gregory:

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.

QUESTIONS PRESENTED

- (1) Is it correct, for purposes of the Ethics Law, that (excluding staff of the Administrative Office of Courts) retired circuit and district court judges, retired circuit and district court clerks, and other retired state judicial employees are not considered as having been employed by the Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice?

- (2) May retired circuit and district court judges, retired circuit and district court clerks, and other retired state judicial employees (excluding staff of the Administrative Office of Courts) contract with the Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice to furnish professional services in connection with the administration of justice and other constitutionally - and statutorily - mandated duties and responsibilities imposed on the Chief Justice and/or the ADC?
- (3) Does Judge Davis' contract comply with the amended Ethics Law?
- (4) What degree of participation must a person have to be considered as having "participated" in the negotiation of contracts, for purposes of the prohibition in 36-25-13(c), relating to "any person who participates in the negotiation . . . of contracts"?
- (5) May a retired circuit or district judge, a retired circuit or district clerk, or other retired state judicial employee, who volunteers his or her service, be reimbursed for expenses incurred in connection with such volunteer service by payment of per diem, a mileage allowance, or other travel expense?

FACTS AND ANALYSIS

The Judicial Article (Article VI) in the Constitution of Alabama of 1901 was entirely rewritten in 1973 by Amendment 328, which included the following within its constitutional provisions:

"6.08. Prohibited activities.

* * *

"(c) The Supreme Court shall adopt rules of conduct and canons of ethics, not inconsistent with the provisions of this Constitution, for the judges of all courts of this State."

"6.10. Administration.

"The Chief Justice of the Supreme Court shall be the administrative head of the judicial system. He shall appoint an administrative director of courts and other needed personnel to assist him with his administrative tasks. The Chief

Justice may assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired appellate judges for temporary service in any court . . .”

The Judicial Article Implementation Act (Act 75-1205), codified primarily in Title 12, provided the necessary statutory authority for the Unified Judicial System (“UJS”) to carry out its constitutionally-mandated duties as a separate and coordinate branch of state government. Among those provisions is Section 12-2-30, which provides, in pertinent part, as follows:

“(b) In connection with these duties and other responsibilities, the Chief Justice is authorized and empowered:

“(1) To maintain a roster of supernumerary circuit judges who are willing and able to undertake special duties from time to time and to assign supernumerary circuit judges in accordance with the provisions of law and, further, to assign supernumerary circuit judges and circuit judges, provided they are agreeable, in connection with studies, projects and functions designed to improve the administration of justice and the courts in Alabama and in connection with projects, studies and functions of the Administrative Office of Courts, . . . the Permanent Study Commission on Alabama’s Judicial System and the Judicial Conference. While so serving, such supernumerary circuit judges and circuit judges shall be paid the same compensation as if they were holding court and shall be entitled to their necessary expenses of travel and to the same maintenance expense allowances, paid from the State Treasury, as if they were holding court outside their circuits.

“(2) To appoint, employ and terminate, in connection with any grants which the Administrative Office of Courts, . . . the Permanent Study Commission on Alabama’s Judicial System, the Supreme Court and the Judicial Conference may receive from any source, any officers, officials, **consultants**, reporters and employees who may be used in connection with the purposes and functions of such grants without regard to the provisions of the merit system, on a full-time or part-time basis, at such compensation or salaries as he may direct.”

* * *

“(8) To take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere.” (Emphasis added.)

Section 12-2-30 contains other provisions, not quoted at length above, which provide for the employment and use of UJS officials and employees in connection with the administration of justice.

Chapter 5 of Title 12 addresses the functions and authority of the Administrative Office of Courts (“AOC”) and the Administrative Director of Courts (“ADC”). Specifically, Section 12-5-2 provides, in pertinent part, that:

“(b) All officials, officers and employees of the Administrative Office of Courts, including the Administrative Director of Courts, shall be appointed, employed, serve and receive compensation in accordance with the provisions of Section 12-2-0, whether employed by grant funds or otherwise.

“(c) The Chief Justice shall have the same authority pertaining to the use of officials, officers, employees and moneys of the Administrative Office of Courts and shall have the same authority of direction as he has with and to other governmental judicial entities or courts as is set forth in Section 12-2-30.”

Section 12-5-9 provides as follows:

“The Administrative Director of Courts shall assist the Chief Justice of the Supreme Court of Alabama in connection with the Chief Justice’s duties as administrative head of the judicial system of Alabama, the Chief Justice’s task of seeing that the business of the courts of the state is attended with proper dispatch and the Chief Justice’s task that the dockets of court are not permitted to become congested and that trials and appeals of cases are not delayed unreasonably.”

