

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 03-818

DISQUALIFICATION WHEN FIRM OF FORMER LAW CLERK APPEARS

ISSUES

Is a judge disqualified to hear a case involving a post divorce modification request due to a former law clerk who worked on prior related proceedings in the case having joined the firm where the attorney representing one of the parties is a partner? **Answer:** No, but it would be appropriate for the judge to bring Rule 1.12 of the Rules of Professional Conduct to the attention of the attorneys in the case.

FACTS

A change of custody modification request has recently been filed in a case that is assigned to a circuit judge. Motions filed in connection with the petition include one asking for a court appointed child custody evaluation. The petition and motions were filed by Attorney A, who is a partner in law firm XYZ.

The judge has held several trials involving the parties over the past few years. A two- or three-day trial was held in 1997 when Ms. B was the judge's law clerk. Ms. B worked a great deal on the case at that time. Ms. B joined law firm XYZ late last year. Ms. B has not made an appearance in the pending case, and the judge does not know whether she has worked on the case since joining the law firm.

The present petition alleges that the father has a personality disorder, and Attorney A is asking that the father be interviewed by a forensic psychiatrist. The judge believes that such an evaluation would include a complete history from the parties, including the time

period that Ms. B worked as his law clerk. The judge also believes that there has been testimony at previous hearings concerning the father's mental health history.

There have been previous recusal issues raised in the case as to which the judge has provided information to and sought advice from the Commission.

DISCUSSION

Canon 3C(1) states that a judge is disqualified whenever the judge's "impartiality might reasonably be questioned." This general provision is followed by subsections listing some specific circumstances under which a judge's impartiality might reasonably be questioned. Since none of the grounds of disqualification stated in the subsections to Canon 3C(1) apply, the issue presented is whether the judge is disqualified under the general disqualification provision.

"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 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). The Commission finds no reasonable basis to question the judge's impartiality under the facts presented. Thus, it is of the opinion that the judge is not disqualified to hear the case.

In considering this matter, Rule 1.12 of the Rules of Professional Conduct came to the attention of the Commission. It appears that this rule may apply to Attorney A and Ms. B under the stated facts, and that action on their part may be required in order for Attorney A to appropriately continue participation in the case. In the light of a judge's disciplinary responsibilities under Canon 3B(3), the Commission is of the opinion that it would be appropriate for the judge to bring Rule 1.12 to the attention of the attorneys in the case, in order to avoid any potential unprofessional conduct.

REFERENCES

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

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

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

Rule 1.12, Rules of Professional Conduct.

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.