

## Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET  
SUITE 201  
MONTGOMERY, ALABAMA 36104

July 27, 1997

The Judicial Inquiry Commission has considered your request for an advisory opinion regarding the propriety of a judge's receiving a portion of a contingency fee award due to the judge's former law firm after the judge has been sworn in where the underlying judgment was not final when the judge was sworn in. It is unclear whether the judge's portion of the award represents compensation for work performed by the judge on the case while at the firm or a partner's share determined under the firm's partnership agreement and paid to partners without regard to whether such partner worked on the case. You also ask whether, if the judge may receive the funds after having been sworn in, the judge is disqualified from hearing cases involving his former firm until the funds are paid.

It is the opinion of the Commission that the judge may receive his portion of the contingency fee award after having been sworn in provided that the basis for the calculation of that portion is established before the judge is sworn in. If the judge's portion of the award is established, but is not distributed before the judge has been sworn in, the judge is not disqualified from hearing cases involving his former firm for that reason.

With respect to the disposition of the pending contingent fee award, Shaman, Lubet and Alfini explain:

[J]udges may make financial arrangements with successor counsel to ensure that payment is made for work performed prior to taking the bench. Where possible, the judge may simply bill for past work at the appropriate hourly rate, and may collect that fee even after assuming office. Cases handled on a contingent fee basis present more difficulty. Even though the judge is entitled to compensation for work performed, it may be difficult to determine the appropriate percentage before the case is actually completed. Two approaches are possible. The judge may estimate a percentage at the time that the judge takes the bench and enter into an agreement with successor counsel on that basis, or the judge may allow the new attorney to make the pro rata determination at the conclusion of the matter. In either case, the entire fee must be reasonable and the judge's portion must be determined on the basis of actual work actually performed prior to taking the bench.

Shaman, Lubet, Alfini, *Judicial Conduct and Ethics*, 2d ed., §7.22, at 235-36 (footnotes omitted). This discussion is consistent with Advisory Opinion 90-402, in which the Commission concluded that a judge may receive a contingent fee established while he was an attorney for work performed as an attorney. The only funds left with the former firm by the judge should be unliquidated but earned and earned but not paid.

In this instance, the work performed by the judge or the partnership agreement controlling the distribution of fees awarded to the firm must be established before the judge takes the bench. Even though the case is not final, the judge's maximum portion of any award can be established if the judge's work or percentage is known. Further activity in the case should be treated separately by the judge and firm if possible. If not, the judge should make certain that he is not compensated for work that was done after he took the bench.