

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MAY 25, 2011

ADVISORY OPINION 11-905

DISQUALIFICATION: ATTORNEY IN CASE RENTS OR SHARES EXPENSES IN OFFICE SPACE IN BUILDING OWNED BY JUDGE, MOTHER, AND BROTHER

CANON 5C PROHIBITION: BUSINESS ARRANGEMENT WITH ATTORNEY REGARDING REAL ESTATE INVESTMENT

### ISSUES

Would a judge be disqualified from presiding in a case in which a party is represented by an attorney who shares office space with the judge's brother-attorney in a building owned by the judge and his family partnership if the attorney pays rent to the judge's brother or shares the brother's expenses in the upkeep of the building, but the judge does not receive any monetary disbursement from the family partnership? **Answer:** Yes

If the judge would be disqualified and the attorney regularly appears before him, would Canon 5C prohibit his continuing to own his property interest? **Answer:** Yes.

Could the judge appoint the attorney to cases assigned to his docket? **Answer:** Question moot.

### FACTS

The inquiring judge and his brother are in a family partnership that owns a building occupied by the brother's law firm. The judge does not receive any monetary disbursement or share profits from the partnership. He and his brother are limited partners, i.e., they do not have voting rights or control. His brother, who does not pay rent to the partnership, wants to enter into an arrangement with another attorney for that attorney to pay rent for office space in the building or maintenance expenses of the

building in lieu of rent. In the past, the judge has appointed this attorney to district and juvenile court cases and would like to continue that practice.

### DISCUSSION

Disqualification, under the proposed facts, is addressed within the context of the general disqualifying provision of Canon 3C(1): the judge's impartiality might reasonably be questioned. The pertinent test 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 is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So. 2d 1332, 1334 (Ala. 1994).

Pursuant to Canon 3C(1), a judge is disqualified in cases involving an attorney who rents office space from the judge because the judge's impartiality might reasonably be questioned where his own financial interests could be directly affected or appear to be affected by the financial well-being of the attorney appearing before him. Advisory Opinions 06-861; 99-742; 97-660; 97-640; 86-275; 81-115. It is inconsequential that the judge retains no control over the property. *See* Advisory Opinion 86-275 (setting up a blind trust with a non-relative does not remove the judge's disqualification where the judge knows the attorney-tenant is the lessee). Moreover, this disqualification is not limited to the judge's earning rental income. Rental income is

simply one manifestation of financial benefit from the attorney to the judge. The question remains whether any factor exists under which the judge's impartiality might reasonably be questioned. Under the facts proposed, the attorney-tenant's assumption of maintenance expenses is a financial benefit to the judge who has an ownership interest in the building, and that financial benefit may depend on the financial success of the attorney. *Cf.* Advisory Opinion 06-864 (even if the judge does not receive rent from an attorney-tenant offering a domestic-violence-intervention course that the judge has discretion to order defendants to attend, there would be a real issue regarding the propriety of the judge's ordering defendants to the attorney's program, e.g., the appearance of impropriety or conveying or permitting others to convey the impression they are in a special position to influence the judge, Canon 2C). Disqualification pursuant to the facts proposed here is not subject to remittal under Canon 3D.<sup>1</sup>

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<sup>1</sup>Two prior advisory opinions relating to remittal offered erroneous advice. In Advisory Opinion 91-428, the Commission concluded that where an attorney would be substantially indebted to the judge pursuant to the judge's financing the attorney's purchase of the judge's property, the judge's impartiality might reasonably be questioned in proceedings in which that attorney appeared before him. That disqualification, pursuant to the general provision of Canon 3C(1), is not remittable under Canon 3D. However, the Commission advised otherwise. That erroneous advice is withdrawn.

In Advisory Opinion 91-432, the Commission advised that the lease by the judge's wife of office space from an attorney appearing before

Thus, the question is whether the judge, as a member of the family partnership, may retain that investment if his brother enters into the described arrangement with the attorney. Although Canon 5C(2) states that a judge may hold and manage investments, including real estate, Canon 5C places ethical restrictions on a judge's investments. Canon 5C(1) provides, "A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position." Canon 5C(3) requires a judge to manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

Therefore, if the attorney regularly practices or is likely to practice in the judge's court and the judge's brother enters into the proposed arrangement, the judge's investment in that property would tend to reflect adversely on his impartiality in any proceeding in which the attorney appeared, and it would also tend to interfere with his performance of his judicial duties (because of disqualification). Thus, his investment would be prohibited under Canon 5C(1) and (3). *See* Advisory Opinion 06-864 (a judge may not lease office space to an attorney who regularly appears before him because the judge receives a financial benefit from the attorney, the financial benefit may depend on the financial success of the attorney, and the judge is required to manage his financial interests so as to minimize the

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the judge disqualifies the judge because of appearances of impropriety and impartiality. However, again, the Commission erroneously advised that such disqualification is remittable. That erroneous advice is also withdrawn.

number of cases in which he is disqualified); 82-130 (Canon 5C prohibits the judge or the judge and his wife from leasing office space to an attorney who appears in proceedings before the judge because such arrangement would tend to reflect adversely on the judge's impartiality and interfere with the judge's proper performance of his judicial duties); 81-115 (Canon 5C prohibits the judge from leasing office space to attorneys for their payment of a small amount of rent and all taxes, insurance, maintenance, and upkeep on the property; such arrangement would tend to reflect adversely on the judge's impartiality and tend to interfere in the proper performance of the judge's judicial duties).

Because the judge should divest himself of his interest in the family partnership in regard to the law-firm building if his brother enters into the proposed arrangement with the attorney, the judge's question concerning his appointment power is moot.<sup>2</sup>

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<sup>2</sup>The Commission encourages the inquiring judge to further consult with the Commission if he considers divesting himself of this property interest. Because the remaining owners would be his family members, he would still be confronted with questions regarding disqualification and the exercise of his appointment power. See Canon 3C(1)(d)(ii) (the judge is disqualified where he or a person within the fourth degree of relationship to him is known by him to have an interest that could be substantially affected by the outcome of the proceeding); Advisory Opinion 86-275 (the judge could not avoid disqualification by selling his real-estate interest to his parents prior to the property's rental to a local attorney where the judge knew that his parents' rental payments would be

## REFERENCES

Advisory Opinions 06-864; 06-861; 99-742; 97-660; 97-640; 91-432; 91-428; 86-275; 82-130; 81-115.

Alabama Canons of Judicial Ethics, Canons 2C, 3C(1), 3D, 5C, 5C(1), 5C(2), 5C(3).

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

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

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substantially affected by the outcome of the proceeding or where, under the specific facts and circumstances, the judge's impartiality might reasonably be questioned); 06-865 (any limitation on the judge's exercise of his appointment power should be read consistently with Canon 3C(1)'s disqualification provisions); New York Advisory Opinion 07-27 (where the judge's parents lease office space to a law firm, the judge may not appoint an attorney of that firm as a referee because of an appearance of impropriety even though the attorney is otherwise eligible for such appointment).