

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-790

DISQUALIFICATION WHEN A PARTY IS REPRESENTED BY AN ATTORNEY WHO PRACTICES LAW WITH A PART-TIME JUDGE OF THE SAME COURT

ISSUES

Is a part-time municipal judge disqualified to hear cases in which the defense counsel is an attorney who practices law in the firm of another part-time judge of the same municipality? **Answer:** Yes.

FACTS

An attorney recently was appointed as alternate judge for a municipality which has a longtime presiding municipal judge, who also serves as a part-time judge. The city currently has three court sessions per month. Each of the judges handles one session per month, and they alternate handling the first session of the month. Other attorneys in the new judge's firm represent defendants in municipal court in cases with which the new judge has no involvement. The new judge receives her judicial salary directly from the city; these funds are not part of the firm's income.

DISCUSSION

None of the specific grounds of disqualification stated in the subsections of Canon 3C(1) apply to the question presented. Thus, the issue is whether the presiding judge is disqualified under that canon's general provision requiring disqualification when 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).

Judicial ethics advisory bodies in other states are divided on the question whether a judge may hear cases in which a party is represented by a partner or associate of another judge of the same court. The majority of states that have addressed the matter have concluded that an attorney who practices law with a part-time judge may not practice in the court on which the judge serves. After careful consideration, the Commission is persuaded that the majority position is correct.

In addressing this matter, the Texas Committee on Judicial Ethics noted that Canon 2B prohibits a judge from permitting others to convey the impression that they are in a special position to influence the judge, and it concluded that partners and associates of a part-time judge would be in a position to convey this impression were they to practice in the judge's court. Texas Advisory Opinion 190 (1996).

The Arizona Judicial Ethics Advisory Committee reached the same conclusion in Arizona Advisory Opinion 92-16. "Although the appearance of impropriety is arguably attenuated compared to that created when the judge herself practices before the court, the taint remains. An observer or party might suspect that the lawyer's association with the part-time judge fosters special influence." *Id.*

The Hawaii Commission on Judicial Conduct has decided that the appearance by a member of a judge's firm before other judges on the same court would create an appearance of impropriety or undermine public confidence in the judiciary, contrary to Canon 2 and 2A. Hawaii Advisory Opinion 03-96. In deciding that lawyers who are "of counsel" to the law firm of a judge may not practice in the court in which the judge sits, the Hawaii Commission later explained that the appearance of impropriety would be caused by an observer or party questioning whether the lawyer's association with the part-time judge fosters special influence or advantage, and that Canon 2B is violated by such a perception. Hawaii Advisory Opinion 01-98.

Judicial ethics advisory bodies in other states have also concluded that an attorney who practices law with a part-time judge should not practice in the court on which the judge

serves. Florida Advisory Opinion 90-26; Florida Advisory Opinion 98-23; and Louisiana Advisory Opinion 46 (1979). The application section of the New York Rules of Judicial Conduct specifically addresses this matter:

A part-time judge . . . shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law.

The New York Committee on Judicial Ethics has advised that this prohibition extends to an attorney who shares office space with a part-time judge. New York Advisory Opinions 89-160 and 97-46.

In Texas Advisory Opinion 132 (1989), the Committee on Judicial Ethics additionally decided that a part-time judge may not practice law with a lawyer who represents clients whose cases were considered by other judges on the same court because this would at least give the appearance of disregarding Canon 5C(1), which provides that a judge should refrain from certain financial and business dealings (including ones that tend to reflect adversely on the judge's impartiality or exploit the judicial position).

In accordance with the foregoing discussion and under the facts presented, the Commission concludes that a part-time municipal judge is

disqualified to hear cases in which the defense counsel is an attorney who practices in the firm of another part-time judge of the same municipal court. This disqualification may not be remitted.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2, 2A, 2B, 3C(1), and 5C(1).

Arizona Advisory Opinion 92-16.

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

Florida Advisory Opinions 90-26 and 98-23.

Hawaii Advisory Opinions 03-96 and 01-98.

Louisiana Advisory Opinion 46 (1979).

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

New York Advisory Opinions 89-160 and 97-46.

New York Rules Governing Judicial Conduct, §100.6(B)(3).

Texas Advisory Opinions 190 and 132.

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, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.