

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

June 26, 1998

The Judicial Inquiry Commission has considered your request for an advisory opinion whether it is appropriate under the Alabama Canons of Judicial Ethics for a judge to hear harassment charges against a police officer brought by three individuals whom the officer arrested when the judge previously has heard the charges of resisting arrest that arose from the same incident, and found the defendants guilty. You also state that the prosecuting attorney has been advised by the State Bar's General Counsel that he should not prosecute the harassment charges since he prosecuted the resisting arrest cases and called the arresting officer as his principal witness. You inquire in this regard whether, in the event you are not disqualified, it is your responsibility to appoint a special prosecutor for the harassment cases.

It is the opinion of the Commission that you are not disqualified in any of these cases unless you have formed a *personal* bias or prejudice concerning a party in the case.

Recusal is not required on account of a judge having prior familiarity with the case derived from having previously tried the same case or a related case. Advisory Opinions 89-375, 93-510, and 93-511. "The rule against prior personal knowledge only applies to knowledge garnered from extrajudicial sources. Knowledge about matters in a proceeding that has been obtained by a judge within the proceeding itself or within another legal proceeding is permissible and does not call for disqualification." J. Shaman, S. Lubet, J. Alfani, Judicial Conduct and Ethics, §4.10 at 113 (1995).

Further, the bias necessary to disqualify a judge generally must arise from an extrajudicial source, and involve an opinion on the merits based on something other than what the judge has learned from participating in the particular case or a prior case. See Advisory Opinions 83-188, 89-375, 92-449, 93-510, and 97-639. The mere fact that a judge has heard and made factual findings in a prior related case is not ground for disqualification. Advisory Opinions 83-188, 86-267, 89-350, 89-375, 92-449, 97-639, and 98-685.

The Commission is unable to answer your question whether it is a trial judge's responsibility to appoint a special prosecutor when the prosecuting attorney is disqualified. Under Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission, the Commission may only provide advisory opinions concerning "whether certain specified actions contemplated or proposed to be taken by [the judge] may constitute a violation of the canons of judicial ethics." It is the Commission's understanding that this particular question may be addressed to the legal division of the Administrative Office of Courts, 300 Dexter Avenue, Montgomery, Alabama, telephone: (334) 242-0396.