Section 12-5-13(b) provides, in pertinent part, that:

“(b) The Administrative Director of Courts is authorized to direct the expenditure of moneys appropriated to the Administrative Director of Courts, Administrative Office of Courts, . . . or to any account for trial courts, circuit courts or district courts for any and all functions or projects directly or indirectly affecting the operation of any court, the administration of justice or continuing education for judges and court-supportive personnel and may transfer moneys appropriated for such office, department or accounts to any one or more of such other accounts, office or department.”

Section 12-5-14 provides:

“In connection with the functions of conducting studies and projects pertaining to improvements in the administration of justice, the improvement of courts in Alabama and continuing legal and judicial education, the Chief Justice or the Administrative Director of Courts is authorized and empowered to employ **consultants and consultant firms** in connection therewith and to contract with the same for their services at such compensation and for such time as he determines to be advisable. Such contracts with such consultants or consultant firms shall be considered as contracts for professional services.” (Emphasis added.)

Additionally, Chapter 18 of Title 12 contains a number of provisions relating to the use of retired judges.

The doctrine of separation of powers is derived from Article III, Sections 42 and 43, Constitution of Alabama of 1901, which provide as follows:

“Sec. 42. Legislative, executive and judicial departments established.

“The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”

“Sec. 43. Separation of powers.

“In the government of this state, except in the instances in the Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.”

Mr. Gregory states that as we are aware, with the exception of temporary appointments by the Governor, state court judges and circuit court clerks are elected officials. Further, the conduct of judges is governed by the Canons of Judicial Ethics, as enforced by the constitutionally-created Judicial Inquiry Commission and Court of the Judiciary. Salaries for these elected court officials, as well as court employees working in their offices, are provided by an annual appropriation by the legislature, which appropriation is separate and distinct from the

annual appropriation for the AOC. Contracts with the AOC are submitted, if required, for review by the Legislative Contract Review Committee, pursuant to Section 29-2-40, et seq. Finally, Section 36-25-11 requires that the Ethics Commission be notified of the execution of certain contracts.

In light of the foregoing constitutional and statutory provisions, the amended Ethics Law, and the doctrine of separation of powers, Mr. Gregory respectfully requests an opinion concerning the above referenced questions, as they relate to retired personnel of the Unified Judicial System.

Mr. Gregory relates that by letter dated November 20, 1997, John W. Davis, Retired Circuit Judge, advised the Ethics Commission that he had entered into a contract with the Administrative Director of Courts, in order to provide "professional services pertaining to improvements to the administration of justice and the improvement of courts in Alabama." Mr. Gregory has attached, for the Commission's convenient reference, a copy of Judge Davis' contract. Judge Davis also provided the Commission with a copy of the Contract Review Report. The Ethics Commission never advised Judge Davis of any concern relating to his contract.

Mr. Gregory refers to Advisory Opinion 98-35 and the Commission's interpretation concerning Section 36-25-13(c), to the effect that such section prohibited, for a two-year period, any person who was a "public official, director, assistant director, department or division chief, purchasing or procurement agent having authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards" from contracting with the governmental agency of which the person was a member or employee. Mr. Gregory notes that this is the only place in the opinion that seems to indicate that a person's job title is determinative (for purposes of the prohibition contained in Section 36-25-13(c) in the case of a "director" or "assistant director"), regardless of a particular person's actual authority and responsibilities while employed by a state agency.

In addition to the provisions already quoted relating to UJS personnel, Section 12-5-17 provides as follows:

"(a) Notwithstanding any other provision of law relating to reimbursement of traveling expenses of public officers and employees, the Chief Justice, officers, officials, personnel and employees of the Administrative Office of Courts . . . are authorized to attend colleges, schools, conferences, seminars and other meetings pertaining to the administration of justice and courts, as well as performing the duties of their office, in or outside the State of Alabama, provided the Chief Justice requests them to do so, and are entitled to be reimbursed for their

actual and necessary expenses, including, but not limited to, travel expenses, lodging, subsistence outside the County of Montgomery, tuition fees, registration fees and membership fees or dues.

“(b) Members of the judiciary and court-supportive personnel are authorized to attend judicial colleges, institutes, seminars, conferences, court sessions or other meetings concerning the administration of justice, in or outside the State of Alabama; and, notwithstanding any other provision of law relating to reimbursement of traveling expenses of public officers and employees, such members of the judiciary and court-supportive personnel shall be reimbursed their actual and necessary expenses, including, but not limited to, travel expenses, lodging, subsistence outside the circuit or district in which they are employed, registration fees and membership dues or fees; provided, that the Chief Justice orders such member of the judiciary or any court-supportive personnel to attend the same.”

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) states:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.”

Section 36-25-1(24) states:

"(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(13) defines governmental corporations and authorities as:

“(13) GOVERNMENTAL CORPORATIONS AND AUTHORITIES. Public or private corporations and authorities, including but not limited to, hospitals or other health care corporations, established pursuant to state law by state, county or municipal governments for the purpose of carrying out a specific governmental function. Notwithstanding the foregoing, all employees, including contract employees, of hospitals or other health care corporations and authorities are exempt from the provisions of this chapter.”

