

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: DECEMBER 1, 2005

ADVISORY OPINION 06-858

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### DISQUALIFICATION DUE TO EMPLOYMENT OF WITNESS

#### ISSUE

Is a judge disqualified from continuing to participate in a matter because a part-time household employee of the judge's family is called to give cumulative testimony to that of other witnesses? **Answer:** No.

#### FACTS

A circuit judge is presiding over the administration of an estate where there is an issue concerning paternity. At the hearing on paternity both sides called several witnesses to testify. One of the last witnesses called was a lady who works part-time as a domestic employee for the judge's family. She and one or two other witnesses testified the deceased had said to each of them that he could not father children because of an early childhood bout with the mumps. When this witness testified, the judge told all parties of the relationship between his family and the witness and told the witness there could be no discussion of this matter with him in the future. All parties agreed the judge should continue in the case. The judge states that his relationship with this witness will have no bearing on any ruling in the case.

#### DISCUSSION

The issue before the commission is whether the judge's relationship to the witness causes the judge's impartiality to reasonably be questioned under Canon 3C(1) of the Alabama Canons of Judicial Ethics. The test for determining general disqualification is

whether required "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).

In Advisory Opinion 94-519, this Commission considered whether the fact that the court's circuit clerk could be called as a witness in the proceeding caused the judge's disqualification. The Commission found that the mere existence of the relationship, without more, did not create a situation in which the judge's impartiality might reasonably be questioned. In addressing whether a judge's relationship with a witness could cause the judge's disqualification, the Commission found the Alabama Court of Criminal Appeals' opinion in *Callahan v. State* to be instructive. In *Callahan v. State*, 557 So.2d 1292, 1307-1308 (Ala. Cr. App.), affirmed, 557 So.2d 1311 (Ala. 1989), the Alabama Court of Criminal Appeals noted that disqualification is required only where the witness in question is a material witness in the case. The court followed the Florida Supreme Court in holding that a " 'material witness' is 'a witness who gives testimony going to some fact affecting the merits of the cause and about which no other witness might testify.' *Wingate v. Mach*, 117 Fla. 104, 157 So. 421, 422 (1934)."

Based on these principles, the mere fact of a judge's relationship to a witness does not raise

an issue concerning disqualification unless the witness is a material witness in the matter. Under the facts presented, the witness under consideration is not a material witness and no other facts are presented which would lead to the conclusion that the judge's impartiality might reasonably be questioned.

### REFERENCES

Advisory Opinion 94-519.

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

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

*Callahan v. State*, 557 So.2d 1292, (Ala. Cr. App.), aff'd, 557 So.2d 1311 (Ala. 1989).

*Matter of 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).