1978 S.C. Op. Atty. Gen. 254 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-219, 1978 WL 22687

Office of the Attorney General

State of South Carolina
Opinion No. 78-219
June 12, 1978

***1** A judge of the unified judicial system may not engage in the practice of law and statues authorizing such practice are subordinate to Canon 5(F) of the Code of Judicial Conduct promulgated by the Supreme Court of South Carolina which prohibits practice of law by a judge.

Mr. Howard L. Chappell
The Board of Commissioners on Judicial Standards
Post Office Box 11458
Columbia, South Carolina 29211

Dear Mr. Chappell:
On behalf of the Board of Commissioners on Judicial Standards, you have posed the following question:
Will a judge of South Carolina be in compliance with Supreme Court Rule 31 of the Code of Judicial Conduct, Canon V(F), if he practices law while also employed as a full-time probate judge?

Sections 14–23–1110 and 18–5–80, Code of Laws, 1976, impliedly permit the practice of law by judges, associate judges and probate judges except in matters pending, originating or on appeal from their courts.

Article V, Section 4, of the Constitution of this State, provides, in pertinent part:
'The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system.—The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.'

The Supreme Court of South Carolina, pursuant to the provisions of Article V of the Constitution, adopted a Code of Judicial Conduct. Included therein are the following Canons:

Canon 2

'A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities.'

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Canon 5

'A Judge Should Regulate his Extrajudicial Activities to Minimize the Risk of Conflict with his Judicial Duties.'

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'(F) A judge should not practice law.'

In my opinion, the provisions of the Code of Judicial Conduct, particularly Canon 5(F), are controlling, and a full-time probate judge should not engage in the practice of law.

The courts have relied upon several different bases to justify their actions in enforcing the Canons of Judicial Ethics, including their power over judges as lawyers, the responsibility assigned by state constitutions to the judiciary to discipline judges, the constitutional grant of supervisory authority over lower courts, and the inherent power of the court over the administration of justice. Martineau. Without expressing an opinion upon the applicability of other grounds upon which the conclusion herein expressed might be reached, in my view, the paramountcy of the provisions of the Code of Judicial Conduct may be grounded upon the constitutional grant of supervisory authority given to the Supreme Court over courts of the unified judicial system. This seems apparent from consideration of the express terms of our State Constitution, as well as the legislative history of those provisions.

The original draft of Article V was submitted by the Committee to Make A Study of the South Carolina Constitution. The draft as submitted by that Committee was finally adopted by the General Assembly without change except by the addition of certain provisions relating to terms of court which are not pertinent to the consideration of the problem here considered. In the course of passage, the Senate adopted amendments to the bill so that the following sentence would have been inserted in lieu of the present wording: 'Subject to the statutory law, the Supreme Court shall make rules governing the practice, procedure and the administration in all of the courts of the unified judicial system.' This amendment was not concurred in, however, by the other body and the present verbiage adopted. The Legislature, therefore, had before it the clear choice to subject to statutory law the administration by the Supreme Court of the courts within the unified judicial system. It specifically declined to provide for such legislative oversight; instead, it adopted Article V, Section 4, as presently worded, and vested in the Supreme Court the sole authority to 'make rules governing the administration of all of the courts of the State.'

***2** The conclusion, in my opinion, is inescapable that the authority to provide for the administration of the courts of the State is not subject to the statutory law. It is unnecessary to consider what effect, if any, the subjection to statutory law of administrative authority over courts by the Supreme Court might have if such power had been made subordinate to statutory restrictions.

Among the administrative duties vested by the Constitution in the Chief Justice is 'the power to assign any judge to sit in any court within the unified judicial system.' The intent of this section is obvious, as is the conclusion that the authority to practice law is totally inconsistent with the wherever they may be needed. At one point in the course of passage through the General Assembly a proposal was made to restrict the assignment of judges to courts of 'uniform and comparable jurisdiction.' This effort was not agreed to by the General Assembly, evidencing its recognition of the desirability of making judicial manpower available when and where it might be needed. The ability to make such assignments, already in practice in the administration of the unified judicial system with most effective results, is one of the cardinal objectives leading to the adoption of the entire constitutional article relating to the judicial department.

Of interest is Informal Opinion No. 1294 of the American Bar Association Committee on Ethics and Professional Responsibility dated June 17, 1974, a copy of which is herewith enclosed. Included in that opinion is the following:
'In the opinion of the Committee, it is virtually impossible for a probate judge to continue to practice law within the jurisdiction charged by him as a judge or in opposition to counsel who appear before him from time to time without violation of the spirit and intent of the Code of Judicial Conduct, even were he considered a part-time judge under the law.'

I therefore advise that, in my opinion, the authority to adopt the Code of Judicial Conduct is vested in the Supreme Court by the Constitution of this State; that Canon 5(F) of the Code prohibits the practice of law by judges; and that statutes in conflict therewith are subordinate thereto.

The history of Canon 5(F) demonstrates that it is applicable only to full-time judges. See Thode, page 90; Informal Opinion, ABA, supra.
Very truly yours,

Daniel R. McLeod
Attorney General

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