

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MARCH 21, 2001

ADVISORY OPINION 01-775

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### DISQUALIFICATION WHEN A MEMBER OF THE JUDGE'S REFEREE'S FORMER FIRM IS AN ATTORNEY IN THE CASE

#### ISSUES

I. May a judge hear cases in which a party is represented by an attorney who is a member of a law firm to which a referee appointed by the judge formerly belonged where the referee does not participate in the case? **Answer:** Yes.

II. May the referee hear cases in which a party is represented by an attorney who is a member of the referee's former law firm? **Answer:** The judge should not permit the referee to hear cases where a former law partner of the referee served as a lawyer in the matter while they practiced together; he also should not permit the referee to hear cases in which the referee's former firm is involved so long as the firm continues to pay the referee's health insurance premiums.

#### FACTS

A circuit judge wishes to appoint a retired attorney as a part-time referee to assist with the handling of paternity and child support cases. The referee would be paid through a contract with the Department of Human Resources and the Administrative Office of Courts. The attorney has dissociated himself from his former law firm and there is no remaining financial compensation due to him from the firm, except that his former partners are maintaining his and his wife's health insurance for the next eighteen months. The judge inquires whether he may hear cases in which a party is represented by a former

partner of the referee when the referee has no involvement with the case, either because the case does not involve paternity or child support or because the paternity and child support case comes directly to him without participation of the referee. He also inquires whether the referee can hear cases in which the referee's former law partner represents a party.

#### DISCUSSION

The Commission has previously concluded that a judge is disqualified under Canon 3C(1) from hearing cases in which a party is represented by an attorney appointed by the judge then assisting the judge on a regular, ongoing basis with other cases over which the judge presides. The Commission reasoned that, because a referee who assists a judge on a continuing basis stands in a position of close trust with the judge, and the judge, of necessity, must repose special confidence in such a referee, a person of ordinary prudence might reasonably question the judge's impartiality in a case in which that referee represents a party. Advisory Opinions 99-736, 00-754, and 00-757. Canon 3C(1) requires disqualification in any proceeding in which the judge's "impartiality might reasonably be questioned."

A judge has no special relationship of trust with law partners of an attorney whom the judge has appointed as a referee. Thus, the mere fact that an attorney in a case is a law partner of a referee appointed to assist the judge in other cases does not constitute a reasonable basis to question the judge's impartiality. This situation is analogous to that in which an attorney appears who is a law

partner of an attorney currently representing the judge in an unrelated case. *See, e.g.*, Advisory Opinion 99-731. It is the opinion of the Commission that the Alabama Canons of Judicial Ethics permit a judge to hear cases in which a party is represented by an attorney who is a former law partner of a referee assisting the judge in other cases.

The Commission may only address whether action contemplated to be taken by the judge requesting the opinion might constitute a violation of the canons of judicial ethics. Rule 17, Rules of Procedure of the Judicial Inquiry Commission. Thus, the Commission has no authority to address the ethical propriety of proposed conduct by a referee. Moreover, a referee is not a judge and, thus, is not directly subject to the canons. However, there is a question under the canons as to whether a judge who appoints a referee has an ethical obligation to prevent the referee from hearing certain cases.

Canon 3B(2) states that a judge “should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.” In considering the provision similar to Canon 3B(2) that applies to probate judges, the Commission observed in Advisory Opinion 96-616 that this provision appears to instruct a judge to require his staff and subordinate court officials to disqualify themselves in proceedings in which they would be disqualified if they were the judge. A referee appointed by a judge is a court official who is subject to the judge’s direction and control, and a referee appointed to hear child support matters under Rule 35(C) of the Alabama Rules of Judicial Administration is,

by the terms of that rule, a confidential employee of the judge or judges in the circuit who hear child support cases.

Under Canon 3C(1)(b), a judge is disqualified to hear cases where a lawyer with whom the judge previously practiced law served during such association as a lawyer in the matter in controversy. It is the opinion of the Commission that Canon 3B(2) requires a judge to assure that a referee assisting him with cases does not hear a case where a lawyer with whom the referee previously practiced law served during such association as a lawyer in the matter. The Alabama Supreme Court has explained that a “matter,” as in a matter in controversy, is a “subject (as in a fact, event or course of events, or a circumstance, situation, or question) of interest or relevance.” *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (Ala. 1978).

Under the general provision in Canon 3C(1), a judge is disqualified whenever the judge’s “impartiality might reasonably be questioned.”

“Recusal is required under Canon 3C(1) when ‘facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.’ *Acromag-Viking v. Blalock*, 420, So.2d 60, 61 (Ala. 1982). *See, also, Wallace [v. Wallace]*, 352 So.2d 1376, 1379, (Ala.Civ.App. 1977)]. Specifically, the Canon 3C(1) test 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?’

Thode, *The Code of Judicial Conduct - The First Five Years in the Courts*, 1977 Utah L.Rev. 395, 402.”

Matter of Sheffield, 465 So.2d 350, 355-356 (Ala. 1984). The issue under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge’s impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

It is the opinion of the Commission that a reasonable question as to a judge’s impartiality would exist if an attorney in the case was paying the health insurance of the judge and the judge’s spouse. Accordingly, the Commission concludes that, under Canon 3B(2), a judge should assure that a referee assisting him with cases does not hear cases involving a former law partner of the referee so long as the referee’s former firm is continuing to pay the referee’s health insurance premiums.

#### REFERENCES

Alabama Advisory Opinions 96-616, 99-731, 99-736, 00-754, and 00-757.

Alabama Canons of Judicial Ethics, Canons 3B(2), 3C(1), and 3C(1)(b).

*Ex parte Duncan*, 638 So.2d 1332 (Ala. 1994).

*Matter of Sheffield*, 465 So.2d 350 (Ala. 1984).

Rule 35(C), *Alabama Rules of Judicial Administration*.

Rule 17, *Rules of Procedure of the Judicial Inquiry Commission*.

Rushing v. City of Georgiana, 361 So.2d 11 (Ala. 1978).

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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).