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[Modified by 99-740]

Judicial Inquiry Commission

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February 10, 1995

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. You asked the following specific questions:

- (1) May a judge preside over a case where a party is represented by an attorney who shares office space with another attorney who is a nephew of the judge?
- (2) May a judge preside in a case in which the parties agree or settle the case such as a consent judgment or an uncontested divorce if one of the parties is represented by either a) a nephew of the judge or b) a former law partner of the judge?
- (3) When a case has been set several times and is ready for trial, must a judge recuse himself and assign the case to another judge if a party decides only a few days before trial to employ a nephew or a former law partner of the judge, or may the judge refuse to allow such other attorney to enter the case and proceed to trial?
- (4) Must a judge recuse himself in all cases in which one of the parties either is a former client or was a party opponent to a former client?

The Commission has considered and reached its opinion with regard to questions (1), (2), and (4).

The Commission has not previously addressed disqualification of a judge in a proceeding involving an attorney who shares office space with a lawyer-relative of the judge. However, it has been the holding of this Commission that a judge's disqualification is not required merely because of the fact that a party is represented by a law firm in which the judge's nephew is a partner. Rather, disqualification would occur only if other circumstances exist under which the judge's "impartiality might reasonably be questioned" or the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding." Advisory Opinion 93-491. **95-545**

In accordance with the foregoing opinion and the Commentary following Canon 3C(l)(d)(i), it is the opinion of the Commission that under Canons 3C(l) and 3C(l)(d)(ii), a judge must examine the facts in each case where a lawyer-relative shares office space with an attorney who is representing a party and must determine whether a factor exists under which his “impartiality might reasonably be questioned” or whether the lawyer-relative has an interest which could be “substantially affected by the outcome of the proceeding.” In considering these issues, the judge must be ever cognizant of the provisions of Canon 1 setting out the object of the Canons, the preservation of the integrity and independence of the judiciary. If either such factor exists, the judge must disqualify himself.

Under the terms of Canon 3C(l), a judge should recuse himself in those situations where the judge has a personal bias concerning a party for any reason, including the fact that the party is represented by an attorney who shares office space with the judge’s nephew (Canon 3C(l)(a)); where the nephew-attorney is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding (Canon 3C(l)(d)(ii)); or where any other facts or circumstances exist under which the judge’s impartiality might reasonably be questioned (Canon 3C(l)). “[T]he Canon 3C(l) recusal test is: ‘would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?’” In re Sheffield, 465 So. 2d 350, 356 (Ala. 1984). For example, if the nephew-attorney has participated in the case or has given legal advice to a party relating to the matters in controversy, there exists a reasonable basis for questioning the judge’s impartiality and the judge is disqualified under Canon 3C(l). A copy of Advisory Opinion 93-500 is enclosed for your further guidance in this regard.

Concerning your second question, it has been the consistent opinion of the Commission that a judge is disqualified under Canon 3C of the Canons of Judicial Ethics in any proceeding in which an attorney for one of the parties is related to the judge within the fourth degree of consanguinity or affinity. The nature of the proceeding does not affect this disqualification. **95-546**

See, Advisory Opinion 82-169. Thus, a judge is disqualified in any proceeding in which a party is represented by a nephew of the judge. However, this disqualification may be waived if all parties agree in writing according to the procedure outlined in Canon 3D for the remittal of disqualification.

With regard to cases in which a judge’s former law partner is representing a party, the Commission has held that a judge should disqualify himself from any such proceeding if the former law partner represented that party in the matter in question during the period of the partnership, but that the judge is not disqualified if the former law partner did not represent the party in the matter in controversy while he and the judge were partners. Canons of Judicial Ethics Canon 3C(l)(b) provides that a judge is disqualified in a proceeding where “a lawyer with whom he previously practiced law served during such association as a lawyer in the matter.” This disqualification extends to uncontested civil matters, and cannot be remitted as Canon 3D only provides for remitting disqualifications that arise under Canons 3C(l)(c) and 3C(l)(d). Advisory Opinion 83-170.