Section 36-25-13(a) states:

“(a) No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member for a period of two years after he or she leaves such membership. For the purposes of this subsection, such prohibition shall not include a former member of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.”

Section 36-25-13(b) states:

“(b) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee for a period of two years after he or she leaves such employment. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.”

Section 36-25-13(c) states:

“(c) No public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency.”

Section 36-25-7(b) states that:

“(b) No public official or public employee shall solicit or receive a thing of value for himself or herself or for a family member of the public employee or family member of the public official for the purpose of influencing official action.”

Section 36-25-13(d) states:

“(d) No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual.”

As relates to question number one, retired circuit and district court judges, retired circuit and district court clerks are all elected officials and are not considered employees of the Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice of the Alabama Supreme Court. Other retired State Judicial employees, excluding staff of the Administrative Office of Courts, are likewise, not considered as having been employed by the Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice of the Supreme Court, in that, they are employees of the Judicial Circuit that hired them. For example, an assistant clerk in the Office of the Circuit Clerk of the Fifteenth Judicial Circuit is an employee of that circuit clerk and the Fifteenth Judicial Circuit and serves at the clerk's pleasure. Likewise, the judge's secretary, law clerk, etc., would be considered an employee of that judge.

Likewise, a court administrator would not be considered an employee of the Administrative Office of the Courts, in that, he or she serves at the pleasure of and answers to the judges in that judicial circuit.

As relates to question number two, due to the fact that they are not considered employees of the Administrative Office of Courts, retired circuit and district court judges, retired circuit and district court clerks, and other retired State Judicial employees, excluding the staff of the Administrative Office of Courts, would not be barred by the “Revolving Door Provision” of the Ethics Law from contracting with the Administrative Office of the Courts, the Administrative Director of Courts, or the Chief Justice to furnish professional services to those entities.

As relates to question number three, due to the fact that questions one and two have been answered in the affirmative, this question is moot.

As relates to question number four, the AOC requests the Commission to reconsider that portion of Advisory Opinion No. 98-35, which relies on a job title as opposed to actual authority in prohibiting persons from contracting with their previous employing agency for a period of two years.

The Ethics Commission will not reconsider an opinion unless there are new facts or information which may materially affect the previous decision. Therefore, the Commission will not reconsider that portion of Advisory Opinion No. 98-35.

Be that as it may, Section 36-25-13(c) indicates that there are certain individuals by virtue of their positions, that it is implied that they have authority to make purchases, negotiate contracts or otherwise expend public funds. This section prohibits those individuals based on their job title and the implied authority of that position from entering into a contract with their former employing entity for a period of two years.

In addition to those individuals barred by title, those individuals, who have the authority to make purchases, expend public funds, negotiate or approve contracts, grants, or awards, are likewise barred from negotiating a contract for themselves or their employer for a period of two years after leaving public employment.

As relates to question number five, it is implied that for the bar to apply, a person must have participated personally in the negotiation of contracts, as well as meaningfully.

Based on this Code section, the Commission will only address this issue on a case-by-case basis with specific facts relating to that situation.

As relates to question number six, a retired circuit or district judge, a retired circuit or district clerk, or other retired State Judicial employee, may volunteer his or her services and be reimbursed for his or her actual expenses, if he or she is volunteering his or her services to the Judicial Circuit or a court system with which he or she was formerly employed or elected. Should he or she volunteer his or her services to another court system or Judicial Circuit, he or she may receive per diem, a mileage allowance, or other travel expenses as provided for by contract.

CONCLUSION

Retired circuit and district court judges, retired circuit and district court clerks and other retired state judicial employees (excluding staff of the Administrative Office of Courts) are not considered as having been employed by the Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice and may, therefore, enter into a contract with the

Administrative Office of Courts, the Administrative Director of Courts, or the Chief Justice after retiring from public service.

For purposes of the Alabama Ethics Law, a person is considered as having participated in the negotiation of contracts when they personally and meaningfully participated in the negotiation of that contract. The Ethics Commission will address this issue on a case-by-case basis with the specific facts and details surrounding that individual's participation in that contract negotiation process.

Retired circuit or district court judges, retired circuit or district court clerks, or other state judicial employees (excluding staff of the Administrative Office of Courts) may volunteer their services to the Judicial Circuit or Court System with which they formerly served, provided, they are only reimbursed for actual expenses.

Retired circuit or district court judges, retired circuit or district court clerks, or other state judicial employees (excluding staff of the Administrative Office of Courts) may volunteer their services to a Judicial Circuit or Court System other than that on which they formerly served and may be reimbursed by payment of per diem, a mileage allowance, other travel expenses, or salary as provided for by contract.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 14, 1998.



Camille S. Butrus

Chair

Alabama Ethics Commission