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Judicial Inquiry Commission
800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

April 4, 1989

The Judicial Inquiry Commission has considered your request for a n opinion concerning whether the Canons of Judicial Ethics require a Judge's disqualification in certain specified proceedings. Under the facts presented, the Judge has recently been appointed to the bench by the Governor. At the time of this appointment, the Judge was serving as the Governor's Legal Advisor. Prior to serving in that capacity, the Judge served as a criminal prosecutor. The Governor's new Legal Advisor and/or Deputy Legal Advisor worked with the Judge during the Judge's term as Legal Advisor to the Governor. Based on these facts, seven circumstances are presented in which the Judge is concerned about disqualification. These circumstances are as follows:

1. Cases in which the Governor is a party in his official capacity and which began or existed while the Judge served as Legal Advisor to the Governor but did not have any knowledge or provide any legal advice; **89-359**

2. The same as in number 1 but the cases were filed after the former Legal Advisor became a Judge; **89-360**

3 . Cases in which members of the Governor's staff or cabinet are a party due to their official positions and which cases were pending during the Judge's term as Legal Advisor but as to which the Judge had no knowledge and gave no legal advice; **89-361**

4. The same as number 3 except that the cases were filed after the former Legal Advisor became a Judge; **89-362**

5. Cases in which the parties are represented by an attorney formerly prosecuted by the Judge; **89-363**

6. Cases involving parties against whom the Judge formerly acted as prosecuting attorney but not involving the offenses or fact situations formerly prosecuted or considered for prosecution by the Judge; **89-364**

7. Cases involving the current Legal Advisor and/or Deputy Legal Advisory as attorneys and who worked with the Judge during his service as prosecutor and as Legal Advisor to the Governor. **89-365**

Each of the above instances is governed primarily by Canon 3C of the Alabama Canons of Judicial Ethics. In pertinent part, that Canon provides:

> (1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
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> (a) He has a personal bias or prejudice concerning a party, or personal knowledge or disputed evidentiary facts concerning the proceeding;
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> (b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it.
>
> COMMENTARY
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> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

In the Judge's opinion request, five of the Judge's inquiries concern disqualification based on the Judge's prior association with the Governor as his Legal Advisor. In those instances, it is the opinion of the Commission that the Judge's previous employment as the Governor's Legal Advisor causes the Judge's disqualification only in those proceedings pending during the time of the Judge's service as Legal Advisor, whether or not the judge actually participated by advising or representing the Governor. The Judge is not disqualified from sitting in proceedings which arise after he assumed the bench so long as he has no personal bias or prejudice concerning the parties and he has no knowledge of the facts or considerations made in the Governor's office concerning the facts or legal issues considered as to the matter. Thus, the Judge is disqualified in cases arising under circumstances 1 and 3 simply due to his previous service as Legal Advisor. No disqualification exists on this ground as to circumstances 2 and 4.

Circumstance number 7 is directly addressed by the above quoted COMMENTARY to Canon 3C. The mere fact of the Judge's employment as Legal Advisor at the same time that the current Legal Advisor or Deputy Legal Advisor were part of the Governor's Legal Advisor's staff, does not cause the Judge's disqualification in proceedings in which the current Legal Advisor's staff represents the Governor or his office.

As to your circumstance number 6, the mere fact that the Judge has previously prosecuted a party in a particular proceeding does not disqualify the Judge from sitting in the current proceeding. Disqualification would exist, however, if the current proceeding in any way involves the matters or facts previously prosecuted.

The last fact situation to be considered is set out in circumstance number 5. It is the opinion of the Commission that the judge is not disqualified from sitting in a proceeding by the mere fact that he previously prosecuted to mistrial the attorney representing one of the parties. However, in both circumstances 5 and 6 the Judge should carefully examine the facts and circumstances known to him by virtue of the previous prosecution. If upon such examination he finds facts known to him which might or might not have been made public and which would cause his impartiality to be questioned by a reasonable man, then he should disqualify himself.

In summary, under Canon 3C of the Alabama Canons of Judicial Ethics, the Judge is disqualified in circumstance 1 and 3 by the mere fact of his previous employment as the Governor's Legal Advisor; no disqualification is caused by the mere fact of such employment in circumstances 2, 4 and 7; and the mere fact that a Judge has previously prosecuted a party or a party's attorney does not require the Judge's disqualification in a subsequent proceeding not involving the offense or facts upon which the previous prosecution was based as set out in circumstances number 5 and 6.

Sincerely,

JUDICIAL INQUIRY COMMISSION