Thus, a judge is disqualified in any proceeding in which his former law partner represented a party in the proceeding during the period of partnership, but is not disqualified in other cases by the mere fact of former partnership.

In past opinions, a disqualifying financial interest in a proceeding due to a judge's former relationship of law partner to an attorney in the proceeding has been limited to where the judge's financial dealing with the former law partner could be affected by the success of the litigation or the success of the former partner's practice in general, or to some other situations involving continuous financial and business dealings between the judge and the former law partner. No facts suggesting such a continuing relationship have been presented to the Commission in your request and, therefore, no such situation is addressed herein. The Commission also has previously addressed the situation of a judge's former law partner having been a part-time prosecutor in the trial of the case during the partnership. As this illustrates, many different circumstances may arise in this area. If particular circumstances should arise in which you feel any uncertainty, the Commission will be happy to advise you further.

Under Canon 3C(l)(b), a judge is expressly disqualified where he has served as a lawyer in the matter in controversy. This disqualification includes situations where the judge while practicing law had given legal advice to a party on the matter in controversy. It extends beyond the particular case to other cases involving the same matter or arising from the same fact situation in which he previously served as an attorney. Advisory Opinion 93-478. This disqualification cannot be remitted under Canon 3D.

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The appearance of partiality can also be created when a judge presides over a case which involves a party whom the judge previously represented in a similar or related matter. In fact, even if the current case involves a different controversy, recusal may be required if the same course of events is relevant to both cases. "A 'matter' (as in matter in controversy) is: [a] subject (as a fact, an event or course of events, or a circumstance, situation, or question) of interest or relevance." See, Rushing v. City of Georgiana, 361 So. 2d 11, 12 (Ala. 1978). The fact of a prior representation or involvement may make the current case a proceeding in which ... [the judge's] impartiality might reasonably be questioned" under Canon 3C(l). Advisory Opinion 93-478.

The general rule is that a judge is not automatically disqualified from presiding over cases involving a former client whom the judge represented in an unrelated matter. See, J. Shaman, S. Lubert, J. Alfini, Judicial Conduct and Ethics, 131 (1990); Annot., 72 A.L.R. 2d 443, §10(B) (1960). However, a judge also may be prohibited from presiding over a case involving a former client whom the judge represented in an unrelated matter where his "impartiality might reasonably be questioned" under Canon 3C(l). Judicial Conduct at 131. Among the factors to consider in determining this question in cases such as this are the nature of the prior and present cases, the nature of the prior representation, and the frequency, duration and time passed since the prior representation. Advisory Opinion 91-431.

Cases involving former party opponents are generally governed by the Canon 3C(l) standard of whether the judge's impartiality might reasonably be questioned. In Advisory Opinion 89-349, the Commission held under Canon 3C(l) that a judge was disqualified from sitting in a child custody case in which one of the parties had been a defendant in an unrelated child custody hearing in which the judge had represented that party's then spouse. The judge had had an adversarial relationship with a present party as an attorney in a previous unrelated case of the same nature; the Commission decided that under these particular circumstances a person of ordinary prudence might reasonably question the judge's impartiality.

However, while a prior adversarial relationship between a litigant and the judge in a related or similar matter might cause the judge's disqualification under Canon 3C(l), disqualification does not occur when the relationship is remote in time, the parties agree to the judge hearing the matter, and the parties so consent in writing. Advisory Opinion 91-422. See also, Advisory Opinion 89-352. It is possible that other factors might also exist which would alleviate any appearance of partiality arising from a former adversarial relationship with a party to a current proceeding.

The Commission also has previously addressed situations involving judges who had previously been prosecutors of a current party. Since your request did not suggest that such a situation might arise in your case, this area is not addressed herein. As in other areas of potential disqualification, particular fact situations involving former clients or parties opponent may be submitted to the Commission for an opinion if desired.

Of course, in situations involving either a prior client or a prior party opponent, disqualification would occur under the terms of Canon 3C(l)(a) if the judge has a personal bias or prejudice concerning a party or personal knowledge of the disputed evidentiary facts concerning the proceeding.

The Commission is further considering your remaining question. An opinion on that question should be forthcoming following the Commission's next meeting.

Sincerely,