

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: March 1, 2013

ADVISORY OPINION 13-916

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DISQUALIFICATION: FORMER CLIENT AS PARTY WITHIN TWO YEARS OF REPRESENTATION ON A MATTER UNRELATED TO PENDING CASE.

### ISSUE

Is a judge disqualified from a case in which the judge's former-client-now-party is a financial institution that was the mortgage lender in certain real-estate closings and the judge, when an attorney, represented that lender in those closings; the case is within two years after that representation ceased; and the pending case involves a totally separate and distinct matter and division of the financial institution? **Answer:** It depends on the presence of unusual circumstances.

### FACTS

A new judge, prior to taking the bench, owned two real-estate title-insurance companies and also was the attorney for various lenders in real-estate closings. As the attorney in those closings, he did not have any direct contact with the lender other than to insure the closing documents were in proper order; he did not meet with any lender directly; and, for the most part, the only contact occurred between his closing agent and closing instructions the lender emailed to his office. No lender used his legal services exclusively. (Neither did any lender require his title companies be used exclusively.)

The judge has been assigned several cases involving banks he had represented, as described above, when he was an attorney. Those cases do not, in any way, relate to his prior representation of those clients. In addition, some or all of the lender-banks have several distinct divisions. For example, Regions Bank is one of the nation's largest full-service providers of consumer and commercial banking, wealth management, and mortgage and insurance products and services. See <http://ir.regions.com/overview.cfm>

### DISCUSSION

This opinion presumes the inquiring judge has already determined he does not have a personal bias or prejudice in favor of his former clients he represented in real-estate closings, see Canon 3C(1)(a), and he did not serve as an attorney in the "matter in controversy," see Canon 3C(1)(b), nor does any other specific disqualifying factor following Canon 3C(1) apply.

Thus, the judge's question is addressed in the context of the general "catch-all" provision of Canon 3C(1). The test for this general provision 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).

Until Advisory Opinion 97-658, the Commission advised a judge is not automatically disqualified in cases involving his or her former client in a matter unrelated to his or her prior representation of that client. Instead, the judge was to consider a number of factors in determining whether his or her impartiality might reasonably be questioned. In Advisory Opinion 97-658, although acknowledging no "bright-line" rule of time for disqualification could be established because of the precise nature of the factual inquiry, the Commission recommended two years from the time of representation as the appropriate waiting period before the judge could preside in a bench trial involving his or her former client in a matter unrelated to the representation and, after that two-year period, the judge should consider whether the circumstances present a reasonable question of the judge's impartiality beyond that two-year period. In Advisory Opinion 99-740, the Commission extended that two-year rule to all cases, i.e., not only to bench trials. The Commission also indicated unusual circumstances could disqualify a judge after the two-year period if, pursuant to those circumstances, a reasonable question regarding the judge's impartiality remained.

In Advisory Opinion 05-856, the Commission further construed the application of the two-year rule, as follows:

The Commission continues to believe that the two-year period is an appropriate measure for assessing whether a reasonable question exists as to a judge's impartiality due to prior representation of a party in an unrelated manner. However, the Commission finds . . . that just as there are unusual circumstances in which a reasonable question may remain after a two-year period, there are sometimes unusual circumstances in which there is no reasonable question as to the judge's impartiality before that period expires.

In considering this latter exception to the two-year rule, the Commission advises the inquiring judge to consider the totality of the circumstances to determine whether they present a reasonable question of his impartiality. Such circumstances include the following, which were used before the pronouncement of the two-year rule and are also used to determine the Canon 3C(1) question in post-two-year situations:

- The nature of the prior and present cases;
- The nature of the prior representation;
- The frequency and duration of the prior representation;
- The length of time since the prior representation;
- Whether the judge has discussed the present case with the former client;
- Whether the judge believes he or she has any bias for or against the former client;
- Whether the case will be tried by the judge or a jury;
- Whether the former-client-now-party will be defending policies or practices the then-attorney-now-judge helped to formulate or defend; and

- Whether the former-client-now-party will be calling witnesses the judge worked with, prepared, or called to testify when he was an attorney.

Advisory Opinions 05-856; 97-658; 91-43. The inquiring judge, in reviewing the totality of circumstances, should consider, if applicable, the matter pending before him arises from a division completely separate and apart from the mortgage-lending division of the financial institution he represented when he was an attorney.

Although the canons do not expressly require disclosure of relationships the judge does not deem disqualifying, the judge should disclose the former attorney-client relationship on the record of a case involving the judge's former client, but involving a matter unrelated to the representation of the client. Advisory Opinion 97-658. Canon 3E provides the judge may make information concerning interests or relationships available, either by filing that information in the office of the clerk of the judge's court or by causing notice to be given to the parties to the proceeding. Under Canon 3E, it is the parties' duty to familiarize themselves with any materials available for inspection in the clerk's office.

#### REFERENCES

Canon 3C(1), (1)(a), (1)(b), and 3E.

Advisory Opinions 99-740; 97-658.

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

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

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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 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.