

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

November 10, 1992

This is in response to your request for the Judicial Inquiry Commission to reconsider its advisory opinion of August 21, 1992. Because you have disclosed additional facts which were not included in your original request, the Advisory Opinion of August 21, 1992 is withdrawn. The following becomes the opinion of the 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 payments 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 and was selected at random by DHR. Furthermore, no fee was negotiated or paid for this representation by either you or 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 87-57.

In 1990, an unrelated divorce action was filed in your court in which Attorney A was associated as co-counsel. Attorney A represents the husband in that case.

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.

After an eight day trial in the unrelated divorce action, you recognized the existence of a "potential" for questioning your impartiality and brought the matter to the attention of all the parties involved. Attorney A immediately resigned from representing your wife and her case was assigned to another attorney for DHR. The wife in the unrelated divorce case over which you preside has not and does not question your impartiality and desires you to enter judgment in the case.

The wife's attorney maintains that, as a matter of fact, you are impartial. By separate letter, he requests this Commission to withdraw its opinion requiring your recusal and permit you to decide the case.

It is the finding of this Commission that, based on these additional facts, you are not disqualified from proceeding with the case under these circumstances.

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 where the attorney for the judge's spouse represents a party before the judge, 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, an attorney has no ethical obligation to avoid even the appearance of impropriety. See Alabama Rules of Professional Conduct.

Under Canon 3D of the Alabama Canons of Judicial Ethics, "judicial disqualification may be waived by the parties under limited circumstances. First, only disqualifications based upon financial interest or family relationships are waivable; no remittal may be used for other provisions of Canon 3C." L. Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct 81 (2nd 2d. 1992). Canon 3D does not provide for the remittal of the disqualification under Canon 3C(l) that a judge's impartiality might reasonably be questioned. See J. Shaman, S. Lubet, J. Alfine, Judicial Conduct and Ethics 146 (1990) ("the Reporter's Notes to the Code of Judicial Conduct state unequivocally that the intent was that the other bases for disqualification under the Code cannot be waived").

You request this Commission to distinguish your case from the previous advisory opinions of this Commission which prohibit a judge from sitting in any proceeding in which an attorney for one of the parties represents either the judge or the judge's spouse in an unrelated pending matter. This request for a distinction is based upon the following facts:

1. Your wife's case was assigned to the DHR attorney at random, without any input or influence from you or your wife.
2. No fee was negotiated or paid for this representation by you or your wife.
3. According to the opinion of the Alabama State Bar Association, when there is an assignment of rights to the State of Alabama, the attorney assigned to such case represents the State of Alabama rather than the individual.

Despite these considerations, the fact remains that the DHR attorney was still acting on behalf of your wife in another case while appearing in your court representing another party. In the opinion of this Commission, that fact is sufficient to cause a judge's impartiality to reasonably be questioned.

However, once the basis for the disqualification was announced, the attorney immediately resigned from representing your wife. Therefore, it is the finding of this Commission that, because the basis for your disqualification has been removed and no longer exists, and because the parties and their attorneys do not, in fact, question your ability to be impartial, you may continue to preside over this matter and render judgment in that case. It is the finding of this Commission that you are not disqualified from proceeding with the divorce action under the above described facts.

Although the Canons of Judicial Ethics have the force of law, the opinions of the Judicial Inquiry Commission are rendered in connection with the ethical conduct of the judge and "are not binding and do not affect a party's rights or remedies." Ex parte Balogun, 516 So.2d 606, 609 (Ala. 1987).

This advisory opinion has been considered and approved by the Judicial Inquiry Commission. The advisory opinion issued August 21, 1992 is hereby withdrawn. Please contact me if you have any questions regarding this or any other matter.