

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: JANUARY 21, 2005

ADVISORY OPINION 05-848

### DISQUALIFICATION DUE TO RECEIPT OF EX PARTE COMMUNICATION; DISQUALIFICATION DUE TO PARTY'S RELATIVE'S SERVICE IN LEGISLATURE

#### ISSUES

I. Is a judge disqualified to hear a case because, before realizing that the letter concerned a case pending before him, he read a letter written by a party to a Congressman that had been forwarded to his office? **Answer:** No, since the judge promptly disclosed the communication to the parties, and he did not develop a personal bias or prejudice concerning a party as a result.

II. Is a judge disqualified to hear a case because the defendant's father is a member of a Judiciary Committee of the Alabama legislature? **Answer:** No.

#### FACTS

The plaintiff in a divorce proceeding has filed a motion to recuse the circuit judge assigned to the case. One ground for the motion concerns a letter the defendant sent to his United States Congressman that contains allegations concerning the merits of the case. The congressman forwarded the letter to the judge's office with a form cover letter, and the judge read the letter without realizing it pertained to a pending case. The case is one of a series that had been re-assigned to the judge, and he did not know anything about it until he got the letter. The judge immediately called the lawyers in the case, disclosed the letter, and arranged for them to obtain copies.

The other ground stated for recusal is that the father of the defendant is a member of the Alabama legislature and serves on one of the Judiciary Committees. The plaintiff contends that this creates a reasonable question regarding the impartiality of any currently elected judge, and that a retired judge should be assigned by the Administrative Office of

Courts to hear the case.

The judge has stated that he can hear the case fairly and impartially, solely on the facts and the law, and that he would not be influenced by either the letter or the position of the defendant's father.

#### DISCUSSION

The Commission has previously addressed the subject of disqualification related to receipt of an *ex parte* communication in Advisory Opinion 99-720. In that opinion, the Commission wrote the following:

Canon 3A(4) does not address the question of remedy when an *ex parte* communication inadvertently occurs. However, it does provide, with respect to *ex parte* consultation of an impartial expert, that the judge should, where justice requires, give notice to the parties and afford a reasonable opportunity to respond. The Commission is of the opinion that the judge acted appropriately in this case in disclosing the facts on the record, and that no further remedial action is required.

The Commission concluded in Advisory Opinion 99-720 that the inquiring judge was not disqualified unless he developed a personal bias or prejudice concerning a party as a result of the communication.

The Commission finds the reasoning and conclusion in Advisory Opinion 99-720 applicable to the first issue in the current inquiry. Since the judge promptly disclosed the communication to the parties and he did not develop a personal bias or prejudice concerning a party as a result of the communication, the Commission is of the opinion that receipt of the communication does not disqualify him to hear the subject case.

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).

With respect to the second issue presented, the Commission is of the opinion that the stated facts do not create a reasonable question as to the judge’s impartiality and, therefore, that the judge is not disqualified to hear the case.

#### REFERENCES

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

Advisory Opinion 99-720.

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

*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).