

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 13-917

DISQUALIFICATION: MUNICIPALITY-PARTY (IN ZONING AND LAND-USE CASES) IS NEW JUDGE'S FORMER EMPLOYER, CLIENT, AND PARTY-OPPONENT

ISSUE

Is a new judge disqualified from presiding in zoning and other land-use cases where the city is a party and the judge, before assuming the bench, had a long, multifaceted relationship with the city primarily in the areas of real property, zoning, and land-use matters? **Answer:** No, not on those circumstances alone.

FACTS

Before assuming the bench, the judge had had a lengthy relationship with a large city, as follows:

- From 1981 until 1990, and before the judge obtained his license to practice law, the city employed him as a city planner, an administrative assistant to the mayor, a senior planner, and the zoning administrator. In those capacities, he helped develop comprehensive plans for neighborhoods, organized areas for annexation, supervised zoning processes, served as staff to and made recommendations to the zoning board and planning commission, and presented zoning cases to the city council.
- From 1990 to 1994, the judge, as an attorney in a law firm, represented the city and other clients on zoning, real property, and other land-use matters.
- In 1990 and again in 1994, the city hired the judge, then an attorney, to develop a comprehensive land-use plan for a certain project.
- While in a solo practice from 1995 until recently assuming the bench, the judge represented parties against the city-defendant in cases involving personal injury, zoning, licenses, and other land-use matters. In addition, the judge appeared on behalf of his clients before the planning commission and other city entities.

DISCUSSION

Disqualification questions are governed by Canon 3C(1). Under the circumstances presented, the judge should review the totality of the circumstances to determine if:

- He has a personal bias or prejudice concerning the city, Canon 3C(1)(a);
- He has personal knowledge of disputed facts concerning the proceeding before him, Canon 3C(1)(a);
- He served as an attorney in the "matter in controversy," Canon 3C(1)(b);

- A lawyer with whom the judge previously practiced law served during such association as a lawyer “in the matter in controversy,” Canon 3C(1)(b);
- He or such lawyer has been a material witness concerning the “matter in controversy,” Canon 3C(1)(b); or
- The totality of the facts and circumstances raises a reasonable question regarding his impartiality, Canon 3C(1).

If any one of these disqualifying factors is present, the judge has an affirmative duty to disqualify, and such disqualification is not remittable pursuant to Canon 3D.¹

Personal Bias or Prejudice, Canon 3C(1)(a)

For a judge’s alleged personal bias or prejudice to be disqualifying, it must be personal; stem from an extrajudicial source, i.e., a source outside the courtroom; and result in an opinion on the merits on some basis other than what the judge learned from the case. Advisory Opinion 92-449.

¹ See also § 12-1-12, Code of Alabama (1975), which by providing a mechanism for waiver, appears to be in conflict with Canon 3D:

No judge of any court shall sit in any case or proceeding in which he is interested . . . or in which he has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel, or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record or put in writing if the court is not of record.

The Commission addressed this conflict in Advisory Opinion 95-551:

Canon 3D and § 12-1-12, Ala. Code 1975, are not coextensive. Unlike § 12-1-12, Canon 3D . . . does not permit remittal of the disqualification in a case or proceeding in which the judge has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which the judge was of counsel or the validity or construction of any instrument or paper prepared or signed by the judge as counsel or attorney. Disqualification in such proceedings is required under Canon 3C(1)(b), but only disqualifications under Canons 3C(1)(c) and (d) may be remitted under Canon 3D. There also are more procedural requirements for remittal of disqualification under Canon 3D than those specified in § 12-1-12, Ala. Code 1975. Under Canon 3D, the judge must disclose the basis of his disqualification in the record, and the parties and lawyers, independent of the judge’s participation, must all sign a written agreement that the judge’s relationship is immaterial or that his financial interest is insubstantial, which signed agreement must be incorporated in the record of the proceeding.

Personal Knowledge of Disputed Facts Concerning the Proceeding, Canon 3C(1)(a)

This rule applies to information gained from an extrajudicial source. Advisory Opinion 93-510. Personal knowledge may encompass not only knowledge of the facts, but knowledge of the considerations by the judge's prior-employer-now-party concerning the facts or legal issues considered as to the matter. Advisory Opinion 89-360.

Previously developed legal expertise on issues before the judge as a result of prior employment, however, is outside the scope of Canon 3C(1)(a). L. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* 35 (Am. Judicature Society, 2d ed. 1992). Thus, the inquiring judge's expertise in zoning, real-property, and land-use issues he gained over 30 years does not, without more, present a personal bias or prejudice. Nor are his personal convictions, attitudes, and beliefs about the law or judicial predilection considered personal biases that require disqualification. A.B.A., *Annotated Model Code of Judicial Conduct* 225 (2004).

