

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: JULY 15, 2005

ADVISORY OPINION 05-854

## DISQUALIFICATION WHEN A RELATIVE IS AN ATTORNEY IN A RELATED MATTER

the basis of ethnicity in connection with the underlying incident.

### ISSUE

### DISCUSSION

Is a judge disqualified to hear a charge of probation violation related to a school suspension when her spouse has acted, and may also in the future act, as the attorney for the school board in connection with the underlying incident? **Answer:** Yes.

Canon 3C(1) states a general standard for disqualification, followed by a number of subsections listing circumstances meeting that standard in which disqualification is presumed. The facts presented are not covered by any of the subsections. Thus, the issue is whether the judge is disqualified under the general standard.

### FACTS

A juvenile has been charged with violation of probation as a result of being suspended from school. The district judge before whom the matter is pending is married to the attorney for the school board. The propriety of the suspension is not an issue in the case, but testimony regarding the underlying incident will be admitted for the purpose of determining whether the juvenile violated his probation and, if so, whether he should be punished for the violation.

Under Canon 3C(1), recusal is required 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). Specifically, 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?” *Matter of Sheffield*, 465 So.2d 350, 356 (Ala. 1984). This test may sometimes bar trial by judges who have no actual bias. *Sheffield*, 465 So.2d at 356.

The juvenile’s attorney has sought to contest the propriety of the suspension. A letter written to the school principal requesting a hearing was referred to the judge’s spouse for response; his response included procedural matters relating to the suspension process, and factual and legal positions regarding the underlying incident. The juvenile’s attorney has also filed a motion to dismiss the suspension in the juvenile court proceeding, which the State has opposed with a motion to dismiss and to quash the exhibits attached to the juvenile’s motion. Those exhibits include the letter written by the judge’s husband as attorney for the school board.

In Advisory Opinion 99-727, the Commission wrote that a judge would be disqualified to hear cases against an insurance company due to the judge’s spouse representing a plaintiff in a case pending in another court involving the same company if the cases involved substantially similar or closely related factual allegations. The Commission concluded that, under these circumstances, the judge’s impartiality might reasonably be questioned.

The juvenile has filed a motion to recuse on the basis that the judge’s spouse’s position as attorney for the school board may create an appearance of impropriety. The motion recites both the spouse’s response to the attempt to contest the propriety of the suspension and an intent to pursue a claim of discrimination on

In Advisory Opinion 93-491, the Commission decided that a reasonable basis to question a judge’s impartiality would exist if the judge knew an attorney-relative had given legal advice to a party related to the matters in controversy. The Alabama Supreme Court has explained that a “matter,” as in a matter in controversy, is a “subject (as in a fact, event or course of events, or a circumstance, situation, or question) of

interest or relevance. *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (Ala. 1978). Thus the presumed disqualification in Canon 3C(1)(b) where the judge has served as a lawyer in the matter in controversy, or where an attorney with whom the judge previously practiced served as a lawyer in the matter during such association, is not limited to situations in which the same case is before the judge. Rather, it includes cases involving or arising from the same fact situation and may include similar or related matters.

It is the opinion of the Commission that a juvenile defendant facing a charge of probation violation due to a school suspension might reasonably question the judge's impartiality when the judge's spouse is the attorney for the school board and has acted as such in connection with the underlying incident and under the facts presented.

#### REFERENCES

*Acromag-Viking v. Blalock*, 420 So.2d 60 (Ala. 1982).

Advisory Opinion 93-491 and 99-727.

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

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

*Rushing v. City of Georgiana*, 361 So.2d 11 (Ala. 1978).

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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).