

## JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-794

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DISQUALIFICATION WHEN THE JUDGE'S SPOUSE'S DOCTOR OR THE JUDGE'S MINOR CHILD'S DOCTOR IS A PARTY

### ISSUES

I. Is a judge disqualified to hear cases in which the defendant is his wife's gynecologist? **Answer:** Yes.

II. Is a judge disqualified to hear a case in which the judge's minor children are patients of two of the three pediatrician/defendants? **Answer:** Yes.

III. If the judge is disqualified under either of the foregoing circumstances, is the disqualification subject to remittal? **Answer:** No.

IV. If disqualified, may the judge assign the cases to another circuit judge? **Answer:** No, the procedure for reassignment is set forth in *Ex parte Jim Walter Homes, Inc.*

### FACTS

The presiding judge in a judicial circuit inquires concerning disqualification issues in three pending medical malpractice cases. There are two active judges in the circuit. Another judge who did not seek a further term during the last judicial elections continues to hear some cases by special authorization and assignment. The three medical malpractice cases are assigned to the active judges.

In two of the cases, an obstetrician/gynecologist is the only defendant. This doctor is the gynecologist for

the spouse of one of the two active judges and is the obstetrician/gynecologist for the spouse of the other active judge. Both of the judges' spouses have family practice doctors in addition to this specialist.

In the third case, a general surgeon from one group and two pediatricians from another group are defendants. Minor children of both of the active judges are patients of the pediatricians. Neither the judges nor their spouses nor their children are patients of the general surgeon.

### DISCUSSION

The Commission has previously addressed disqualification when the judge's doctor or the judge's spouse's doctor is a party. In Advisory Opinion 99-740, the Commission wrote that, absent disqualifying bias under Canon 3C(1)(a), this situation is governed by the general provision in Canon 3C(1) requiring disqualification whenever the judge's impartiality might reasonably be questioned. The Commission assumes that the judges in the current case have no personal bias or prejudice concerning a party arising from the doctor/patient relationships in question.

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.”

*In re Sheffield*, 465 So.2d 350, 355-356 (Ala. 1984). The reasonable person/appearance of impropriety test stated in Canon 3C(1) sometimes disqualifies judges who have no actual bias. *Id.*, at 357.

In Advisory Opinion 99-740, the Commission decided that a person of ordinary prudence knowing all the circumstances could conclude there is a reasonable basis for questioning the impartiality of a judge when a party to individual litigation is currently the judge’s or the judge’s spouse’s doctor. The Commission distinguished this situation from one in which a family doctor is a single defendant in complex litigation involving hundreds of parties, indicating that disqualification in that situation depends on the circumstances in the case.

Consistent with Advisory Opinion 99-740, the Commission concludes that a judge is disqualified to hear a medical malpractice action when the sole defendant is the judge’s spouse’s gynecologist (or obstetrician/gynecologist). The Commission also is of the opinion that a person of ordinary prudence knowing all the circumstances could conclude there is a reasonable basis for questioning the impartiality of the judge in a medical malpractice case involving two pediatricians and a surgeon when the judge’s

minor children are patients of the pediatricians.

It should be noted that the situations presented involve ongoing doctor-patient relationships. Other doctor/patient relationships might not create a reasonable question as to the judge’s impartiality, *e.g.*, a defendant who, as an emergency room doctor, set the judge’s child’s broken arm, or a defendant who, as a radiologist, performed and read an MRI on the judge three years before. Whether the relationship causes disqualification when it is not ongoing depends on the circumstances in the particular case.

Since disqualification in both of the situations presented is under the general provision in Canon 3C(1), it is not subject to remittal. Advisory Opinions 92-454, 94-531, and 00-759.

In *Ex parte Jim Walter Homes, Inc.*, 776 So.2d 76 (Ala. 2000), the Alabama Supreme Court decided that a judge who is disqualified to hear a case may not reassign the case to another judge, finding that to do so would be contrary to Canon 3C because the impartiality of the reassignment might reasonably be questioned. *Id.*, at 80. Thus, both active circuit judges are disqualified and they may not reassign the case to another judge.

In its opinion in *Jim Walter Homes*, the Court adopted a procedure for initiating reassignment of a case where the judge presiding over it is disqualified under the canons of judicial ethics. In a circuit with more than one circuit judge, the disqualified presiding judge is to notify the next most senior judge in the circuit of the disqualification. If the judge so notified is

also disqualified, he or she is to enter an order notifying the next most senior judge in the circuit of the disqualification. If the judge notified is not disqualified, he or she becomes the judge to whom the case is assigned, unless that judge assigns the case to another judge in the circuit who is not disqualified and agrees to take the case. If no judge with authority to hear the case is available in the county in which the case is pending, the case must be referred to the Administrative Office of Courts for assignment of a judge. *Id.*

#### REFERENCES

Advisory Opinions 92-454, 94-531, 99-740, and 00-759.

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

*Ex parte Jim Walter Homes, Inc.*, 776 So.2d 76 (Ala. 2000).

*In re Sheffield*, 465 So.2d 350 (Ala. 1984).

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