

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: November 21, 2008

ADVISORY OPINION 08-895

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DISQUALIFICATION: PARTY REPRESENTED BY ATTORNEY FROM FIRM OF RELATIVE WHO IS A FIRM PARTNER

Canon 3C(1)(d) specifically provides, in pertinent part, that a judge is disqualified to hear an action where:

### ISSUE

Must a judge disqualify himself from presiding in a case if one of the parties is represented by attorneys from a 150-member law firm where one of its non-litigating partners is the judge's wife's nephew who will not be participating in the case and whose income probably will not be substantially affected by the outcome of the litigation? **Answer:** The judge is disqualified if the relative has an interest, known to the judge, that could be substantially affected by the outcome; if additional factors exist under which the judge's impartiality might reasonably be questioned; or if the judge has a personal bias or prejudice regarding a party because of the fact that a party is represented by a member of his relative's law firm. The first ground of disqualification is subject to remittal; the latter two are not.

He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .

### FACTS

The judge's wife's nephew is a non-litigating partner of a 150-member law firm that is representing a party in a case assigned to the judge. The judge does not think that the outcome of the case would substantially affect the nephew.

"The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge." Commentary to Canon 3C(1)(d)(i). Although many courts and advisory committees have adopted a per se rule of disqualification where the relative within the prohibited degree is a partner in his firm, Cynthia Gray, *Disqualification Issues When a Judge is Related to a Lawyer* 4 (2001), this Commission has advised that the mere fact that the relative is a partner does not require disqualification. See Advisory Opinions 03-811, 97-653, 97-652, 93-491, and 88-338. See also Advisory Opinion 90-411.

### DISCUSSION

The provisions of Canon 3C address the determination of whether a judge should disqualify himself. Canon 3C(1) states the general standard for disqualification, followed by a number of subsections listing specific circumstances in which disqualification is presumed. The specific test under the general standard is whether a person of ordinary prudence in the judge's position knowing all the facts known to the judge would find that there is a reasonable basis for questioning his impartiality. *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984).

The judge's scrutiny of the circumstances does not end there, however. The judge must determine (1) whether any additional factors exist under which "his impartiality might reasonably be questioned" under Canon 3C(1), and (2) whether the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(ii).

Commentary to Canon 3C(1)(d)(i).<sup>1</sup> See Advisory Opinion 97-652. In making this second determination, the judge must consider any benefit or loss known to him that his relative might receive, whether that benefit or loss is that a reasonable person might question the judge's impartiality as a result, and the extent or degree of that interest. Advisory Opinions 03-811, 97-653, and 96-628 (all citing Leslie W. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* 64-65 (1986)).

The judge should, thus, disclose the existence of the relationship to the parties and their attorneys and then examine the facts in the particular case. Advisory Opinions 06-867, 03-811, 01-787, 97-653, 97-652, and 93-500. "It is the judge's obligation to disclose all possibly disqualifying facts." Advisory Opinion 97-653 (quoting Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 5.26 at 146 (1990)). But see Advisory Opinion 06-865 (under Canon 3E, the judge "may" disclose). Disclosure avoids any appearance of impropriety and gives 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. Advisory Opinions 03-811, 97-653, and 97-652.

The judge is accountable only for those "other facts" of which he has personal knowledge or of which he should have known. Advisory Opinion 93-500. The judge need not initiate any further investigation into this issue, nor investigate whether or not his relative has an interest in the law firm that could be substantially affected by the outcome of the proceedings unless the judge has reason to believe that such an interest exists. Advisory Opinions 03-811, 97-653, 97-652, and 93-500.

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<sup>1</sup> Canon 3C(1)(d)(ii) addresses "an interest that could be substantially affected," not a substantial interest that could be affected.

Such is not the case, however, if a motion to recuse is filed alleging that the judge's relative has an interest that could be substantially affected in that he has an economic interest in the fees resulting from the case, and the judge does not know the financial relationship or arrangement between his relative and his relative's associate. Under those circumstances, the judge should hold a hearing to determine whether his relative does in fact have an interest that could be substantially affected by the outcome of the case. Advisory Opinion 03-811.<sup>2</sup>

In addressing whether there exist any other factors, which, in conjunction with the relationship, would raise a reasonable question of the judge's impartiality, the judge should consider, if he knows:

whether the lawyer-relative would receive a commission, contingency, or bonus from the instant case, or all of the firm's cases for a time period; whether the relative would receive a salary increase when the firm reached a certain dollar amount in a given time period; the degree of kinship between the judge and the relative; the number of cases the firm has before the judge; and any other connections, dealings or relationships of the judge to other members of the relative's firm.

Advisory Opinion 93-500.

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<sup>2</sup> "[T]his follows from Rule 11 of the Alabama Rules of Civil Procedure, which states that the signature of an attorney on a motion constitutes a certificate that there is good ground to support the motion, and provides penalties for violations. Like any other motion, it is the obligation of the attorneys to present whatever evidence they wish the judge to consider in ruling on the motion." Advisory Opinion 03-811.

A reasonable basis for questioning the judge's impartiality would also exist if the judge knows that his relative actively assisted trial counsel with case evaluation and preparation, Advisory Opinion 01-787, or gave a party legal advice that related to the matter in controversy, Advisory Opinions 97-652 and 93-491.

Of course, if the judge has a personal bias or prejudice regarding a party because of the fact that a party is represented by a member of his relative's law firm, he must disqualify pursuant to Canon 3C(1)(a). Advisory Opinion 99-726.

If, after considering the facts known to him, the judge determines that his relative has an interest that could be substantially affected by the outcome of the case handled by the relative's associate, such disqualification is subject to remittal. Advisory Opinions 03-811 and 96-628. Thus, this disqualification is a matter that can be waived in future cases pursuant to the procedures specified in Canon 3D. Disqualification due to the existence of other facts or circumstances under which the judge's impartiality might reasonably be questioned and disqualification for a personal bias or prejudice are not subject to remittal under Canon 3D. Advisory Opinions 97-653, 97-652, and 96-628.

When a judge does not deem himself disqualified from a proceeding under the provisions of Canon 3C, Canon 3E permits the judge to disclose information concerning interests or relationships by either filing that information in the office of the clerk of the judge's court or by causing notice to be given to the parties in the proceeding. Canon 3E further provides, "It shall be the duty of the parties to familiarize themselves with any materials available for inspection in the clerk's office."

#### REFERENCES

Alabama Canons of Judicial Ethics, Canons 3C, 3C(1), 3C(1)(a), 3C(1)(d), 3C(1)(d)(ii), 3D, and 3E, and Commentary, Canon 3C(1)(d)(i).

Alabama Advisory Opinions 06-867, 06-865, 03-811, 01-787, 99-726, 97-653, 97-652, 96-628, 93-500, 93-491, 90-411, and 88-338.

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

Leslie W. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* 64-65 (1986).

Cynthia Gray, *Disqualification Issues When a Judge is Related to a Lawyer* 4 (2001).

Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 5.26 at 146 (1990).

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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.