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November 17, 1986

ATTORNEY GENERAL OPINION NO. 86- 160

Mr. Robert C. Foulston
Foulston, Siefkin, Powers &
Eberhardt
Fourth Financial Center
Wichita, Kansas 67202

Re: Courts--Supreme Court--Qualifications of Justices

Synopsis: Based on the nominee's personal data form as submitted to the Supreme Court Nominating Commission, said nominee does not meet the qualification in K.S.A. 20-105 of having engaged in the active and continuous practice of law for a period of ten years prior to the date of appointment as justice. The active practice of law has been defined by the Supreme Court of Kansas as meaning that the legal activities of the individual must have been pursued on a full-time basis and constituted his regular business. The nominee is not automatically disqualified because of having held the positions to which he has been appointed, but because his personal data form does not indicate that his legal activities while holding those positions were "pursued on a full-time basis and constituted his regular business." In making the ultimate determination of whether this nominee is qualified, the Supreme Court Nominating Commission may consider additional information regarding specific legal services performed by the nominee in his various employments and may thus reach a contrary conclusion. Cited herein: K.S.A. 20-105.

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Dear Mr. Foulston:

As Chairman of the Supreme Court Nominating Commission, you request our interpretation of K.S.A. 20-105 as it applies to a certain nominee. Specifically, you inquire whether this nominee meets the statute's qualification of having "engaged in the active and continuous practice of law" for a period of ten years prior to the date of appointment as justice.

The nominee in question was admitted to practice law in the state of Kansas in 1974. The positions held by this individual since that time are as follows: two years - legal research attorney for a district court judge; one year - law firm associate; one and one-half years - administrative assistant for a United States Representative; four years - Secretary of Revenue; three and one-half years - Kansas Corporation Commissioner. The question thus presented is whether, while holding these positions, the nominee was actively engaged in the practice of law. The answer to this question turns on the definition attributable to the phrase "active practice of law," and the specific facts associated with this nominee.

The common definition of the word "practice" is "to do or perform habitually or customarily; to acquire or polish a skill; to work at, especially as a profession." The American Heritage Dictionary, New College Edition (1976). To actively practice law, then, would be to habitually perform legal services, and in so doing acquire or polish one's legal skills. This definition is supported by the recent Kansas Supreme Court decision of In re Application of Stormont, 238 Kan. 627 (1986). In that case, the Court was asked to determine whether an applicant for admission to the bar of Kansas was qualified under Supreme Court Rule 703 as exempt from written examination. The applicant had been admitted by examination to the bar of Oklahoma in 1966. He had practiced in that state until 1981 when he moved to Kansas and accepted a position which entailed corporate managerial and legal activities. He retained a few of his clients in Oklahoma and continued to perform occasional legal services for those clients. The Court held that the work performed under his license to practice in Oklahoma between 1981 and 1986 was not sufficient to constitute active legal services as required by Supreme Court Rule 703(a) (3). The Court stated as follows:

"Rule 703(a) (3) requires more than a showing of the performance of legal services in the foreign jurisdiction for

the required period of time--the rule requires the applicant to have actively performed legal services. Kansas has a valid interest in admitting individuals to the bar who have an acceptable level of professional ethics and knowledge--hence the bar examination requirement for all except those qualifying under Rule 703. In admitting individuals under Rule 703, experience in another jurisdiction is, inter alia, substituted for current testing of knowledge. The occasional practice of law in another jurisdiction is no assurance of competency and skills kept honed by experience.

"The Supreme Court of Arkansas was confronted with the determination of what constituted the active practice of law for admission to the bar on reciprocity without written examination in Udem v. State Bd. of Law Examiners, 266 Ark. 683, 587 S.W.2d 563 (1979). The court held:

'The active practice of law means that the legal activities of the applicant must have been pursued on a full-time basis and constituted his regular business. Petition of Jackson, 95 R.I. 393, 187 A.2d 536 (1963).' 266 Ark. at 696.

"We agree with this definition and hold that the term 'actively performed legal services' contained in Rule 703(a) (3) requires that the applicant must have pursued such legal activities in the jurisdiction in which he or she was admitted on a full-time basis and must have constituted the applicant's regular business for the requisite time period." 238 Kan. at 628, 629.

While the language of the Supreme Court Rule discussed in Stormont differs somewhat from the relevant language found in K.S.A. 20-105, we believe that the reasoning of the court is applicable to the latter as well as the former. K.S.A. 20-105 provides in full as follows:

"No person shall be qualified to hold the office of justice of the supreme court, unless such person shall have been regularly admitted to practice law in the state of Kansas and has engaged in the active and continuous practice of law, as a lawyer, judge of a court of record or any court in this state, full-time teacher of law in an accredited law school or any combination thereof for a period of at least ten (10) years prior to the date of appointment as justice."

