94-512

Judicial Inquiry Commission

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This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. Your question is whether you must disqualify yourself from presiding over "relatively routine matters" and cases in which your son, a practicing attorney, represents a party.

I. Disqualification under Canon 3C(l)(d).

The mere fact that a judge is related to an attorney representing a party in a case is not a basis for the judge's disqualification under Canon 3C(l)(d), Alabama Canons of Judicial Ethics. 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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> . . .
>
> (d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is named a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iii) Is to the judge's knowledge likely to be a material witness in the proceeding; . . ."

Under the Model Code of Judicial Conduct (1972), a judge must disqualify himself when "he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . is acting as a lawyer in the proceeding." Canon 3C(l)(d)(ii), Model Code of Judicial Conduct. However, there is no similar provision in the Alabama Canons of Judicial Ethics.

Covering essentially the same prohibition, Ala. Code 1975, § 12-1-12 provides:

"No judge of any court shall sit in any case or proceeding in which he is interested or related to any party within the fourth degree of consanguinity or affinity or in which he has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record or put in writing if the court is not of record."

"Under the common law the mere fact that the trial judge is related to one of the attorneys does not disqualify the judge." Ex parte Clanahan, 261 Ala. 87, 90, 72 So.2d 833 (1954). In that case, the Alabama Supreme Court held that a judge is not disqualified merely because the judge is related to an attorney in the case: "[T]o disqualify a judge for and on account of relationship, the relationship must be within the prohibited degree (fourth degree of consanguinity or affinity), the employment must be on a contingent basis, the fee must be a lien on the judgment or decree and the amount of the fee must be affected by the amount of the recovery." Clanahan, 261 Ala. at 93. In State ex rel. Smith v. Deason, 264 Ala. 596, 600, 88 So.2d 674 (1956), that court held that the mere fact that the judge's father was the attorney for one of the parties did not establish the father/attorney as a "party" within the meaning of Ala. Code 1975, § 12-1-12, although an attorney may be a "party" when he is "directly interested in the subject matter of the suit, as for example, where he is employed on a contingent fee payable out of the judgment recovered. Deason, 264 Ala. at 600. See Gulf States Steel Company v. Christison, 228 Ala. 622, 625-26, 154 So. 565 (1934).

Relying on Clanahan, the Alabama Court of Criminal Appeals held that a district court judge was not disqualified merely because the judge's brother was one of the assistant district attorneys who participated in some of the proceedings: "The district court's judge's brother, acting in his official capacity as an assistant district attorney, did not have 'an interest that could be substantially affected by the outcome of the proceedings,' see Canon 3C(l)(d)(ii), Canons of Judicial Ethics, and he was not a 'party,' see, § 12-1-12, Code of Alabama 1975." Davis v. State, 554 So.2d 1094, 1098 (Ala.Cr.App. 1984) (emphasis in original), affirmed, 554 So.2d 1111 (Ala. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991).

However, the Alabama Court of Civil Appeals has stated: "It is clear to this court that under Canon 3(C)(1)(d) of the Canons of Judicial Ethics a trial judge is disqualified where it is found that he is related to one of the parties or attorneys within the fourth degree." Guthery v. Guthery, 409 So.2d 844, 846 (Ala.Civ.App. 1981) (emphasis added).

In September of 1993, the Judicial Inquiry Commission addressed a related issue in Advisory Opinion 88-338 in which the Commission held that a judge is not disqualified from sitting in a proceeding merely because a party is represented by a member of a law firm in which the judge's uncle holds the position of senior partner. We now expressly limit that opinion to that particular factual situation - where the judge is related to member of the law firm and not to the particular attorney appearing before the judge.

Based on the above, we conclude that the mere fact that a judge is related to an attorney representing a party to a proceeding is not a basis for disqualification under either Canon 3C or Ala. Code 1975, § 12-1-12.

II. Disqualification under Canon 2.

Canon 2, Alabama Canons of Judicial Ethics provides in pertinent part:

> **"A judge should avoid impropriety and the appearance of impropriety in all his activities.**
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> "A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
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> "B. A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.
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> "C. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him." (Emphasis added.)

It is the opinion of this Commission that pursuant to Canon 2, a judge should not preside over any matter in which the judge's child serves as an attorney for one of the parties unless all the parties and their attorneys have agreed in open court and upon the record to a waiver of such disqualification. The waiver of this disqualification is in response to situations where a judge must preside over cases in rural areas, even when the attorney is related to the judge, in order to provide parties with a speedy trial." J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics §5.12 at 119 (1990).

It is the opinion of this Commission that you should not preside over or issue a ruling in any case in which your son represents a party, even with regard to matters that are non-contested and considered "routine," unless a waiver of disqualification has been obtained from all of the parties and their lawyers. Under Canon 2, you should not appoint your son to act as guardian ad litem or to represent an indigent criminal defendant.

This opinion has been reviewed by and is the opinion of the Judicial Inquiry Commission.