

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-791

DISQUALIFICATION WHEN A PARTY IS REPRESENTED BY THE JUDGE'S BROTHER-IN-LAW

ISSUES

Is a judge disqualified to hear cases in which a party is represented by the judge's brother-in-law? **Answer:** Yes, but the disqualification is subject to remittal.

FACTS

The brother-in-law of a circuit judge is an active member of the bar in the county in which the judge sits.

DISCUSSION

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 always been interpreted to cause disqualification of a judge where a party's attorney is related to either the judge or the judge's spouse within the fourth degree, either by consanguinity or 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. Canon 3D provides as follows:

R E M I T T A L O F
DISQUALIFICATION. A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose in the record the basis of his disqualification. If based

on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

Thus, the parties and their attorneys may waive the disqualification resulting from a judge's brother-in-law representing a party in the case, but they must do so in writing after disclosure in the record by the judge of the basis for the disqualification. The decision to remit must be made independent of the judge's participation, and the written agreement remitting the disqualification must be incorporated in the record of the proceeding.

It is the opinion of the Commission that the inquiring judge must either recuse himself from any proceeding in which his brother-in-law represents a party or, alternatively, he may disclose in the record that the attorney is his brother-in-law, and then recuse himself unless all the parties and their attorneys waive the disqualification by agreeing, independent of his participation and in a writing that is made part of the record, that the relationship is immaterial.

REFERENCES

Advisory Opinions 95-546 and 97-637.

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

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.