ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 02 - 2021

RE: Propriety of a retired Circuit Court judge accepting a position as advisor to a state agency.

FACTS

A retired Circuit Court judge serves as a periodic part-time judge. Under Canon 4F, the judge also serves as a mediator or arbitrator. However, periodic part-time judges are not permitted to practice law. Canon 4G. Recently the judge has been approached by the general counsel of a state agency about an advisory position (for which the judge would be compensated though the terms of the compensation have not been discussed). Specifically, the judge has been asked to review old orders and directives and to critique them by offering suggestions to improve their content, style, and legality. The judge would not be making any rulings as these are old cases that have already been decided. In addition, all identifying information regarding the parties would be redacted. Basically, the agency seeks to have the judge review the orders/directives to see if they pass "judicial muster." The judge inquires as whether serving in this advisory role would constitute the practice of law in violation of Canon 4G.

CONCLUSION

A periodic part-time judge may not accept employment as an advisor to the general counsel of a state agency.

OPINION

As the judge indicated, periodic part-time judges are not permitted to practice law. The determination of what actions constitute the practice of law are not easily made. The South

Carolina Attorney General has noted: "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgement of a lawyer." 1974 WL 27968, at *1 (S.C.A.G. Sept. 23, 1974). In attempting to determine what would constitute the *unauthorized* practice of law, our Supreme Court considered the definition of the practice of law, stating:

> The South Carolina Constitution delegates the duty to regulate the practice of law in South Carolina to this Court. The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts. The practice of law, however, is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. The unauthorized practice of law jurisprudence in South Carolina is driven by the public policy of protecting consumers. For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. Instead, whether an activity constitutes the practice of law remains flexible and turns on the facts of each case.

Crawford v. Cent. Mortg. Co., 404 S.C. 39, 45, 744 S.E.2d 538, 541 (2013)(internal quotations and citations omitted). The practice of law "extends to activities ... which entail specialized legal knowledge and ability." Rogers Townsend & Thomas, PC v. Peck, 419 S.C. 240, 244, 797 S.E.2d 396, 398 (2017).

Other jurisdictions have varying definitions of the practice of law. An Oklahoma advisory opinion states that the "[p]ractice of law, within the meaning of the bar act… is any service involving legal knowledge whether of representation, counsel, or advocacy, in or out of court, rendered in respect of the rights, duties, obligations, liabilities, or business relations of the one requesting, or for whom the service is rendered." OK Adv. Op. 11 (Nov. 20, 1931). That

opinion also noted that the practice of law included "in general, all advice to clients, and all action taken for them in matters connected with the law." Id.

Tennessee has opined: "Under the standard adopted by the Tennessee Supreme Court in *In re Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995), the 'practice of law' is related to the rendition of services for others that call for the professional judgment of a lawyer." Tenn. Op. Att'y Gen. No. 05-132 (Aug. 25, 2005). The *Burson* case referenced in that AG opinion stated:

> The term, "practice of law" shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law.

Burson, 909 S.W.2d at FN 6. Similarly, according to the Connecticut Attorney General:

> The practice of law not only includes appearances in courts, but also extends to out-of-court activities, particularly to situations where persons are rendering advice to individuals, which advice encompasses matters which may be characterized as legal in nature. It is impossible to define precisely the many activities which may constitute the practice of law.

1969 WL 14958, at *1 (Conn. A.G. Oct. 31, 1969).

While the definitions may have slight variations, all of them encompass in some way, the giving of advice or counsel based on the legal knowledge of the lawyer. In our opinion, the inquiring judge would be providing legal advice to the state agency. While the judge will not be reviewing new or pending matters, the judge is being asked to review the content, style, and legality of old orders and directives to see if they pass "judicial muster"--presumably so the agency can conform its new orders and directives to the judge's guidelines. Thus, the judge would be providing advice based on the judge's legal knowledge and ability, which would constitute the practice of law.

s/ Letitia H. Verdin
LETITIA H. VERDIN, CHAIR

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES

s/ Keith M. Babcock
KEITH M. BABCOCK

January 19, 2021