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Honorable Drayton Nabers, Jr.
Chief Justice
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104

Oaths and Affirmations - Judges -
Term of Office

There is no legal prohibition against the taking of a judicial oath before the beginning of the term of office, but rather it is necessary to complete the requirements to be issued a judicial commission before the exercise of any official duties of the office.

There is no conflict created by a newly elected associate justice taking the oath of office before the expiration of the term of office of the incumbent justice, because the newly elected associate justice will not assume office until the date set by statute when the term of the predecessor associate justice expires and the term of the newly elected associate justice begins.

Dear Mr. Chief Justice:

This opinion of the Attorney General is issued in response to your request.

QUESTION ONE

Are there any legal prohibitions against the administering of a judicial oath of office to newly elected associate justices before their eligibility to assume the duties of the office?

FACTS AND ANALYSIS

Section 279 of Article XVI of the Constitution of Alabama requires that the following oath be taken, *inter alia*, by all judicial officers before they enter upon the execution of the duties of their offices. The oath states as follows:

I, _____, solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof, and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.

ALA. CONST. art. XVI, § 279.

The oath itself refers to the undertaking of official duties in the future tense; i.e., “*upon which I am about to enter.*” *Id.* This does not speak to an immediate entry into office but one of future entry. Webster’s Third New International Dictionary defines “about” as “on the point or verge of.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 5 (1986).

Section 36-2-6 of the Code of Alabama requires that “[t]he judges of the several courts” obtain a commission before entering upon and exercising the duties of their offices. ALA. CODE § 36-2-6 (2001). The exercise of any official duties without having first obtained a commission is statutorily prohibited in section 36-2-9. ALA. CODE § 36-2-9 (2001). Section 36-2-8 of the Code requires that a bond must be made before a commission can be issued. ALA. CODE § 36-2-8 (2001). Judicial officers are no longer required to execute separate bonds and are covered by the State of Alabama’s blanket fidelity bond under Rule 1 of the Alabama Rules of Judicial Administration. ALA. R. JUD. ADMIN. 1. Reading sections 36-2-8 and -9 of the Code, *in para materia*, dictates that the judicial oath must be taken before the issuance of a judicial commission, which must be issued before the judicial officer can perform any official duties.

CONCLUSION

The answer to your first question is that there is no legal prohibition against the taking of a judicial oath before the beginning of the term of office, but rather it is necessary to complete the requirements to be issued a judicial commission before the exercise of any official duties of the office.

QUESTION TWO

If a newly elected Associate Justice of the Alabama Supreme Court is administered the oath of office before the actual beginning of his or her term of office, will a conflict be created between the incumbent Justices and the newly elected Justices?

FACTS AND ANALYSIS

The term of office for a judicial officer is dictated by statute. Section 36-3-2 of the Code defines that the "Chief Justice of the Supreme Court and associate justices of said court . . . shall hold their respective offices for the term of six years from the first Monday after the second Tuesday in January next after their election *and until their successors are elected and qualified.*" ALA. CODE § 36-3-2 (2001) (emphasis added). Qualifications for judicial office include the taking of the above-referenced oath and obtaining a commission as required by section 36-2-6 of the Code.

The issue of when an elected official takes office is carefully explained in section 36-3-2, but the section presents the issue of when an officer is qualified to take office. As far back as 1875, the Alabama Supreme Court has held that the issuance of a commission only confers a *prima facie* title to the office in question, but does not circumvent other qualifications. *Plowman v. Thornton*, 52 Ala. 559 (1875). The date set down by the Legislature as the beginning of the term has been acknowledged and respected by the Supreme Court for many years. In *State v. St. John*, 244 Ala. 269, 13 So. 2d 161 (1943), the Court held that an "official-elect" only became an "official" as provided by statute. The Court held that "holding office" meant qualifying and assuming the obligations and being invested with the powers of the office. The Court, however, further held that "until one who is elected qualifies according to law he has no more right to serve than any intruder would have. . . ." *Id.* at 275, 166. The Court further noted *all* the statutory requirements must be met for a candidate to fill an office; i.e., the oath must be taken and the commission received. *Id.*

The taking of the oath of office and the posting of the required bond by a prospective officeholder shows his or her intention to enter into the performance of the duties of the office. *Cook v. State*, 287 Ala. 412, 415, 252 So. 2d 71, 73 (1971). A successor to office cannot assume the office until the term of the predecessor expires. *Id.* at 416, 74.

The term of office for an associate justice is set by statute and does not expire until a date certain. A careful reading of section 36-3-2 of the

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Code *requires* that the newly elected associate justices take the oaths of office before the taking of office to be qualified to assume the duties and responsibilities of such office.

CONCLUSION

There is no conflict created by a newly elected associate justice taking the oath of office before the expiration of the term of office of the incumbent justice, because the newly elected associate justice will not assume office until the date set by statute when the term of the predecessor associate justice expires and the term of the newly elected associate justice begins.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

TROY KING
Attorney General

By:



BRENDA F. SMITH
Chief, Opinions Division

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