

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: March 11, 2011

ADVISORY OPINION 11-904

DISQUALIFICATION: JUDGE'S KNOWLEDGE OF COMMISSION'S ONGOING INVESTIGATION OF A COMPLAINT FILED BY A PARTY DURING PENDENCY OF CASE BEFORE JUDGE.

ISSUE

Is a judge disqualified because a party in a case has filed a complaint with the Judicial Inquiry Commission against the judge and the Commission is conducting a full investigation during the pendency of the underlying case? Yes.

FACTS

In a motion to recuse, the party-complainant asserts that the judge should recuse because the party-complainant has filed, with the Judicial Inquiry Commission, multiple complaints against the judge within the context of the pending litigation. The Commission is investigating those complaints, including interviewing and subpoenaing witnesses to testify before the Commission. In response to the Commission's investigation, the judge has solicited and filed affidavits of twelve attorneys who practice before the judge, including the attorney representing the opposing party in the pending case.

DISCUSSION

Foremost, the decision on a party's motion to recuse is specifically for the judge to determine as a matter of fact and law. Advisory Opinion 09-902. Although legal error and judicial misconduct are not mutually exclusive, and acts done in the exercise of judicial discretion may, in some circumstances, also constitute

misconduct, the Commission will not invade the province of the trial court to decide issues presented. Advisory Opinion 09-903. Recognizing its responsibility to preserve the independence of the judiciary while also striving to fulfill its constitutional duty to promote high standards of judicial conduct, the Commission restricts this opinion to the ethical implications regarding the issues presented to the Commission.

It is well settled that a litigant cannot create, by his own actions, an artificial appearance of bias and prejudice, thereby attempting to control the issue of recusal of a particular judge. See Advisory Opinion 07-876, and authorities cited therein. Accordingly, neither the mere fact of a litigant's filing of a complaint against a judge nor the nature of that complaint necessarily requires the judge's disqualification. Advisory Opinion 97-655.

The Commission, however, has generally recognized that extraordinary circumstances may exist such that a litigant's filing of a complaint actually calls into reasonable question the judge's impartiality **and, thus, disqualifies that judge pursuant to Canon 3C(1)**. Advisory Opinions 05-855, 04-844, and 98-686, and authorities cited therein. Such circumstances may arise from, among other considerations, (1) the nature and seriousness of the allegations of the complaint; (2) the possibility of an outcome adverse to the judge; and (3) the extent of the Commission's investigation of that complaint.

In regard to the nature and seriousness of the allegations of the complaint, the judge should disqualify if the party's complaint alleges specific facts regarding matters extrajudicial to the pending proceeding and if the

complaint, even if believed by the judge to be untrue or erroneous, contains specific facts that would cause a reasonable person to question the judge's impartiality or create an appearance of impropriety to a reasonable person. Arizona Advisory Opinion 98-2. *See also* North Dakota Advisory Opinion 93-1 (a judge should recuse if the complaint alleges specific facts that facially present a meritorious claim of judicial bias arising from an extrajudicial source and a reasonable person considering all the relevant facts and circumstances would question the judge's impartiality). The judge should also consider the possibility of factual issues involving his or her credibility. United States Advisory Opinion 103 (2002).

The third consideration – the extent of the Commission's investigation – must be assessed within the framework of the notification requirements pronounced by the Alabama Supreme Court in the Rules of Procedure of the Judicial Inquiry Commission.¹ Under Rule 6C, the

¹There are three stages of the Commission's consideration of a complaint, activated only by a majority vote of the Commission. First, the Commission merely reviews the complaint to determine whether it is sufficiently specific to inform the Commission of the cause of the complaint. If there are sufficient facts to determine that the complaint does not present any ethical or misconduct concerns, the Commission summarily dismisses the complaint. The vast majority of complaints are dismissed after this review. The second stage is an initial or preliminary inquiry to ascertain whether

Commission must serve on the judge a copy of the complaint within 14 days of its decision to conduct some investigation of that complaint. At that time, the Commission must also serve "all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint, or accumulated by the commission before such service upon the judge." Rule 6C. Thereafter, every 42 days, the Commission must serve on the judge "all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate." Rule 6D. See also Rule 7C, which requires that, when the Commission issues a subpoena, the Commission must serve a copy on the judge before or simultaneously with service on the witness. Although Rule 6E provides three narrow circumstances in which notification may be delayed (none of which apply here), the Commission does not have any discretion to refrain from notifying a judge of a complaint regarding a pending case until after the pending matter is concluded. The Commission must abide by Rules 6 and 7 despite the competing public interests that are thwarted by the judge's knowledge of every facet of and fact elicited during the Commission's investigation. Two such public interests especially material here are protection of the judiciary's independence

additional facts exist to raise an ethical concern or warrant further inquiry. If this inquiry produces sufficient information to proceed, the Commission conducts a full investigation – the third stage.

