

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: APRIL 30, 1999

ADVISORY OPINION 99-728

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### DISQUALIFICATION DUE TO BIAS OR PREJUDICE TOWARD ATTORNEY

#### ISSUE

Is a judge disqualified to hear all cases involving two particular law firms? **Answer:** Yes, under the particular facts in this case.

#### FACTS

In post trial proceedings in a case that had been involved in protracted litigation, the defendants alleged that the judge had been involved in improper jury contact. The judge responded that the allegations were false and he confronted the attorneys. The judge later asserted that counsel intentionally made false charges against him, both in the original accusation and subsequent thereto, and that they committed perjury. The judge also implicated one of the attorneys in an illegal taking of the judge's trial notes for the case, and he charged all of the attorneys involved with ex parte coercion of the court reporter to alter the transcript of the trial. The judge additionally accused counsel of offering a counterfeit document at trial as an authentic original, and of having assisted in the preparation of a counterfeit document. The judge initially instituted statutory removal proceedings against the attorneys (*see* Ala. Code §34-3-86, *et seq.* (1975)). However, he has decided to turn his findings over to the State Bar and to discontinue the statutory removal proceedings. Two law firms of which some of the attorneys involved are members have asked the judge to recuse himself in all of their cases before the judge.

#### DISCUSSION

“[H]ostility toward a party's attorney must be both personal and extreme before it is disqualifying. This is particularly so when the judge's behavior toward an attorney does not grow out of the particular case the judge is hearing at that time. Antipathy towards a lawyer will not necessarily be considered ... as extending to the lawyer's client, and where the antipathy is against the lawyer but not against the client personally, recusal will not be required.

J. Shaman, S. Lubet, J. Alfini, *Judicial Conduct and Ethics* §4.08, at 109-110 (2d ed. 1995) (footnotes omitted). “[A] judge will be disqualified where he or she shows hostility to a lawyer that is of such a degree that it adversely affects the judge's state of mind toward the lawyer's client.” *Id.*, at 110. Disqualification is usually considered on a case-by-case basis; blanket disqualification due to alleged bias toward counsel is very unusual. *Id.*, at 111.

The Judicial Inquiry Commission first addressed this subject in Advisory Opinion 85-243. There, a party was represented by an attorney against whom the judge had previously filed a complaint; the judge also had reported questionable conduct to the District Attorney. The judge stated that he felt no personal conflict with counsel. The

Commission decided that it was for the judge in the first instance to determine whether proper grounds for recusal existed under Canon 3C. Although personal bias and prejudice is specifically addressed in Canon 3C(1)(a), the Commission cautioned the judge to be particularly mindful of Canon 3C(1). Canon 3C(1) provides that a judge is disqualified whenever “his impartiality might reasonably be questioned.”

In Advisory Opinion 86-281 and 86-284, the Commission held that the mere fact that a judge had reported to the District Attorney or other law enforcement authority evidence adduced at a trial that the judge thought possibly constituted a prior or continuing criminal offense did not establish grounds for disqualification. The Commission concluded that “reporting a suspected violation of the law arising out of evidence adduced during a trial falls within the judicial authority of a sitting judge and that the judge’s appearance of impartiality should not be affected by such a report.” Advisory Opinion 86-284.

In Advisory Opinions 89-363, the judge had formerly been a prosecutor and had prosecuted to mistrial an attorney representing parties before him as judge. The Commission held that the mere fact of such prosecution did not cause disqualification, but that the judge should carefully consider the facts and circumstances known to him by virtue of that prosecution and disqualify himself if, upon such examination, he found facts which would cause his impartiality to be questioned by a reasonable man. The Commission also decided that the judge would be disqualified if the proceeding involved the facts upon which the prior prosecution was based.

In Advisory Opinion 97-656, the Commission stated that a judge’s filing of a complaint with the State Bar against an attorney-litigant is generally not disqualifying. The Commission analogized the situation to that of a contempt proceeding:

Even where the contemptuous conduct consists of strong, personal criticism of the judge, disqualification is not necessary. At some point, though, a line will be crossed where disqualification from contempt proceedings is mandated where a judge has become biased or prejudiced. Thus, where a verbal attack upon a judge becomes particularly offensive, or where a judge becomes enraged at offensive conduct, recusal is necessary.

Advisory Opinion 97-565 (quoting *Judicial Conduct and Ethics*, §4.09 at 111).

Because of the seriousness of the charges the judge has made, as well as the surrounding facts and circumstances made known to the Commission, the Commission concludes that a reasonable person might question the judge’s impartiality in cases in which a party is represented by any member of the two firms that have requested the judge’s recusal. Thus, it is the opinion of the Commission that the judge must recuse himself from any presently pending case in which a party is currently represented by any member of those two law firms. It is the further opinion of this Commission that such disqualification also

applies to any case in which any member of those firms appears as initial counsel that is filed while any disciplinary proceeding arising out of the litigation in question continues.

#### REFERENCES

Alabama Advisory Opinions 85-243, 86-281, 86-284, 89-363, 97-656.

Alabama Canons of Judicial Ethics, Canons 3C(1) and 3C(1)(a).

J. Shaman, S. Lubet, J. Alfini, *Judicial Conduct and Ethics* §§4.08 and 4.09 (2d ed. 1995).

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This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; e-mail: [jic@alalinc.net](mailto:jic@alalinc.net).