

Judicial Inquiry Commission

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June 27, 1997

The Judicial Inquiry Commission has considered your request for an advisory opinion clarifying or modifying its opinion in Advisory Opinion 93-486 concerning whether a judge is disqualified in cases in which a party is represented by a member of a law firm in which the judge's first cousin's husband is a partner. The Commission will also address your question concerning the procedure for remittal of disqualification.

As you know, a judge is disqualified under Canon 3C(1)(d) in any proceeding in which an attorney is related to the judge within the fourth degree of consanguinity or affinity. In Advisory Opinion 88-338, the Commission overruled its prior holdings that this disqualification extended automatically to cases in which a party was represented by any member of the lawyer-relative's law firm. The decision in Advisory Opinion 88-338 was based upon the Commentary to Canon 3C(1)(d)(i).

It is the opinion of the Commission that a judge is not disqualified merely because a party is represented by a member of a law firm of which the judge's cousin's husband is a partner. J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics, §5.12 (1990). However, the judge is disqualified if other circumstances exist under which the judge's "impartiality might reasonably be questioned" (Canon 3C(1)), if he has a personal bias or prejudice concerning a party as a result of the fact that a party is represented by this law firm (Canon 3C(1)(a)), or if the judge's cousin's husband is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding." Canon 3C(1)(d)(ii).

If the judge has a personal bias or prejudice concerning a party as a result of the fact that a party is represented by a member of the law firm in which his cousin's husband is a partner, the judge must recuse himself from the case. A disqualification due to personal bias may not be remitted.

In all other cases in which a party is represented by a member of a law firm of which the judge's cousin's husband is a partner, the judge should disclose the existence of the relationship to the parties and their attorneys. The general rule is that "it is the judge's obligation to disclose all possibly disqualifying facts." Judicial Conduct and Ethics, §5.26 at 146. This will avoid any appearance of impropriety and give the parties and their attorneys the opportunity to supply information concerning whether any additional circumstances exist under which the judge's impartiality might reasonably be questioned. The judge need not initiate any further investigation into this issue, nor need he investigate whether or not his relative has an interest in the law firm that would be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists. Advisory Opinion 93-500.

After disclosure of the relationship, the judge must then examine the facts and determine whether an additional factor exists under which his impartiality might reasonably be questioned, or whether his relative has an interest which could be substantially affected by the outcome of the proceeding. Advisory Opinions 88-338, 93-491, and 93-500. In considering these two 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. The Canon 3C(1) recusal test concerning whether the judge's "impartiality might reasonably be questioned" 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, a reasonable basis for questioning the judge's impartiality would exist if the judge knew that his relative had given legal advice to a party related to the matter in controversy. Advisory Opinion 93-491. In determining whether the judge's relative has an interest which could be "substantially affected by the outcome of the proceeding," the judge should consider any benefit or loss he knows the relative might receive, whether such benefit or loss is such that a reasonable person might question the judge's impartiality as a result, and the extent or degree of the interest involved. L. Abramson, Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct at 64-65 (American Judicial Society, 1986). A copy of Advisory Opinion 93-500 is enclosed for your reference regarding these issues.

Disqualification due to knowledge that the judge's lawyer-relative has an interest that could be "substantially affected by the outcome of the proceeding" is subject to remittal only under the method set forth in Canon 3D. A failure of the parties or counsel to object after notice of the relationship does not constitute proper remittal.

Disqualification due to the existence of other facts or circumstances under which the judge's "impartiality might reasonably be questioned" is not subject to remittal. Canon 3D. Advisory Opinion 93-491.

A copy of Advisory Opinion 95-586 is enclosed for your reference. This opinion deals with the special circumstance of change of counsel after significant proceedings and may assist with your concern about the possibility of "judge-shopping."

Yours very truly,

JUDICIAL INQUIRY COMMISSION