The legislature, through this statute, has made a point of requiring not only that the individual seeking an appointment as supreme court justice be regularly admitted to practice law in Kansas, but also that the individual be engaged in the active and continuous practice of law for a period of ten years. Just as in Stormont, the occasional practice of law over a period of ten years is not assurance of legal skills kept honed by experience, which is the purpose of the requirement of continuous and active practice of law. Other Kansas cases recognize a distinction between the requirements of being admitted to the bar and being admitted to practice law. See Phelps v. Shanahan, 210 Kan. 605, 609 (1972). We suggest that there is also a distinction between the requirements of being admitted to practice law and actively engaging in the practice of law. Indeed the statute itself suggests a distinction between the two in that it lists both as requirements and would otherwise be redundant. K.S.A. 20-105.

We must point out, however, that in Stormont the Court was interpreting its own rule, while we are interpreting the legislative intent behind a statute. The Court, had it been looking at K.S.A. 20-105, may not have applied such a strict construction to the statute as it applied to its own rule. For the reasons stated, the Court has determined that admittance by motion to the bar of the state of Kansas requires that the applicant have maintained a significant degree of active legal practice to be entitled to forgo written examination. Such a high degree of activity may not be deemed as required for qualification as a justice. As stated in Attorney General Opinion No. 86-7:

"[S]tatutory provisions imposing qualifications for office should be

construed in favor of those seeking to hold office:

'Provisions in constitutions and statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers, and in favor of those seeking to hold office. Ambiguities should be resolved in favor of eligibility to office, and constitutional and statutory provisions which restrict the right to hold public office should be strictly construed against ineligibility.' (Footnotes omitted.) 67 C.J.S., Officers §17."

Further, the legislature has recognized in K.S.A. 20-105 that attorneys who do not represent clients or make court appearances may still be considered as engaged in the active practice of law, i.e. judges and law school professors. The inference is that one who continues to utilize and update his legal training, even if not as a trial lawyer, meets this qualification for appointment as a justice.

In applying the above considerations to the nominee in question, and basing our analysis on the limited personal data information submitted to the Nominating Commission by the nominee, we cannot say that the nominee meets the qualification in K.S.A. 20-105 of having engaged in the active and continuous practice of law for a period of ten years. This is not to say, however, that the nominee is conclusively disqualified. The nominee is not disqualified merely for holding the positions to which he has been appointed. The nominee may be able to present additional information relevant to his legal activities which would tend to show that he has been actively engaged in the practice of law. Further, it is the Commission which is to make the final determination as to the nominee's qualifications. We are merely setting forth matters for the Commission to consider in making this determination, and providing an opinion based on the limited information contained in the nominee's personal data form.

Our conclusion that the nominee does not meet the qualification of having engaged in the active and continuous practice of law for a period of ten years was reached pursuant to the following considerations:

- 1) There is little doubt that the nominee's two-year clerkship with a district court judge and his one year as associate with a law firm constituted the active practice of law.
- 2) The one and one half years spent as administrative assistant to a United States Representative appears also to have constituted the active practice of law. One of the responsibilities of the nominee while serving in this capacity was to analyze federal legislation and it is our understanding that he was expected to and did provide legal advice and opinions for the Representative.
- 3) As Secretary of Revenue, the nominee has stated that his job "entailed strategic planning and management, development and analysis of legislation and regulations and ultimate determination of the Department's legal posture in significant cases." He also states that "my efforts there focused on management and organizational planning." It is difficult for us to judge, using this description, whether these functions were performed under the nominee's "administrator's hat" or his "lawyer's hat." As mentioned by the nominee, the Department employed a staff of 18 attorneys. He does not indicate whether he participated with his legal staff in the drafting of legal opinions and briefs or approved such as to their substance. Information in this regard is crucial in making the ultimate determination that he was or was not engaged in the active practice of law during those four years.
- 4) The nominee's last three years of service have been with the Kansas Corporation Commission as a Commissioner. He states that "[m]ajor commission decisions are the product of a hearing process similar to that carried out in the state's trial courts." The nominee functions as a "hearing officer" or "judge" in these proceedings. According to the nominee, a staff of 19 attorneys is responsible for providing "representation for the general public in commission proceedings and before other administrative bodies and to assist in drafting orders and pursuing appeals." In presiding over these hearings and issuing decisions pursuant to them, it can be argued that a Kansas Corporation Commissioner utilizes legal expertise and in so doing keeps his legal skills polished. Though the position does not require legal expertise, it certainly does not preclude one holding that position from practicing law and in fact provides an ideal forum for one to do so. Again, the Nominating Commission may need additional information to formulate a determination of

whether this particular nominee engaged in the active practice of law while employed in this position.

In conclusion, based on the nominee's personal data form as submitted to the Supreme Court Nominating Commission, said nominee does not meet the qualification in K.S.A. 20-105 of having engaged in the active and continuous practice of law for a period of ten years prior to the date of appointment as justice. The active practice of law has been defined by the Supreme Court of Kansas as meaning that the legal activities of the individual must have been pursued on a full-time basis and constituted his regular business. The nominee is not automatically disqualified because of having held the positions to which he has been appointed, but because his personal data form does not indicate that his legal activities while holding those positions were "pursued on a full-time basis and constituted his regular business." In making the ultimate determination of whether this nominee is qualified, the Supreme Court Nominating Commission may consider additional information regarding specific legal services performed by the nominee in his various employments and may thus reach a contrary conclusion.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General