

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MAY 26, 2006

ADVISORY OPINION 06-868

DISQUALIFICATION WHEN REFEREE IS FORMER LEGAL AID ATTORNEY

ISSUES

May a judge permit a referee who was previously employed by the Legal Aid Society to hear cases in which a party is represented by a Legal Aid attorney? **Answer:** Not if the attorney served as a lawyer in the matter in controversy during the referee's employment by the Legal Aid Society.

FACTS

A circuit judge is responsible for appointing referees to assist in hearing juvenile cases. One potential source of candidates is the Legal Aid Society, whose office handles a large number of cases in Family Court. Legal Aid attorneys are the Court's default source of court-appointed guardians ad litem and attorneys for children. In this capacity, they function as a de facto public defenders office.

The Legal Aid Society is a private, nonprofit corporation whose work in Family Court is funded by a contract with the State through the Administrative Office of Courts. There are eleven Legal Aid attorneys working in the Family Court. Together, they represent parties in the majority of cases in the Family Court. Legal Aid attorneys are salaried employees. They have no financial stake in the outcome of their cases.

DISCUSSION

The Commission may only address whether action contemplated to be taken by the judge requesting the opinion might constitute a violation of the canons of judicial ethics. Rule 17, *Rules of Procedure of the Judicial Inquiry Commission*. Thus, the Commission has no authority to directly address the ethical propriety of proposed conduct by a referee. Moreover, a referee is not a judge and, thus, is not directly subject to the canons. However,

there is a question under the canons as to whether a judge who appoints a referee has an ethical obligation to prevent the referee from hearing certain cases. Advisory Opinion 01-775.

Canon 3B(2) states that a judge "should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him." In considering the provision similar to Canon 3B(2) that applies to probate judges, the Commission observed in Advisory Opinion 96-616 that this provision appears to instruct a judge to require his staff and subordinate court officials to disqualify themselves in proceedings in which they would be disqualified if they were the judge. A referee appointed by a judge is a court official who is subject to the judge's direction and control. Thus, Canon 3B(2) requires a judge to assure that a referee assisting him with cases does not hear cases in which the referee would be disqualified if he or she was the judge. Advisory Opinion 01-775.

Under Canon 3C(1)(b), a judge is disqualified to hear cases where a lawyer with whom the judge previously practiced law served during such association as a lawyer in the matter in controversy. The inquiring judge notes that the Commentary to Canon 3C(1)(b) provides:

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

He asks whether the exception stated in the Commentary to Canon 3C(1)(b) may be applied when the referee was not a lawyer

with a governmental agency, but rather with the Legal Aid Society.

The Commission does not believe it may apply the exception in the Commentary to Canon 3C(1)(b) to lawyers with the Legal Aid Society. That exception is stated to apply to lawyers in a governmental agency. Thus, it is the opinion of the Commission that a judge may not permit a referee who was previously employed by the Legal Aid Society to hear cases in which a party is represented by a Legal Aid attorney if the attorney served as a lawyer in the matter in controversy during the referee's employment by the Legal Aid Society. Canons 3B(2) and 3C(1)(b).

The Commission also notes that the Alabama Supreme Court has given the phrase "matter in controversy" a rather broad definition. In *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (1978), the Court held that cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation or question is relevant to both cases.

REFERENCES

Alabama Advisory Opinions 96-616 and 01-775.

Alabama Canons of Judicial Ethics, Canons 3B(2), 3C(1)(b), and Commentary to Canon 3C(1)(b).

Rule 17, *Rules of Procedure of the Judicial Inquiry Commission*.

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

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, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; E-mail: jic@alalinc.net.