and avoidance of allowing a litigant to force a recusal.²

Pursuant to these mandatory provisions for disclosure, the inquiring judge learns of the complaint and all materials gathered and subpoenas issued during the Commission's investigation – while the underlying case is pending before the judge. This extensive knowledge of the investigation raises three concerns from the reasonable-person perspective: (1) whether, with this extensive knowledge of the witnesses and facts gathered in the Commission's investigation, the judge can avoid a personal bias or prejudice against the party-complainant or witnesses before the Commission, *see Canon 3C(1)(a)*; (2) whether this extensive knowledge would cause a reasonable person to question the judge's impartiality in the pending litigation or create an appearance of impropriety to the reasonable person, **Canon 3C(1) and Canon 2, respectively**; and (3) whether this extensive knowledge of the circumstances and results of the Commission's investigation constitutes personal knowledge of disputed evidentiary facts, Canon 3C(1)(a), or is akin to *ex parte* communications under Canon 3A(4), thereby creating an appearance of impropriety, **proscribed by Canon 2**.

²By its most recent amendment to Rule 6, effective May 1, 2010, the Alabama Supreme Court limited the requirement of notification to only those complaints the Commission investigates. In deleting the requirement of serving the frivolous complaints, the Court implicitly recognized the competing public interests and chose to buttress the policy against "judge shopping."

The Commission's investigative materials often include extrajudicial facts, circumstances, and opinions regarding the underlying case(s). Neither the party-complainant nor his opponent is necessarily aware of these matters or of the fact that the judge is receiving this extrajudicial information. For example, the judge may provide opposing counsel the verbatim allegations being investigated by the Commission; that attorney may provide the Commission an affidavit addressing each allegation; and, thereafter, the Commission must serve that attorney's affidavit on the judge – an affidavit that, point by point, defends the actions of the judge in the pending case before the judge, but of which the party-complainant has no knowledge.

Such exchange and such information gained during the pendency of the underlying case easily present an appearance of impropriety and reasonable question of impartiality, **under Canon 2 and Canon 3C(1), respectively**. Furthermore, such disclosure of extrajudicial information to the judge triggers Canon 3A(4)'s requirement that the judge accord all parties full right to be heard. *See, e.g.,* Advisory Opinion 82-135 (a judge may not solicit a confidential report from the victim regarding the crime unless it is made a part of the court file or the pre-sentence report). Moreover, such knowledge imparted to the judge, but not necessarily shared by both parties, may constitute personal knowledge of disputed evidentiary facts, thereby requiring the judge to disqualify pursuant to Canon 3C(1)(a). There is little or no argument that such disclosure by the Commission of its investigatory materials to the judge while the litigation is pending compromises the

principles of an independent and honorable judiciary, which is indispensable to justice.³ Although the court in *Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992), observed the following in the context of unauthorized ex parte communications, the Commission finds the following apropos here:

Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case

We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

³In fact, a judge, requested by the Commission to respond to specific allegations in a complaint while the underlying case was pending, asserted that such response would be improper because the judge would be commenting on the factual allegations of a pending case, and such response would constitute consideration of potential evidence outside of the trial.

Under the Canons, a judge has a continuing duty to disqualify at any stage of the proceedings in which his or her impartiality might reasonably be questioned or in which an appearance of impropriety arises. Under the circumstances known to the inquiring judge and the Commission, including the extent of the Commission's investigation and the judge's correlating exposure to extrajudicial information or gain of personal knowledge, the inquiring judge's impartiality is reasonably questioned, and a reasonable appearance of impropriety has arisen.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2A, 3A(4), 3C(1), and 3C(1)(a).

Alabama Advisory Opinions 09-903, 09-902, 07-876, 05-855, 04-844, 98-686, 97-655, and 82-135.

Rules of Procedure of the Judicial Inquiry Commission, Rules 6, 6C, 6D, 6E, 7, and 7C.

Rose v. State, 601 So.2d 1181 (Fla. 1992).

United States Advisory Opinion 103 (2002).

Arizona Advisory Opinion 98-2.

North Dakota Advisory Opinion 93-1.

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; E-mail: jic@alalinc.net.