

Judicial Inquiry Commission

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August 21, 1992

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question is whether you are disqualified under the following circumstances.

In 1987, your wife engaged the services of the county Department of Human Resources in seeking a modification of child support payments and the collection of arrearage of child support from her former husband. Attorney A represents DHR in child support cases and your wife's case was assigned to him. Attorney A was not personally retained by your wife. According to the opinion of the Alabama State Bar Association, when an attorney prosecutes a child support case pursuant to an assignment of child support rights to the Department of Human Resources, as was done in your wife's case, the attorney's client is DHR rather than the individual spouse. See Alabama State Bar Ethics Opinion RO-87-57.

In 1990, an unrelated divorce action was filed in which Attorney A was associated as co-counsel.

In 1991, your wife again sought the collection of arrearage child support payments and contribution toward post-minority educational expenses. Under the same arrangement that existed in 1987, Attorney A was assigned the case and filed a civil action against your wife's former husband.

It is the finding of this Commission that you are disqualified from hearing the divorce action in which Attorney A has been associated as co-counsel for one of the parties under the above described facts.

The circumstances presented do not fit the more specific factual settings described in the subsections following Canon 3C(l), Alabama Canons of Judicial Ethics. However, the "catch-all" provision of Canon 3C(l) provides that "[a] judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned." (Emphasis added). Canon 2 provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." In the factual situation described, public confidence in the integrity of the judicial process demands that the judge disqualify himself from the divorce proceeding.

The provisions of Canon 3C(l) prohibit a judge from sitting in any proceeding in which an attorney for one of the parties represents the judge in an unrelated pending matter. Advisory Opinions 92-433, 88-337, 88-336, 87-313, 82-168, 80-78, 80-74, 78-53. This prohibition exists when the attorney represents the judge's spouse in an unrelated pending matter. See Advisory Opinion 91-414 (a judge is disqualified from sitting in a child support proceeding in which his wife, as an assistant district attorney, previously represented the State of Alabama). Furthermore, attorneys are not governed by the Canons of Judicial Ethics and an attorney has no ethical obligation to avoid the appearance of impropriety. See Alabama Rules of Professional Conduct.

A judge's disqualification under Canon 3C(l) may not be waived by the parties. Under Canon 3D, only disqualifications based upon financial interest (Canon 3C(l)(c)) or family relationships (Canon 3C(a)(d)) may be waived.

This opinion has been approved by the Judicial Inquiry Commission. Please contact me if you have any questions regarding this or any other matter.