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Judicial Inquiry Commission

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April 28, 1995

The Judicial Inquiry Commission has considered and reached its opinion with regard to the remaining inquiry in your February 8, 1995, request for an advisory opinion from the Commission. You presented the factual situation of a case which is ready for trial that has been set for trial several times where one of the parties decides a few days prior to the trial to employ one of the judge's nephews or the judge's former law partner. You asked whether in this event a judge may proceed with the suit and refuse to permit the new attorney into the case or whether the judge should simply recuse himself and assign the case to another judge. **95-548**

As stated in the Commission's recent response to your other inquiries, a judge is not disqualified from a case in which his former law partner represents a party so long as the partner did not represent the party during the period of the partnership and there is neither any ongoing financial interest between the judge and former partner or any other interest between them that could be substantially affected by the outcome of the proceeding, nor any personal bias or prejudice involved. As also was stated in the Commission's response to your other inquiries, the disqualification due to an attorney being a nephew of the judge is subject to remittal under Canon 3D. Thus, there is no need for a judge to recuse himself where disqualification is not required due to the involvement of the judge's former law partner or where the disqualification due to the involvement of the judge's nephew is remitted under Canon 3D. In either situation, the question whether a continuance should be granted is a matter committed to the judge's discretion, which should be exercised according to the legal standards generally applicable to such requests.

It is the further opinion of the Commission that there is no hard and fast rule concerning what to do when disqualification would be required due to the involvement of either a former law partner or a nephew of the judge and that disqualification either cannot or will not be remitted. Instead, this appears to be a matter committed to the judge's discretion upon consideration of the factors generally applicable to questions involving changes of counsel and requests for continuances associated therewith. In other words, it is the Commission's opinion that the judge in such a situation should determine whether a change of counsel and concomitant continuance is appropriate under the facts in the case. If it is, then the judge should recuse himself and assign the case to another judge; if it is not, then he may proceed with the lawsuit and refuse to permit employment of new counsel.

The Commission also has considered the additional questions in your March 9, 1995, request for an advisory opinion from the Commission. The first such question was whether a judge is disqualified in a subsequent petition where a nephew of the judge represented one of the parties in the original divorce or custody proceeding, but different attorneys are handling the subsequent petition. The Commission has previously determined that a judge is disqualified from sitting in any proceeding in which a lawyer/relative within the fourth degree of relationship has previously appeared as counsel of record. The Commission's opinion in this regard is based upon Canons 3C(l)(c) and (d) and, therefore, can be remitted by following the procedures in Canon 3D. Advisory Opinion 91-415. **95-549**

The second question presented in your March 9, 1995, request for an advisory opinion was whether a circuit judge may preside over a trial on de novo appeal from the district court when he presided over the case in his former position as district judge. The Commission also has previously addressed this question and has determined that the judge is disqualified from sitting in this situation, regardless of whether the appeal is to be tried by a jury. This opinion is based on Canons 1, 2 and 3C. A copy of Advisory Opinion 87-301 and 302 is attached. **95-550**

Your final question in your March 9, 1995, request for an advisory opinion was whether any problems of ethics or legality of the decrees would be presented where the parties sign a waiver of the disqualification under §12-1-12 of the Alabama Code in an uncontested divorce or consent judgment case. The general question concerning the legality of a decree is beyond the scope of the Commission's authority to answer. Under Rule 17 of the Judicial Inquiry Commission Rules, a judge may request an opinion as to whether certain conduct may constitute a violation of the canons of judicial ethics, and the Commission may then render to the judge such opinion as it may deem appropriate in the premises. **95-551**

Remittal of disqualification is governed by Canon 3D:

REMITTAL OF DISQUALIFICATION. A judge disqualified by the terms of Canon 3C(l)(c) or Canon 3C(l)(d) may, instead of withdrawing from the proceeding, disclose in the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

Canon 3D and §12-1-12, Ala. Code 1975, are not coextensive. Unlike §12-1-12, Canon 3D of the Canons of Judicial Ethics does not permit remittal of the disqualification in a

case or proceeding in which the judge has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which the judge was of counsel or the validity or construction of any instrument or paper prepared or signed by the judge as counsel or attorney. Disqualification in such proceedings is required under Canon 3C(l)(b), but only disqualifications under Canons 3C(l)(c) and (d) may be remitted under Canon 3D. There also are more procedural requirements for remittal of disqualification under Canon 3D than those specified in §12-1-12, Ala. Code 1975. Under Canon 3D, the judge must disclose the basis of his disqualification in the record, and the parties and lawyers, independent of the judge's participation, must all sign a written agreement that the judge's relationship is immaterial or that his financial interest is insubstantial, which signed agreement must be incorporated in the record of the proceeding.

This advisory opinion has been considered and approved by the Judicial Inquiry Commission. Please contact the Commission if you have any further questions concerning these or any other matters.