

Judicial Inquiry Commission

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December 8, 1995

The Judicial Inquiry Commission has considered your request for an advisory opinion as to whether a judge is disqualified from sitting in a case due to relationship of the judge or his spouse to a party or counsel for a party within the fourth degree of relationship where a dissatisfied litigant either hires a relative of the judge after significant proceedings in the case or withdraws an agreement under Canon 3D that the judge's relationship is immaterial.

Canon 3C expressly provides that a judge is disqualified where a person within the fourth degree of relationship to the judge or his spouse is either a party to the proceeding or an officer, director, or trustee of a party. This provision requires the disqualification of a judge when the judge or his spouse is related to an attorney for a litigant within the fourth degree of relationship. However, as indicated in your request, this disqualification is subject to remittal under Canon 3D.

The Commission has recognized that a party generally should not be able to engage in "judge-shopping" by manufacturing a ground for disqualification. See J. Shaman, S. Lubet, and J. Alfini, Judicial Conduct & Ethics §5.06 (1990). It is the opinion of the Commission that if a party engages the service of an attorney whose relationship to the judge handling the case thereby disqualifies the judge, and if the attorney first files an appearance after the judge has heard or decided any contested issue in the case, the party should be deemed to have agreed to remittal of that disqualification. Of course, such agreement by the one party does not infringe on the right of the opposing party or parties to decline to agree to remittal as provided in Canon 3D.

Canon 3D does not provide for withdrawal of an agreement remitting a judge's disqualification due to relationship. Under the common law, disqualification of a judge is waivable, and if a party knows of facts that would disqualify a judge but does not move for disqualification, the right to do so at a later date will be considered waived. Judicial Conduct & Ethics §5.26. See also 48A C.J.S. Judges §136 (1981). It is the opinion of the Commission that a party may not withdraw an agreement remitting a judge's disqualification due to relationship.

Sincerely,

JUDICIAL INQUIRY COMMISSION