94-519

Judicial Inquiry Commission

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March 29, 1994

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

> A defendant in a criminal case over which you preside has filed a motion to dismiss the indictment. That motion alleges that the members of the grand jury that returned the indictment were illegally summoned, selected and empaneled.
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> The defendant has filed a motion to recuse stating that the clerk of the circuit court will be called as a witness in support of the motion to dismiss. The motion to recuse also asserts:
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> > "4. That due to the fact that this is a small Circuit with two Circuit Judges, which by necessity requires a close working relationship between the Court and the Circuit Clerk, it is reasonable to question whether the Court could impartially weigh the evidence to be presented in this case.
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> > "5. That the Court also has personal knowledge of disputed evidentiary facts in this proceeding, to-wit, the procedure and authority under which the Court and Circuit Clerk's Office operated in excusing potential Grand Jurors which procedure and authority were used in selecting the Grand Jury which returned the indictment in this cause."

It is the opinion of this Commission that these circumstances do not require your disqualification.

The question you have posed involves two factors. First, your relationship with the clerk of the circuit court, and, second, your alleged knowledge of disputed facts.

First, it is the opinion of this Commission that no ground for disqualification is found in the mere fact that the clerk of the circuit court will be a material witness before the circuit court. Furthermore, it is the opinion of the Commission that no ground for disqualification is found in the mere fact that the legality of the manner in which the clerk has performed his or her professional duties will be challenged in a case before a circuit judge.

The professional relationship between a circuit judge and a circuit clerk, in and of itself, is not such as would cause a judge's impartiality to reasonably be questioned under Canon 3C or to create the appearance of impropriety under Canon 2. However, those canons might be violated were there other circumstances to consider in addition to the mere fact of the relationship between the judge and the clerk. Such circumstances include but are not limited to any social, financial, "non-judicial," or extraordinary relationship between the clerk and the judge. Furthermore, a judge's disqualification would be required if the judge's relationship with the circuit clerk were such that the judge would be unable to remain fair and impartial in any proceeding in which the circuit clerk appeared as a witness.

Second, it appears that any knowledge you have obtained about the disputed issue in this case was gained in your capacity as a judge in the performance of your judicial duties. "As a general rule, bias or prejudice that is caused by occurrences in the context of a court proceeding are not grounds for disqualification. To require recusal, bias or prejudice normally must be rooted in an extrajudicial source." J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics § 15.06 at 105-06 (1990).

> "'Ordinarily, a judge's rulings in the same or a related case may not serve as the basis for a recusal motion. Jaffe v. Grant, 793 F.2d 1182, 1189 (11th Cir. 1986), cert. denied, 480 U.S. 931, 107 S.Ct. 1566, 94 L.Ed.2d 759 (1987). The judge's bias must be personal and extrajudicial; it must derive from something other than that which the judge learned by participating in the case. Id. at 1188-1189. An exception to this general rule occurs when the movant demonstrates pervasive bias and prejudice.' Id. at 1189 (quoting United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir., Unit B (1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).'"

Parker v. State, 587 So. 2d 1072, 1097 (Ala.Cr.App. 1991) quoting McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990). "Canon 3C does not recognize judicial bias or prior trial of a cause by a judge in his judicial capacity as a ground for disqualification." Advisory Opinion 89-350. "[J]udicial decisions usually uphold the propriety of a judge ruling on objections to his own decisions, finding no inherent bias in the review process." L. Abramson, Judicial Disqualification under Canon 3 of the Code of Judicial Conduct 32 (American Judicature Society 2d ed. 1992).

In Kitchens v. Maye, 623 So.2d 1082, 1086 (Ala. 1993), the plaintiff argued that the trial judge's pretrial extrajudicial communication with members of the municipal police department concerning the plaintiff's physical condition and the judge's repeated refusals to grant the plaintiff's motions to continue the trial compelled the judge's recusal. The Alabama Supreme Court held that the plaintiff's argument that the trial judge's inquiry into the plaintiff's condition gave him personal knowledge of disputed facts was "misplaced, because the information did not

concern the merits of the case, but related to the trial court's management of the case." Kitchens, 623 So.2d at 1086.

> "In United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L. Ed. 2d 778, 793 (1966), the United States Supreme Court stated: 'The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' (Emphasis added.) . . . . Bias and prejudice are not presumed, Wells v. Wells, 346 So. 2d 442 (Ala. Civ. App.), cert. denied, 346 So. 2d 444 (Ala. 1977); the movant has the burden of proving that the judge was biased or prejudiced, Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979), cert. denied, 378 So. 2d 1118 (Ala. 1980)."

Kitchens, 623 So.2d at 1086. See also Ex parte Duncan, (Ms. 1921874, January 21, 1994] ___
So.2d ___ (Ala. 1994).

> "To be disqualifying prejudice or bias as to a party, it must be such that it is personal in nature and it must derive from an extrajudicial source. Rikard v. Rikard, 590 So. 2d 300 (Ala. Civ. App. 1991). Our Supreme Court stated a general rule on disqualification for prejudice by quoting from 48 C.J.S. Judges §82(b), as follows:
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> > 'It is actual existence of prejudice on the part of a judge, not the mere apprehension of it by a party which disqualifies. Further, the disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a character calculated to impair seriously his impartiality and sway his judgment, and must be strong enough to overthrow the presumption of his integrity. ...'
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> > Ross v. Luton, 456 So. 2d 249, 254 (Ala. 1984)."
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> > Ellison v. Ellison, [Ms. 2910656, September 24, 1993] ___ So.2d ___(Ala.Civ.App. 1993)

We note that under Canon 3C(I)(d)(iii), disqualification is required when a judge, to his or her knowledge, may be a material witness in a proceeding. However, a litigant may not require the disqualification of a judge presiding over the litigation merely by alleging during the course of that litigation that the judge may be a potential witness. Advisory Opinion 92-453.

Based on the facts and circumstances presented, it is the opinion of this Commission that your disqualification is not required. This opinion has been considered by and is the opinion of the entire commission.