

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MARCH 17, 2005

ADVISORY OPINION 05-849

## DISQUALIFICATION WHEN A CLOSE RELATIVE MAKES A LATE APPEARANCE IN A CASE

### ISSUE

May a judge continue to hear a case when a close relative makes a late appearance, the opposing party remits disqualification of the judge, but the party retaining the attorney relative declines to do so? **Answer:** Yes, if the judge determines that the attorney relative is precluded from appearing in the case or that the party who retained him waived the disqualification.

### FACTS

A circuit judge had a case set on his trial docket on January 10, 2005. The case had been pending for several years and the judge had ruled on numerous disputed matters, including a summary judgment motion. The case was earlier set for trial in January 2004; it was continued due to an allegation made just before the trial date that the defendant had intentionally withheld or responded untruthfully about documents.

Numerous depositions were subsequently conducted concerning this allegation, and a hearing was held that involved about half a day of testimony, voluminous briefs, and the filing of several depositions, multiple affidavits and other submissions. Plaintiff's firm alone claims to have spent almost 160 hours of attorney time and more than \$7,500 for out-of-pocket expenses in discovery and presentation of the issue to the court. Counsel were informed that the judge found misconduct by an employee of the defendant company and would order sanctions, but that the sanction would be substantially less than the default judgment the plaintiff's firm requested. This matter was under advisement on December 22, 2004, pending a determination by the court as to the monetary amount of the sanction to be imposed.

On December 22, an attorney who is married to a first cousin of the judge entered an appearance in the case as additional counsel for the plaintiff. The attorney relative advised the judge he was retained to assist in jury selection, for which he would be paid a set fee by the firm representing the plaintiff. Both the attorney relative and the firm representing the plaintiff were aware at the time the attorney was retained that the attorney's appearance would cause disqualification of the judge due to his close familial relationship to the judge. Plaintiff's counsel had announced "ready" at a pretrial conference earlier in December. Plaintiff neither sought permission for the attorney relative to appear, nor made any showing to justify the belated appearance or to demonstrate the need for additional counsel.

On the date set for trial, the judge inquired about the parties' positions regarding his continued participation in the case. Defendant informed the court that it waived any potential conflict that the attorney relative's appearance may have generated. Plaintiff's counsel then stated the plaintiff was unwilling to remit the disqualification. The judge continued the case in order to request an opinion from the Commission.

### DISCUSSION

As the inquiring judge recognizes, he ordinarily could not hear a case in which this attorney represented a party, absent remittal under Canon 3D. Canon 3C(1)(d)(i) provides that a judge is disqualified when, *inter alia*, a person within the fourth degree of relationship to the judge or the judge's spouse is an officer, director or trustee of a party. This provision has been interpreted to cause disqualification of a judge where a party's attorney is related within the fourth degree to the judge or the judge's spouse, either by consanguinity or by affinity. See Advisory Opinion 97-637 and prior opinions cited therein. This disqualification is subject to remittal under

Canon 3D. Advisory Opinions 95-546 and 97-637.

The Commission has previously recognized, however, that the appearance of new counsel in a case sometimes causes significant damage to judicial economy and/or may be otherwise detrimental to the proper administration of justice. Thus, the Commission has advised judges that they would not violate the canons were they to make a legal determination that an attorney was disqualified from making a late appearance in a proceeding. Advisory Opinion 88-336 and 95-548.

In Advisory Opinion 95-548, the Commission addressed the matters of disqualification and continuance as follows:

It is the . . . opinion of the Commission that there is no hard and fast rule concerning what to do when disqualification would be required due to the involvement of . . . a nephew of the judge and that disqualification either cannot or will not be remitted. Instead, this appears to be a matter committed to the judge's discretion upon consideration of the factors generally applicable to questions involving changes of counsel and requests for continuances associated therewith. In other words, it is the Commission's opinion that the judge in such a situation should determine whether a change of counsel and concomitant continuance is appropriate under the facts in the case. If it is, then the judge should recuse himself and assign the case to another judge; if it is not, then he may proceed with the lawsuit and refuse to permit employment of new counsel.

Whether a judge should refuse the appearance of an attorney who would cause his disqualification is a legal question the judge must decide. The Commission may only address whether a particular course of conduct might

violate the canons; it is not authorized to proffer an opinion on other legal questions.

In Advisory Opinion 95-586, the Commission suggested another option when an appearance of an attorney after significant proceedings in a case causes disqualification which the party employing the attorney is not willing to remit. Noting that, as a general principle, a party cannot create a ground for disqualification by the party's own conduct, the Commission wrote the following:

It is the opinion of the Commission that if a party engages the service of an attorney whose relationship to the judge handling the case thereby disqualifies the judge, and if the attorney first files an appearance after the judge has heard or decided any contested issue in the case, the party should be deemed to have agreed to remittal of that disqualification. Of course, such agreement by the one party does not infringe on the right of the opposing party or parties to decline to agree to remittal as provided in Canon 3D.

The Commission continues to be of the opinion that a judge would not be in violation of the canons were he to make a determination that a party should be deemed to have agreed to remittal of a disqualification the party had created through the late engagement of an attorney related to the judge. As previously noted, the Commission may only address whether a particular course of conduct might constitute a violation of the canons.

If the judge permits the attorney relative to remain in the case, it is the opinion of the Commission that there is no ethical impediment to the judge's ruling on the motion for sanctions now pending before him nor to his continuing to preside over further proceedings in the case, it being established by the facts presented that the plaintiff has brought the attorney relative into the case subsequent

to the judge having heard contested issues in the case.

**REFERENCES**

Advisory Opinion 88-336, 95-546, 95-548, 95-586, and 97-637.

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

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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).