

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: October 11, 2007

ADVISORY OPINION 07-889

DISQUALIFICATION – ACTIVE-DUTY RETIRED JUDGE PRESIDING (1) WHEN ATTORNEY-LITIGANTS ARE OPPOSING COUNSEL TO THE JUDGE IN A CASE IN ANOTHER COURT AND (2) WHEN COUNSEL REPRESENTING THE ATTORNEY-LITIGANTS ARE CO-COUNSEL TO THE JUDGE IN A CASE IN ANOTHER COURT

## ISSUE

May a retired circuit judge, who serves part-time in an active-duty status, preside in cases in which Law Firm A is a party-defendant and Law Firm B is representing Law Firm A (1) if party-defendant Law Firm A is the judge's opposing counsel in an unrelated case pending in another circuit, and (2) if, in an unrelated matter pending in the other circuit, Law Firm B and the judge are "aligned with a common client," with the judge "working as local counsel"? **ANSWER:** No.

## FACTS

The retired judge is serving part-time in an active-duty status and is taking occasional case assignments in his general geographic area while also practicing law. He has accepted several cases in which attorneys are litigants. In one case, Law Firm A is a party-defendant and is represented by Law Firm B. In a case in another circuit, the judge and Law Firm A are opposing counsel. In another case in that same circuit, Law Firm B and the judge are "aligned with a common client," with the judge "working as local counsel." The three cases are separate from and independent of each other except for the commonality of the participation of the part-time active-duty retired judge.

## DISCUSSION

The applicability of the Alabama Canons of Judicial Ethics to retired judges, who are serving part-time in an active-duty status, is specifically provided for by the Alabama Supreme Court in the Compliance provisions of the Canons. Section D(2) of the Compliance provisions provides:

Retired ... judges, who are serving part time on the Supreme Court or on either of the courts of appeals or on any circuit court or district court in the state, in an active duty status, shall be required to comply with all of these Canons, except Canon 5C(3), D, E, F, G and Canon 6C.

Because a part-time active-duty retired judge is exempted from Canon 5F, he is permitted to practice law. However, Canon 5C(1), which does apply to a part-time active-duty retired judge, proscribes financial activities that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position. *See also* Canon 2 ("A judge must avoid impropriety and the appearance of impropriety in all his activities."). Thus, the Canons permit a retired judge serving part-time in an active-duty status to engage in the practice of law if the judge's particular work does not reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, or exploit his position. Advisory Opinion 06-862.

A retired judge serving part-time in an active-duty status is also not exempted from compliance with Canon 3. It does not appear that any of the specific grounds of

disqualification in the subsections of Canon 3C(1) apply to the scenarios presented, i.e., (1) party-defendant Law Firm A is the judge's opposing counsel in an unrelated case pending in another circuit, and (2) Law Firm B, who is representing Law Firm A before the judge, and the judge are "aligned with a common client," with the judge "working as local counsel" in an unrelated matter pending in the other circuit.

Thus, the question is whether the judge is disqualified under Canon 3C(1)'s general provision requiring disqualification when the judge's "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 – a member of the public, a party, or counsel – knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994); *In re Sheffield*.

In regard to scenario (1), the Commission has recognized several special circumstances of a relationship between a judge and a party that would cause disqualification. Advisory Opinion 98-701. One such circumstance is an "extraordinary" relationship. *Id.* A person of ordinary prudence might reasonably question the judge's impartiality regarding a party with whom the judge has a contemporaneous adversarial relationship as an attorney. *Cf.* Advisory Opinion 89-352 (a judge presiding in a case in which a party had been an adversarial party to one of the judge's former clients while the judge was representing that

client may raise a reasonable question of impartiality). It appears that there are not any factors that would alleviate this appearance of bias or prejudice. *Compare id.* (disqualification is not required when the lawyer-client relationship is remote in time, the parties insist upon the judge hearing the matter, and the parties so consent in writing).

In regard to scenario (2), "[i]f a part-time judge is co-counsel to another attorney in a case, that relationship requires disqualification if the co-counsel appears in the judge's court on an unrelated case." Cynthia Gray & Nancy Biro, *An Ethics Guide for Part-Time Lawyer Judges* 39 (1999). *Cf.* Advisory Opinion 96-593 (a part-time judge may not preside in any case in which a lawyer with whom he has formed a professional corporation appears).

When attorneys co-counsel on cases and divide fees ..., even though they are not partners or associates in a firm, there is a professional relationship which could give an appearance of impartiality if one of the attorneys appears before the other in his/her role as [judge]. ... Potential conflicts abound because of the personal, professional, and financial aspects of the relationship.

Ohio Advisory Opinion 91-20. Disqualification is required while the case in which the judge is co-counsel is still pending, or until the fees have been received, if the case has been completed. *Id.* *Compare* Advisory Opinion 03-816 (no reasonable basis to question the active-duty retired judge's impartiality in a case in which a party was represented by Attorney A of a certain law firm, and Attorney B of that same firm is representing a party in unrelated mediation

before the judge who looks to the attorney representing the mediating party for payment of the mediation fees if the client does not pay).

A reasonable observer, party, or counsel might question whether counsel's association with the part-time judge fosters special influence or advantage, thereby violating Canon 2C, which mandates that a judge "should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him." *Cf.* Advisory Opinion 02-790 (allowing an associate of a part-time judge to practice in the court in which the judge serves, albeit before another judge, would permit that associate to convey the impression that he is in a special position of influence and, thus, would be a violation of Canon 2C). *But see* Washington Advisory Opinion 06-02 (a part-time judicial officer is not required to recuse from hearing all cases in which a party is represented by an attorney who is co-counsel with the part-time judicial officer in an unrelated, pending civil case; however, the judicial officer should disclose the relationship to all parties in cases before the judicial officer during the pending of that case and, if any party objects, the judicial officer should withdraw).

In advising that the judge should disqualify himself pursuant to Canon 3C(1), the Commission does not suggest that there is an actual bias in this case and, in fact, the judge has declared that he can keep all matters separate and avoid any interference with his dual responsibilities regarding the various cases, parties, and counsel involved. Yet, the determinative consideration is whether another, knowing all the circumstances, might

reasonably question the judge's impartiality. Accordingly, the Commission advises that an active-duty retired judge is disqualified to preside in a case in which a party is the judge's opposing counsel in an unrelated pending case and counsel for that party is the judge's co-counsel in a different pending case.

## REFERENCES

Advisory Opinions 06-862, 03-816, 02-790, 98-701, 96-593, and 89-352.

Alabama Canons of Judicial Ethics, Canons 2, 2C, 3, 3C(1), 5C(1), 5C(3), 5D, 5E, 5F, 5G, 6C, and Section D(2) of Canons Compliance provisions.

*Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

*In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984).

Ohio Advisory Opinion 91-20.

Washington Advisory Opinion 06-02.

Cynthia Gray & Nancy Biro, *An Ethics Guide for Part-Time Lawyer Judges* 39 (1999).

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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).