JUDICIAL INQUIRY COMMISSION

ADVISORY OPINION 09-902

I. COMMISSION'S JURISDICTION: MOTIONS TO RECUSE

II. DISQUALIFICATION: PARTY REPRESENTED BY ATTORNEY WHO WAS INVOLVED IN PROSECUTION OF JUDGE IN COURT OF JUDICIARY

ISSUES

I. May the Commission render an opinion on the merits of a pending motion to recuse?

II. Is a judge, who had been found guilty and sanctioned by the Court of the Judiciary, subsequently disqualified in any case in which (1) a party is represented by an attorney who was the complainant or a material witness in the Commission's prosecution of the judge in the Court of Judiciary; (2) an attorney, investigator, or employee of the former complainant/witness's firm is involved in the subsequent case before the judge; (3) the Commission's prosecutor represents a party; or (4) the judge's former defense attorney represents a party?

FACTS

The judge was prosecuted by the Commission in the Court of the Judiciary. That court found that he had violated numerous canons and meted out sanction accordingly. The judge now seeks guidance regarding the question of his recusal in cases in which litigants are represented by attorneys who were prominent in the disciplinary proceedings against him. He has also forwarded to the Commission pending motions to recuse and the transcript of a hearing on one of those motions.

DISCUSSION

The Commission's authority to issue advisory opinions is Rule 18, Rules of Procedure of the Judicial Inquiry Commission, which provides the following:

> A judge may direct to the commission in writing a request for an opinion as to whether certain specified action contemplated or proposed to be taken by the judge may constitute a violation of the Canons of Judicial Ethics, and the commission may, in its discretion, render to the judge in writing such opinion as it may deem appropriate in the premises. Any such opinion rendered by the commission that certain specified conduct by the judge would not constitute a violation of the Canons of Judicial Ethics shall be admissible on behalf of the judge to whom it is directed in any disciplinary proceeding involving the propriety of such conduct by the judge to whom the opinion is directed.

This rule does not give the Commission the authority to give its independent opinion as to the appropriate ruling on a motion to recuse filed in a specific case. *See* Advisory Opinion 07-883. Once a motion to recuse is filed, the question expands beyond ethical considerations to factual and legal ones, and the motion is then in an adversarial context. The Commission had no authority to determine the correctness of the respective legal and factual positions. *See* Advisory Opinion 89-384. Such is beyond the

Commission's jurisdiction, for it is not an adjudicatory body. *See* Advisory Opinion 93-503. Moreover, the Commission has no authority to require any judge to take or refrain from taking any action. As Rule 18 specifies, the Commission may address only "a certain specified action contemplated or proposed to be taken by the judge" and, even then, only in the context of the application of the Canons of Judicial Ethics.

The decision whether to recuse rests with the judge and cannot be decided for that judge by an advisory body. The burden is solely on the judge, Advisory Opinion 84-221, and the Commission cannot invade that province of the trial court. As Rule 18 provides, an advisory opinion is rendered solely for the benefit of the judge and is admissible on behalf of a judge only should he act consistent with the opinion and then have disciplinary proceedings brought against him for that conduct. *Balogun v. Balogun,* 516 So.2d 606, 609 (Ala. 1987), *abrogated on other ground by Ex Parte Crawford*, 686 So.2d 196 (Ala. 1996). Such an advisory opinion is not binding and does not affect a party's rights or remedies. *Balogun*, 516 So.2d at 609; Advisory Opinion 94-530. *Cf.* Advisory Opinion 87-298 (where a petition for mandamus on the trial judge's denial of a motion to recuse is pending before the appellate court, it would be presumptuous for the Commission to issue a non-binding advisory opinion).

The Alabama Supreme Court presented the following discussion of "recusal" and "disqualification" in *Ex parte Cotton*, 638 So.2d 870, 871-72 (Ala. 1994), *abrogated on other ground by Ex Parte Crawford*, 686 So.2d 196 (Ala. 1996):

At the outset, we point out the distinction between recusal and disqualification. Although the fundamental difference is a procedural one, a brief clarification seems appropriate here. When the facts of a case present possible bias on the part of a trial judge, or the appearance of bias, the party who sees that possible bias or appearance of bias has the duty of moving for a recusal. It becomes the judge's responsibility to initiate the action of removing himself from the case under Canon 3(C)(1) only when he is disqualified. Generally, the grounds for recusal are as well known to the parties as they are to the judge, but facts leading to disqualification are often known only to the judge.

When disqualification is required, the duty is squarely placed upon the judge to disqualify himself. Consequently, the judge's failure to disqualify himself in a particular case, when required to do so by the Canons, may subject the judge to an inquiry if a complaint is filed with the Judicial Inquiry Commission, whereas, the judge's ruling on a recusal motion is reviewable on a mandamus petition filed in the appropriate appellate court.

