

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 06-865

APPOINTMENT OF COUNSEL: ATTORNEY IN SAME FIRM AS CLOSE RELATIVE OF JUDGE

ISSUE

May a judge appoint as counsel attorneys who practice in a firm in which the judge's child is of counsel? **Answer:** Yes, unless the judge would have a personal bias concerning a party as a result or knows that his relative has an interest that could be substantially affected by the outcome of the proceeding, or if the presence of additional factors would create a reasonable question as to the judge's impartiality. The judge may, pursuant to Canon 3E, disclose his relative's relationship at the time the appointment is made.

FACTS

A district and juvenile court judge's daughter is an attorney who practices of counsel with a firm that has an office in the county where he sits. Her pay is not dependent upon the income of the firm in that she receives compensation only as a percentage of the fees that she personally generates. The firm also pays expenses for the office where she practices. The judge had appointed members of the firm to represent indigent defendants prior to his daughter working with the firm.

DISCUSSION

The Commission has long held that a judge may not appoint an attorney who is related to the judge or the judge's spouse within the fourth degree of consanguinity or affinity. Advisory Opinions 80-91, 82-138, 87-316 and 99-742. These opinions are based on the disqualifying kinship described in Canon 3C(1)(d). In Advisory Opinion 97-661, the Commission also stated that the limitation against the use of the judge's appointment power based on nepotism in Canon 3B(4) should be read consistently with the disqualification provisions in Canon 3C(1).

The Commission has previously concluded that a

judge is not disqualified merely because a party is represented by a member of a law firm in which a relative within the prohibited degree also is a member. *See, e.g.,* Advisory Opinions 97-653 and 97-665. The Commission also has held that the judge is disqualified if he or she has a personal bias or prejudice concerning a party as a result of the fact that a party is represented by a member of the law firm in which a close relative also practices. *See, e.g.,* Advisory Opinion 97-653. The judge should therefore examine the facts to determine if such a bias exists.

In addition, pursuant to Canon 3E of the Alabama Canons of Judicial Ethics,

a judge who does not deem himself or herself to be disqualified, from a proceeding by the terms of Canon 3.C. may nonetheless make information concerning interests or relationships available, either by filing that information in the office of the clerk of the judge's court or by causing notice to be given to the parties to the proceeding.

The judge, therefore, may disclose the existence of the relationship as described in Canon 3E, Alabama Canons of Judicial Ethics.

Canon 3C(1) provides generally that a judge should disqualify himself in any proceeding in which his "impartiality might reasonably be questioned." 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?" *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984). The question under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

Canon 3C(1)(a) provides for disqualification in the circumstance of personal bias or prejudice concerning a party. Subsection (d) provides, in pertinent part, that a judge is disqualified to hear an action where a person within the fourth degree of relationship to the judge is "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."

In Advisory Opinion 97-653, the Commission explained that disclosure could avoid any appearance of impropriety and give the parties and their attorneys the opportunity to supply information concerning whether any additional circumstances exist under which the judge's impartiality might reasonably be questioned. The judge need not initiate any further investigation into this issue, nor need he investigate whether or not his relative has an interest in the law firm that would be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists. Advisory Opinions 93-500 and 97-653.

In the situation presented, the judge's daughter's pay is not dependent on the income of the firm. In determining whether she has an interest that could be "substantially affected by the outcome of the proceeding," the judge should consider whether there is any other benefit or loss that he knows she might receive as a result of the appointment, whether such benefit or loss is such that a reasonable person might question his impartiality as a result, and the extent or degree of the interest involved. Advisory Opinions 97-653 and 03-811 (citing L. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* at 64-65 (American Judicature Society, 1986)).

It is the opinion of the Commission that the judge may appoint as counsel attorneys who practice in a firm in which the judge's daughter is of counsel unless the judge would have a personal bias concerning a party as a result or knows that his relative has an interest that could be substantially

affected by the outcome of the proceeding, or if the presence of additional factors would create a reasonable question as to the judge's impartiality. The judge may disclose his daughter's relationship to the attorney's firm at the time the appointment is made. If he determines that his daughter does have an interest that could be substantially affected by the outcome of the case, such disqualification is subject to remittal under Canon 3D; other disqualifying bases that would prohibit the appointment are not subject to remittal.

REFERENCES

Advisory Opinions 80-91, 82-138, 87-316, 88-338, 93-941, 93-500, 97-653, 97-661, 97-653, 97-665, 99-742 and 03-811.

Alabama Canons of Judicial Ethics, Canons 3B(4), 3C(1), 3C(1)(a), 3C(1)(d) and 3D.

Ex parte Duncan, 638 So.2d 1332 (Ala. 1994).

In re Sheffield, 465 So.2d 350 (Ala. 1984).

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.