

# JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 03-811

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## DISQUALIFICATION WHEN MEMBER OF CLOSE RELATIVE'S FIRM APPEARS

### ISSUES

Is a judge disqualified to hear cases in which a party is represented by an attorney who is a law partner of a close relative of the judge?

**Answer:** The mere fact that an attorney in the case practices law with a close relative of the judge does not cause disqualification of the judge. However, the judge is disqualified if he knows that his relative has an interest that could be substantially affected by the outcome of the proceeding or if the presence of additional factors is sufficient to create a reasonable question as to the judge's impartiality. If an attorney in the proceeding files a motion alleging that the judge is disqualified, the judge should hold a hearing if necessary to give the parties an opportunity to present relevant evidence.

### FACTS

Before coming to the bench several years ago, a circuit judge practiced law with his brother in a two-man law firm. About two years ago, the judge's brother entered into partnership with another attorney. The judge never practiced law with that attorney, nor does he derive any benefit whatsoever from their law firm.

A motion to recuse was recently filed in a case in which the judge's brother's law partner represents the defendant municipality. The motion alleges that the judge's brother has a substantial interest in the case since he is the partner of opposing counsel and, therefore, has an economic interest in the fees resulting

from the case and other present and future cases involving the same client. It also alleges that the judge's relationship as brother to a partner of opposing counsel is sufficient of itself to give rise to an appearance of impropriety.

The judge is not privy to the financial relationship or arrangement between his brother and his law partner in their practice. He has always recused himself from hearing cases in which his brother represents a party.

### DISCUSSION

Canon 3C(1) provides generally that a judge should disqualify himself in any proceeding in which his "impartiality might reasonably be questioned." The test under Canon 3C(1) 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?" *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984). The question 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).

Subsection (d) to Canon 3C(1) specifically provides, in pertinent part, that a judge is disqualified to hear an action where:

He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

- (i) Is named a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- ...

Commentary to Canon 3C(1)(d)(i) states as follows:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that “his impartiality might be reasonably questioned” under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be “substantially affected by the outcome of the proceeding” under Canon 3C(1)(d)(ii) may require his disqualification.

The Commission has previously concluded that a judge is not disqualified merely because a party is represented by a member of a law firm in which a relative within the prohibited degree also is a member. *See, e.g.*, Advisory Opinions 97-653 and 97-665. The Commission has advised that, when the judge’s relative has not entered an appearance in the case, the judge should disclose the existence of the relationship to the parties and their attorneys and then examine the facts in the particular case to determine whether any additional factor exists under which his

impartiality might reasonably be questioned or whether the relative has an interest that could be substantially affected by the outcome of the proceeding. Advisory Opinions 88-338, 93-941, 93-500, and 97-653. In Advisory Opinion 97-653, the Commission explained that disclosure would avoid any appearance of impropriety and give the parties and their attorneys the opportunity to supply information concerning whether any additional circumstances exist under which the judge’s impartiality might reasonably be questioned.

The judge need not initiate any further investigation into this issue, nor need she investigate whether or not her relative has an interest in the law firm that would be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists.

Advisory Opinion 93-500.

Advisory Opinion 97-653.

What is commonly called a partnership between two attorneys may encompass many different sorts of arrangements, some of which would not involve one of the attorneys having a substantial interest in the outcome of cases handled by the other attorney. The Commission is of the opinion that, where a motion to recuse is filed that alleges that the judge’s brother has a substantial interest in the case in that he has an economic interest in the fees resulting from the case, and the judge does not know the financial relationship or arrangement between his brother and his brother’s law partner, the judge should hold a hearing to determine whether his brother does

have an interest that could be substantially affected by the outcome of the case. The Commission believes this follows from Rule 11 of the Alabama Rules of Civil Procedure, which states that the signature of an attorney on a motion constitutes a certificate that there is good ground to support the motion, and provides penalties for violations. Like any other motion, it is the obligation of the attorneys to present whatever evidence they wish the judge to consider in ruling on the motion.

In deciding whether his brother has an interest that could be “substantially affected by the outcome of the proceeding,” the judge should consider any benefit or loss it is established that his brother might receive, whether such benefit or loss is such that a reasonable person might question the judge’s impartiality as a result, and the extent or degree of the interest involved. L. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* at 64-65 (American Judicature Society, 1986). The judge should also note that, if he determines that his brother has an interest that could be substantially affected by the outcome of cases handled by his law partner, such disqualification is subject to remittal. Thus, it is a matter that can be waived in future cases to which it may apply under the procedures specified in Canon 3D.

#### REFERENCES

Advisory Opinions 88-338, 93-491, 93-500, 97-653 and 97-665.

Alabama Canons of Judicial Ethics, Canons 3C(1), 3C(1)(d)(i), 3C(1)(d)(ii), 3D, and Commentary to 3C(1)(d)(i).

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

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

L. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* (American Judicature Society, 1986).

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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).