Litigants are entitled to a judge who will hear both sides and decide an issue on the merits of the law and the evidence presented. However, they are not entitled to a judge whose mind is a clean slate. Every judge "brings to the bench the experiences of life, both personal and professional. A lifetime of experiences that have generated a number of general attitudes cannot be left in chambers when a judge takes the bench." *Madsen v. Prudential Federal Sav. and Loan Ass'n*, 767 P.2d 538 (Utah 1988). *See also Dep't of Revenue v. Golder*, 322 So. 2d 1 (Fla. 1975) ("It would appear from this commentary that the ABA's drafting committee specifically rejected the notion that judges should disqualify themselves for previously developed or expressed legal expertise.").

Id. A judge's expertise is not disqualifying unless his or her predisposition is based solely on prior legal analysis for purposes unconnected with the pending case, the parties, or their counsel. Abramson, *supra* at 35.

A judge is not disqualified on the mere allegation he or she may have personal knowledge if, upon careful consideration, the judge is satisfied he or she has no personal knowledge. Advisory Opinion 01-771 (the judge is not disqualified from a case requiring the judge to interpret certain statutes the plaintiff alleges the defendant-city has violated—despite the fact the judge was the city's attorney when the city was in litigation challenging those statutes—because a law firm represented the city in that litigation and the judge does not recall working on or giving legal advice about those challenges or receiving any confidential information regarding the city's position or representation).

Service as an Attorney in the "Matter in Controversy," Canon 3C(1)(b)

The phrase "matter in controversy" has been broadly defined: cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation, or question is relevant to both cases. Advisory Opinion 02-793 (citing *Rushing v. City of Georgiana*, 361 So.

2d 11, 12 (Ala. 1978)). This disqualification extends beyond the specific matter on which the then-attorney-now-judge represented a party; it is immaterial if the parties, the nature of the case, or the matter in controversy is different. *See* Advisory Opinions 97-658; 95-546.

For disqualification, the judge must have “served as a lawyer in the matter.” A judge is disqualified, although he or she was not the attorney of record, if he or she participated in any aspect of the case, i.e., an attorney-client relationship was established. *See* Advisory Opinion 03-813. It includes situations where the judge merely gave legal advice, however slight, *see* Advisory Opinion 95-547, and the prohibition applies regardless of how long ago the representation ended. C. Gray, *Ethical Issues for New Judges* 13 (2003).

For an example of the application of these principles, *see Sharp v. Maryland*, 607 A.2d 545 (Md. 1992), where the court held a judge should have recused from a zoning case involving a private airstrip because 17 years earlier, the then-attorney-now-judge drafted the restrictive covenants that created the airstrip. The court explained, when an attorney has given legal advice or performed legal work in a non-adversarial setting, recusal is required if the underlying purpose of the prior representation was to achieve the goal that is at issue in a later proceeding before the same attorney as now-judge. *See also* New Mexico Advisory Opinion 87-7 (a judge must recuse from a case in which a landowner has sued an electric co-op for trespass where the judge, when an attorney, represented the property owner in the acquisition of the property and has personal knowledge the co-op maintained a power line across the property).

Prior Association with a Lawyer Serving, During the Association, as an Attorney in
The “Matter in Controversy,” Canon 3C(1)(b)

In cases in which the judge’s former law partner or associate is representing a party, the judge is disqualified if the lawyer represented that party in the same matter while the judge and the lawyer were in the same firm. Advisory Opinion 05-855. This disqualification applies even in uncontested matters. Advisory Opinion 95-546.

Has Been or Lawyer with Association to Judge Has Been a Material Witness Concerning
The “Matter in Controversy,” Canon 3C(1)(b)

A judge is disqualified in a proceeding if he or an attorney with whom he was associated has already been a material witness, e.g., after testifying as a material witness about an issue in a case, the judge is disqualified from considering the defendant’s motion for a new trial. A “material witness” is a witness who gives testimony (1) going to some fact affecting the merits of the cause (2) about which no other witness might testify. *State v. Jones*, 86 So. 3d 350, 352 (Ala. 2011).

(Compare Canon 3C(1)(d)(iii): a judge is disqualified if, to the judge’s knowledge, he or she is likely to be a material witness in the proceeding.)

The Judge's Impartiality Might Reasonably Be Questioned, Canon 3C(1)

This general provision is the “catch-all” for analysis when the circumstances do not fit the more specific provisions listed in 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 under Canon 3C(1) 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).

