

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: January 26, 2007

ADVISORY OPINION 07-876

## DISQUALIFICATION DUE TO A LITIGANT'S MULTIPLE COMPLAINTS FILED WITH THE COMMISSION AND DISSEMINATION OF ACCUSATIONS TO VARIOUS GOVERNMENTAL ENTITIES

### ISSUE

Is a judge disqualified, pursuant to the provision of Canon 3C(1) that a judge "should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned," merely because a party has previously filed numerous complaints with the Alabama Judicial Inquiry Commission against that particular judge and has sent various other documents and requests concerning his prior litigation before that judge to state and federal officials? Answer: No, a judge is not automatically disqualified by the Alabama Canons of Judicial Ethics solely because of the actions of a party.

### FACTS

During a recent series of pleadings pertaining to a final judgment of divorce issued in 1991, the judge granted the former husband's pro se request for modification of child support and included the following language in its order:

[I]t appears that there are no further issues before the Court, therefore all orders of the Court not specifically amended remain in full force and effect. If there are any other pending issues, then either party can request a hearing be set. However, the request needs to be filed within the next 30 days.

A subsequent pleading by the former wife was dated the same day this order was allegedly

filed. In addition to claiming that her pleading is untimely, the former husband asserts, in a pro se motion to recuse, that the language quoted above implies that the judge and the former wife's attorney engaged in ex parte communication. The judge denies that such communication occurred.

In the motion to recuse, the former husband refers to previous complaints he filed with the Alabama Judicial Inquiry Commission against the judge, which, he claims, illustrate the "history of interpersonal conflict and animus" between them. In his request for an advisory opinion, the judge also notes that the former husband has disseminated various other documents and requests among state and federal officials. The judge asks that the Commission issue an advisory opinion on whether the facts, as stated, call for a recusal under the reasonable-person/appearance-of-impropriety test discussed in *Matter of Sheffield*, 465 So.2d 350 (Ala. 1984).

It is noteworthy that the former husband did not file a motion to recuse when the former wife filed her pleading, but contested the judge's impartiality when a former guardian ad litem subsequently filed a request on December 29, 2006, that a garnishment be filed against the former husband for fees assessed against him three years earlier.

### DISCUSSION

Canon 3C(1) states, "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned." Expressly included as a disqualifying ground is a judge's "personal bias or prejudice

concerning a party.” Canon 3C(1)(a). Recusal is also required when facts are shown that make it reasonable for the public, a party, or counsel to question the impartiality of the judge. *Acromag-Viking v. Blalock*, 420 So.2d 60, 61 (Ala. 1982). In applying the reasonable-person/appearance-of-impartiality analysis, the question is not whether the judge is impartial in fact, but “[w]ould 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?” *Sheffield*, 465 So.2d at 356. Thus, the test may sometimes bar a judge who has no actual personal bias.

The Alabama courts and the Judicial Inquiry Commission have long thwarted the efforts of litigants to create, by their own actions, an artificial appearance of bias and prejudice, thereby attempting to control the issue of recusal of a particular judge. *See, e.g., Ex parte Bentley*, 849 So.2d 997 (Ala. Crim. App. 2002) (the defendant’s sending threatening letters to the judge did not warrant recusal); *McLeod v. State*, 581 So.2d 1144, 1153 (Ala. Crim. App. 1990) (the defendant’s filing of a legal action against the judge did not require the judge to recuse) (citing Alabama Advisory Opinion 86-273); Alabama Advisory Opinion 05-855 (in finding that the defendant’s filing of an unknown number of complaints against the judge did not disqualify that judge, the Commission stated that it “has long held that a litigant’s actions toward or statements about a judge during the course of a judicial proceeding do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result”). Accordingly, neither a litigant’s filing of a complaint against a judge

nor the nature of that complaint requires the judge’s disqualification. Alabama Advisory Opinion 97-655. In short, a party will not be allowed to benefit from its own misconduct. *Bentley*.

Otherwise, the complaining litigant would have the power to create the appearance of bias or prejudice by his own acts and thus control the proceedings by engaging in “judge shopping.” *See* Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, *Judicial Conduct and Ethics* § 4.06 (3d ed. 2000) (where a party acts toward a judge in a manner calculated to create bias or prejudice, such as filing a complaint, disqualification of the judge on the basis of bias or prejudice will not ordinarily be required). In addition to permitting a litigant to “judge shop,” a policy to the contrary would invite misconduct toward judges, including an endless succession of frivolous complaints to the Commission, and halt the orderly administration of justice. Alabama Advisory Opinions 05-855, 98-686, and 86-273.

The Commission, however, has generally recognized that extraordinary circumstances may exist such that a litigant’s filing of complaint(s) actually calls into reasonable question the judge’s impartiality. Advisory Opinions 05-855, 04-844, and 98-686, and opinions cited therein. However, a litigant’s mere filing of numerous complaints against a particular judge and dissemination of various accusations do not, as a matter of law, constitute extraordinary circumstances calling for that judge’s recusal. The appearance of impartiality has no correlation with the number of prior complaints or the amount of accusatory correspondence by a litigant.

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The decision on a party's motion to recuse is specifically to be left to the judge for determination as a matter of law. This opinion addresses only the ethical matter discussed above.

#### REFERENCES

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

*Matter of Sheffield*, 465 So.2d 350, 356 (Ala. 1984).

*Acromag-Viking v. Blalock*, 420 So.2d 60, 61 (Ala. 1982).

*Ex parte Bentley*, 849 So.2d 997 (Ala. Crim. App. 2002).

*McLeod v. State*, 581 So.2d 1144, 1153 (Ala. Crim. App. 1990).

Alabama Advisory Opinions 05-855, 04-844, 98-686, 97-655, and 86-273.

Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, *Judicial Conduct and Ethics* § 4.06 (3d ed. 2000).

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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).