

Judicial Inquiry Commission

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April 24, 1992

You have requested an advisory opinion from the Alabama Judicial Inquiry Commission clarifying Advisory Opinion 85-239. In that opinion, this Commission found that under the provisions of Canon 3C of the Alabama Canons of Judicial Ethics, “the mere fact that the judge’s son is employed as a law clerk in a law firm, which represents a party to a proceeding, does not cause the judge’s disqualification in that proceeding.” However, the Commission cautioned that “facts and circumstances could arise which could cause disqualification. For instance, the judge would be disqualified in any proceeding in which the law clerk participated.” (Emphasis added).

You request this Commission to expand upon the emphasized phrase, especially the words “any proceeding” and “participated.”

In Advisory opinion 81-125, this Commission held:

“[A] judge must himself assess the facts and circumstances surrounding the proceeding, his relationship with the employee of the firm, and the employee’s relationship to the proceeding to determine whether the judge should disqualify himself. However, the mere fact that the judge’s relative is a paralegal working for the firm does not require the judge’s disqualification.”

In each case, the judge must determine if the circumstances are such that the law clerk’s work on a case is so extensive that the judge’s impartiality is in question. Under Canon 3 C(l), recusal is required when “‘facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.’ . . . Specifically, the Canon 3 C(l) test is: ‘Would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?’” In re Matter of Sheffield, 456 So.2d 350, 355-356 (Ala. 1984).

If the law clerk has an interest, financial or otherwise, in a particular motion or matter that could be substantially affected by the judge’s ruling, then disqualification would be required under Canon 3 C(d)(ii). For example, if the law clerk’s salary or continued employment is contingent upon the outcome of the proceeding, then the judge’s disqualification would be required.

With regard to the issue presented, some factors a judge should consider in determining whether or not the judge is disqualified are: the nature of the relationship

between the judge and the law clerk; the clerk's degree of participation in the proceeding - has the clerk merely performed the legal research or has the clerk investigated the facts; will the clerk assist the attorney at hearings or in the courtroom; does the clerk's name appear on any of the motions or pleadings; has the clerk discussed the merits of the case with the judge; and the significance of the law clerk's contribution to the preparation or outcome of the proceeding. Obviously, the totality of the circumstances must be considered in each case.

You specifically question the situation where a law clerk, who is related to the judge within the fourth degree of relationship, attends a deposition but merely observes and does not participate. Afterward, the clerk and the attorney by whom the clerk is employed engage in a discussion of the substantive merits of the deposition. Under that limited factual situation, it is the opinion of the Commission that the judge's recusal would not be required. That opinion may not be the same had the clerk prepared the questions for the deposition and actually assisted the attorney at the deposition.

In any proceeding where a judge's spouse, or a person within the fourth degree of relationship to either the judge or the judge's spouse, or the spouse of such a person serves as a law clerk for a law firm representing a party, the judge should disclose that fact to the attorneys, and determine whether or not the judge is disqualified. Canon 3 D provides for waiver of disqualification by written agreement.

The Commission will be glad to address any other specific factual situation with which you may be presented. Thank you for your request.

Respectfully,