Former Client as Party: The general rule is a judge is disqualified from hearing cases in which former clients in unrelated matters appear for a period of two years from the time the representation ceases. Advisory Opinions 13-916; 99-740; 97-658. (An exception is where there are unusual circumstances in which there is no reasonable question as to the judge’s impartiality. Advisory Opinions 13-916; 05-856.)

After the two-year period, the judge may be disqualified where the circumstances present a reasonable question as to the judge’s impartiality. The totality of the circumstances may include the following:

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

See Advisory Opinions 97-658 (a reasonable question of the judge’s impartiality is presented in an action under the Federal Employer Liability Act against the judge’s former client, given the duration of representation, i.e., 12 years (but not within the immediate 2 years); the similarity between the present claim and the claims on which the then-attorney-now-judge represented the corporation; the substantial likelihood the corporation has dealt with such claims in a consistent way over the past several years; and the fact the case is to be tried by the judge); 91-431 (no reasonable question presented where the judge’s former client is suing for slander and abuse of process, both totally unrelated to the then-attorney-now-judge’s representation regarding an automobile accident). *See also* Advisory Opinion 95-546 (the appearance of impartiality may be presented where the judge previously represented the party in a similar or related matter).

Former Party-Opponent as Party: In cases in which a party was the party-opponent to a client the judge represented when he was an attorney, a reasonable question of the judge's impartiality could arise if the present case and the previous matter(s) are of the same nature or similar or related matter. *See* Advisory Opinions 07-883; 95-547; 88-349. The particular circumstances, however, may alleviate any appearance of bias or prejudice. Such factors are where the original adversarial relationship is remote in time; the parties insist and consent in writing that the judge hear the case; and the judge is not certain the party participated in the prior matter. Advisory Opinions 07-883; 95-547; 91-422.

Compare Advisory Opinions 07-883 (disqualification from a public-intoxication case because, two years earlier, the judge represented the defendant's former spouse in a divorce action where the defendant's alcohol abuse and/or mental illness was an issue); 88-349 (disqualification from a child-custody case where a party was the defendant in an unrelated child-custody case in which the then-attorney-now judge represented that party's then-spouse) *with* Advisory Opinions 04-833 (not disqualified because the adversarial relationship was 30 years earlier, the judge does not independently recollect the prior case or the parties to it, and the prior case had been settled by agreement); 91-422 (not disqualified from a divorce case where the judge is not certain one of the parties was a defendant in a child-support case the then-assistant-district-attorney-now- judge prosecuted, any adversarial relationship was years earlier, the parties insist and consent in writing that the judge hear the case, and the prior case was settled by agreement); 89-352 (not disqualified from a child-custody case where a party had been the defendant in an unrelated child-custody case and the then-attorney-now-judge represented that defendant's then-spouse; the prior case was ten years earlier and the parties in the current case have not objected, but the parties and their attorneys must consent in writing).

Prior Expression of Opinion: A judge's prior expression regarding the merits of the matter or issue to be decided disqualifies a judge because it presents a reasonable question of the judge's impartiality. The expression of an opinion gives the impression the judge has already decided the issue and is therefore no longer impartial. Advisory Opinion 97-679.

Disclosure

Although the canons do not expressly require disclosure of relationships the judge does not deem disqualifying, Canon 3E provides that 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.

This advisory opinion discusses only the most apparent potentially-disqualifying grounds that could arise from the facts presented by the inquiring judge. However, in the event other grounds for disqualification arise, the inquiring judge is encouraged to submit the particular fact situation to the Commission.

REFERENCES

Canon 3C(1), (1)(a), (1)(b), and (1)(d)(iii); 3D; 3E

Advisory Opinions 13-916; 07-883; 05-856; 05-855; 04-833; 03-803; 02-793; 01-771; 99-740; 97-679; 97-658; 95-551; 95-547; 95-546; 93-510; 92-449; 91-431; 91-422; 89-360; 89-352; 88-349

Ala. Code § 12-1-12 (1975)

State v. Jones, 86 So. 3d 350, 352 (Ala. 2011)

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

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

Rushing v. City of Georgiana, 361 So. 2d 11, 12 (Ala. 1978)

Sharp v. Maryland, 607 A.2d 545 (Md. 1992)

New Mexico Advisory Opinion 87-7

A.B.A., *Annotated Model Code of Judicial Conduct* 225 (2004)

L. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* 35 (Am. Judicature Society, 2d ed. 1992)

C. Gray, *Ethical Issues for New Judges* 13 (2003)

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.