However, although recusal and disqualification are two separate concepts, there has developed an overlap. The preamble to the Canons states that the Canons "formulate and establish . . . principles which govern the conduct of members of the judiciary." These Canons establish a system to govern the judiciary that is

> administered by a peer-review system: the Judicial Inquiry Commission. However, the Canons are also being used to define legal standards of judicial conduct. See *Wallace v. Wallace*, 352 So.2d 1376 (Ala.Civ.App. 1977) (where the court held that the Canons had the force of law and used the objective standard of Canon 3(C)(1) to hold that a trial judge erred in failing to grant the motion to recuse). See also *Ex parte Melof*, 553 So.2d 554, 556 (Ala. 1989).

Thus, after a motion to recuse has been filed, the Commission restricts its advisory opinion to the inquiring judge to general advice regarding the application of the Canons.

II.

In addressing the question of his disqualification, the inquiring judge should be mindful of his ethical obligations, particularly his duty to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A, and his duty to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, Canon 3C(1).

> The test [under the general disqualification provision in Canon 3C(1)] that remains applicable at all times, the answer to which always depends upon the "totality of circumstances" of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality.

Ex parte City of Dothan Pers. Bd., 831 So.2d 1, 11 (Ala. 2002). "'An independent and honorable judiciary is indispensable to justice in our society,' and this requires avoiding *all appearance* of impropriety, even to the point of resolving all reasonable doubt in favor of recusal." *In re Sheffield*, 465 So.2d 350, 357 (Ala. 1984) (quoting Canon 1).

Thus, in determining any question of disqualification, the totality of the circumstances should be considered. A circumstance that should be given significant weight by the inquiring judge is that the Court of the Judiciary found him to have violated numerous canons, all relating to a question of recusal. It specifically determined that his failure or refusal to recuse constituted a serious breach of the Canons and an intentional act of misconduct. His actions underlying the charges and the prosecution of and verdict on those charges resulted in substantial publicity, which brought his judicial office into disrepute and diminished the public's confidence in the integrity and the impartiality of the judiciary. *See* Commentary, Canon 2C ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."). *See also State v. Moore*, 988 So.2d 597, 603 (Ala.Crim.App. 2007) (in finding an appearance of impropriety in having the judge preside over the defendant's retrial for capital murder, the court considered the fact that the public perception of the case was that it was not the State against the defendant, as it should be, but the prosecutor against the judge). Thus, for an undeterminable period, the circumstances regarding the inquiring judge's

prior unethical exercise of his authority regarding recusal will inevitably present some question of impropriety as to any determination by him regarding his disqualification or recusal from a case pending before him. With the passage of time, the critical determination will remain whether such question is a reasonable one under the totality of the circumstances before him.

In determining the particular question of disqualification presented in a case in which one of the attorneys was a complainant or material witness in the prosecution of a disciplinary complaint against the judge, the judge should also consider the circumstances of his prosecution, such as the person's role in the disciplinary proceedings, the judge's past conduct toward that person, and the outcome of the disciplinary proceedings. *See* Advisory Opinion 84-220 (the mere fact that counsel for a party previously testified adversely to the judge in a disciplinary action against the judge does not necessarily cause the judge's disqualification, but the additional facts and circumstances compelled the judge's disqualification by presenting a reasonable question of the judge's impartiality). *See also* New York Advisory Opinion 89-154 (a judge should disqualify himself in all matters where the disciplinary-proceeding attorney-witnesses appear).

This disqualifying relationship extends to the attorney's associates, investigators, and employees, if extraordinary circumstances exist under which the judge's impartiality might still be reasonably questioned in a case involving another member or employee of the attorney's firm. *See* Advisory Opinion 96-616. *Compare* New York Advisory Opinion 89-154 (where a judge's sanction for unethical conduct was based, in part on the testimony of several attorneys employed in the district attorney's office and several employed in the public offender's office, a judge should disqualify himself in all matters where a member of either office appears, "at least for a reasonable time, perhaps two years, from the date of the public censure of the judge, particularly because both offices in the small county are themselves small and the scope of their involvement in the events leading up to and including the disciplinary hearing was extensive, making the risk of mutual hostility also high, at least in the public perception, but such would not be the case necessarily if the circumstances were that they involved a large county with large public legal agencies and large law firms) *with* New York Advisory Opinion 98-71 (where the judge was admonished in disciplinary proceedings initiated on the district attorney's complaint, the following factors militate against a continued mandatory recusal in all cases prosecuted by the district attorney's office: more than two years had elapsed since the admonition; admonition is the least severe form of public discipline; the particular matter involved a single incident; there is no indication of hostility between the district attorney and the judge; and the judge believes that he can be impartial, and there is nothing to indicate that the district attorney thinks otherwise). In addition, the closer the professional relationship between the adverse disciplinary-proceeding attorney and the current-case attorney from the same firm, the more disqualifying that relationship is. *See, e.g.*, New York Advisory Opinion 89-154 (a judge should not preside over cases in which partners and associates of the disciplinary attorney-witness appear because of the reasonable assumption that the attorneys in the witness's firm share the witness's knowledge and also because of the reasonable perception

of partiality similar to that which would arise if the witness himself appeared before the judge).

