

## 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 or not you are disqualified from hearing a petition for post-conviction relief involving a collateral attack upon a criminal conviction in which your former partner served as an assistant district attorney.

From your inquiry it appears that before becoming a judge you were a partner in a three-member law firm. One of your partners was also a part-time assistant district attorney who prosecuted most of the felony cases tried in the county.

Under Canon 3C(l)(b), Alabama Canons of Judicial Ethics, a judge should disqualify him or herself in a proceeding in which “a lawyer with whom he previously practiced law served during such association as a lawyer in the matter [in controversy].” A strict and literal interpretation of this Canon requires your disqualification.

However, by rule, the Alabama Supreme Court has provided that the judge who presided over the appellant’s conviction shall hear the appellant’s petition for post-conviction relief. Rule 32.6(d), A.R.Crim.P. states that “[t]he proceeding shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge.” See Advisory Opinion 89-385 (A judge is not disqualified from hearing a Rule 20 petition for post-conviction relief in which the petitioner challenges the validity of a prior conviction obtained before the judge).

The result is that a judge may preside over a post-conviction attack of a case he tried but, under a literal interpretation of Canon 3C(l)(b), may not preside over a post-conviction attack of a case his law partner tried. These results are quite obviously inconsistent.

It is the opinion of this Commission that Canon 3C(l)(b) was not intended to cover the situation presented here.

“The second part of Canon 3C(l)(b) suggests judicial disqualification when a lawyer with whom the judge ‘previously practiced law served during such association as a lawyer concerning the matter, . . .’ Canon 3C(l)(b) prescribes disqualification when a party was merely a client of the judge’s former law firm on the same matter during the judge’s association with that firm. Even though the judge himself was not counsel for the party, as long as the firm was representing the party on the very matter now before him, disqualification is necessary.”

In the present situation, your former law firm was not counsel for the State or for the district attorney merely because your former law partner served as a part-time assistant district attorney. Such service was in your partner's individual capacity and not as a member of the law firm.

Therefore, it is the finding of this Commission that a judge is not disqualified from hearing a petition for post-conviction relief involving a collateral attack upon a criminal conviction merely because the judge's former partner prosecuted the criminal case as a part-time assistant district attorney. This opinion would not hold true if you participated with your partner in the prosecution of the criminal case or had discussions with your partner about the facts of or the manner in which the criminal case was to be prosecuted. In that event your disqualification would be required.

This advisory opinion has been considered by and is the opinion of the entire Commission.