Regarding the appearance, in a current case, of either the attorney who prosecuted the disciplinary complaint against the judge or the attorney who represented the judge in the defense of that complaint, the mere fact of the prior relationship after the disciplinary proceeding has concluded may not present a reasonable question of impartiality. *See Ex parte Cotton*, 638 So.2d at 872-72; Advisory Opinion 04-840 (disqualification of a judge is not required by the mere fact of prior representation of the judge by an attorney in unrelated litigation after that litigation is completed or the representation otherwise ceases). However, additional circumstances may exist in which disqualification extends for a period after the disciplinary proceedings have concluded and/or extends to the members of each respective attorney's firms who had not been involved in the disciplinary proceedings. *See Ex parte City of Dothan Pers. Bd.*, 831 So.2d at 8, 11; Advisory Opinions 04-840 and 96-616. The judge's consideration should include the circumstances of the disciplinary proceedings, the counsel's role in those proceedings, the time period since the prosecution, etc. Moreover, additional extraordinary circumstances may exist that would extend disqualification to other members of the prosecuting attorney's firm, e.g., if the disciplinary attorney is an equity partner and the case before the judge involves significant liability or award of damages.

Additional circumstances pertaining to possible disqualification because of the appearance of the judge's attorney could also arise from the length of the representation, the nature and extent of the representation, the amount of attorney fees involved, the nature of the relationship the judge develops with the attorney, and whether the judge maintains a special and close relationship with the attorney. *See* Colorado Advisory Opinion 06-5. *See also* Advisory Opinion 94-516 (once the Commission dismissed the complaint against the judge, that judge was no longer disqualified in cases where a party was represented by one of the attorneys who represented the judge before the Commission because no extraordinary circumstances were present: the Commission did not find the need to investigate the allegations of the complaint, the judge's actions made the basis of the complaint were not in dispute, and the Commission issued a finding of "no ethical violation" approximately six weeks after the filing of the complaint). Moreover, the judge should disqualify if his attorney volunteered his legal services for no fee or if the judge continues to owe his attorney for legal representation.

The inquiring judge asks how long, if any, his disqualification will continue. Such will depend on the circumstances. *See* Advisory Opinion 92-446 (in observing that the facts known to the judge still presented a reasonable basis for questioning the judge's impartiality in any case where a party is represented by any member of a particular law firm, the Commission observed, "With the improvement of the legal atmosphere within the judicial community of the county, the passage of time should reduce the appearances of partiality and impropriety.").

Disclosure pursuant to Canon 3E could promote public confidence in the impartiality

of the judiciary and give the parties and their attorneys the opportunity to supply information regarding whether any additional circumstances exist under which the judge's impartiality might reasonably be questioned. *Id.*

REFERENCES

Advisory Opinions 07-883; 04-840; 96-616; 94-530; 94-516; 93-503; 92-446; 89-384; 87-298; 84-221; 84-220.

Alabama Canons of Judicial Ethics, Canons 1; 2A; 2C; 3C(1); 3E; Commentary, Canon 2C.

Rules of Procedure of the Judicial Inquiry Commission, Rule 18.

Ex parte City of Dothan Pers. Bd., 831 So.2d 1, 11 (Ala. 2002).

Balogun v. Balogun, 516 So.2d 606, 609 (Ala. 1987), *abrogated on other ground by Ex Parte Crawford*, 686 So.2d 196 (Ala. 1996).

Ex parte Cotton, 638 So.2d 870, 871-72 (Ala. 1994), *abrogated on other ground by Ex Parte Crawford*, 686 So.2d 196 (Ala. 1996).

Ex parte Melof, 553 So.2d 554, 556 (Ala. 1989).

In re Sheffield, 465 So.2d 350, 357 (Ala. 1984).

State v. Moore, 988 So.2d 597, 603 (Ala.Crim.App. 2007).

Wallace v. Wallace, 352 So.2d 1376 (Ala.Civ.App.1977).

Colorado Advisory Opinion 06-5.

New York Advisory Opinions 98-71; 89-154.

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 18 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.