JUDICIAL INQUIRY COMMISSION

DATE ISSUED: July 12, 2013 ADVISORY OPINIONS 13-920, -921, -922, & -923

13-920 TRANSITION TO THE BENCH:
ADVICE TO FORMER CLIENTS
RECOMMENDATION OF SUCCESSOR ATTORNEY
FINALIZING TITLE-INSURANCE POLICY

13-921 PAYMENT OF LEGAL FEES EARNED BEFORE ENTERING OFFICE

13-922 DISQUALIFICATION:
JUDGE IS FORMER ATTORNEY IN CASE
PARTY IS REPRESENTED BY JUDGE'S FORMER LAW PARTNER
PROBATE JUDGE, AS ATTORNEY, WITNESSED OR NOTARIZED WILL

13-923 APPOINTMENTS: JUDGE'S FORMER LAW PARTNER

ISSUES

13-920

1. May a judge meet with and/or advise former clients to resolve or close their files? **Answer:** Only if the post-bench discussion is necessary and the judge scrupulously avoids the practice of law.

2. May a judge advise former clients to transfer their active-case files to the judge's former law partner? **Answer:** Such post-bench advice is prohibited if the judge has any financial ties with the former partner; otherwise, it is strongly discouraged.

3. May a judge assist in finalizing the issuance of a title-insurance policy for a transaction that originated while the judge was an attorney if the judge does not sign the policy? **Answer:** No.

13-921

May a judge receive his or her share of legal fees for work the judge performed before taking office, when the judge's former firm received those fees after the judge took office? **Answer:**

Yes, if a prior fee agreement exists and, in the case of contingent fees, if additional conditions are met.

13-922

1. Is a judge disqualified from a case in which he or she is the attorney of record, if the judge's only judicial act is ruling on his or her motion to withdraw as counsel and have a special judge appointed? **Answer:** Yes.

2. Is a judge disqualified from a case in which a party is represented by the judge's former law partner if the case was filed before the judge entered office? **Answer:** Yes.

3. Is a judge disqualified from a case in which a party is represented by the judge's former law partner if the case was filed after the judge entered office? **Answer:** Yes, if the judge's former partner represented the client-party in the same matter while the judge was associated with that partner.

4. Is a probate judge disqualified from a petition to probate a will that was filed by the judge's law partner if all necessary parties consent to the admission of the will to probate and to the issuance of letters testamentary and waive a hearing? **Answer:** Yes, if the disqualification is pursuant to Canon 3C(1)(a) or (b) or if the circumstances present a reasonable question as to the judge's impartiality.

5. Is a probate judge disqualified from a petition to probate a will that the judge signed as a witness or notarized when the judge was an attorney if all necessary parties consent to the admission of the will to probate and to the issuance of letters testamentary and waive a hearing? **Answer:** Yes, generally, if the will was a matter in the judge's former law firm while the judge was associated with that firm and, more specifically where the judge signed as a witness, yes.

13-923

May a judge appoint his or her former law partner to represent a party or serve as a guardian ad litem? **Answer:** Yes, if certain requirements are met.

FACTS

A new judge is a former partner of his family's law firm, which consisted of three partners: the then-attorney-now-judge, the judge's father, and a non-relative. The firm's primary areas of practice were real estate transactions (including t issuance of title insurance), probate matters (estates, guardianships, conservatorships), business/corporation law (formation of business entities and their transactions), and matters in juvenile court (dependency/delinquency). The firm's files contained more than 1,100 original wills, which had been prepared by its partners, and all client files for at least the previous 15 years.

The judge, on the day prior to taking office, filed motions to withdraw as counsel in sixteen probate court cases. They stated the non-relative partner was ready, willing, and able to represent the party.

After the judge took office, the remaining two partners winded-down the partnership, and the non-relative partner formed his own firm. The judge's father is affiliated with that firm. Over time, the judge's former, non-relative partner was appointed either the attorney for the petitioner or the guardian ad litem for the respondent almost 73% of all involuntary-commitment cases filed in the probate court (264 cases).

DISCUSSION

13-920

TRANSITION TO THE BENCH:

ADVICE TO FORMER CLIENTS

RECOMMENDATION OF SUCCESSOR ATTORNEY

FINALIZING TITEL-INSURANCE POLICIES

1. May a judge meet with and/or advise former clients to resolve or close their files?

After assuming the bench, a judge may not continue to counsel clients, even if in an effort to wind-up the judge's pending cases. Canon 5F states, "A judge should not practice law." See also ALA. CONST. art. VI, § 147 ("No judge of any court of this state shall, during his continuance in office, engage in the practice of law . . . ."). See, e.g., U.S. Compendium of Selected Opinions § 2.7(g) (2001) (a judge may not render advice, counsel, or opinions about the appeal of one of the judge's former cases). This prohibition applies immediately upon assuming the bench. See Arizona Advisory Opinion 00-7.

Although a judge is prohibited from rendering legal advice regarding the future representation of the client, a judge may provide incidental information to successor counsel to safeguard the interests of the judge's former client and in the interest of the proper administration of justice. See J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics §7.10A (4th ed. 2007). For example, a judge may respond to new counsel's questions as to historical facts not readily apparent from the file, factual details within the judge's peculiar knowledge, and similar matters of clarification. New York Advisory Opinions 96-128; 95-20. See, e.g., Nevada Advisory Opinion 98-3 (a judge may provide a written, verbatim transcription of her otherwise illegible notes in her former case, provided she does not discuss the notes, transcription, or any other matter with the current prosecutor).

The safe and ethical practice is for the judge-elect or appointee to have any discussion of pending cases with the client or the client's new attorney during the process of closing the law practice, not after the judge takes office. However, if, after taking office, something arises that necessitates discussion with the former client or the client's attorney, the judge must scrupulously avoid the practice of law.

2. May a judge advise former clients to transfer their active-case files to the judge's former law partner?

Advice on the ethical responsibilities an attorney owes to a client when the attorney leaves the practice of law to become a judge is beyond the scope of the Commission's authority. In regard to a judge's ethical obligations and constraints, clearly, a judge may not refer or assign a case to a lawyer with whom the judge has any financial ties. See A.B.A., Annotated Model Code of Judicial Conduct 293 (2004). Again, the safe and ethical practice is for any discussions with the client regarding options available for obtaining counsel or any assistance in locating counsel with necessary expertise should be concluded prior to the judge's taking office.

3. May a judge assist in finalizing the issuance of a title-insurance policy for a transaction that originated while the judge was an attorney if the judge does not sign the policy?

A judge may not assist in finalizing the issuance of a title-insurance policy because such activity constitutes, at most, the practice of law, Florida Advisory Opinion 2006-01, or, at the very least, it gives the appearance the judge is practicing law. Utah Advisory Opinion 98-7 (a judge may not issue title insurance through Attorney's Title because it creates the appearance the judge is practicing law).

13-921

PAYMENT OF LEGAL FEES EARNED BEFORE ENTERING OFFICE

May a judge receive his or her share of legal fees for work the judge performed before taking office, when the judge's former firm received those fees after the judge took office?

After taking office, a judge may accept fees for legal services he or she performed prior to becoming a judge if a prior fee agreement exists. Advisory Opinion 98-699 (even nine years after taking office). See also Advisory Opinions 90-402; 84-215; 81-114. A judge may also receive a contingent fee established while the judge was an attorney for work performed before entering office. Advisory Opinions 97-659; 90-402. This general rule has the following provisos:

- The percentage the judge receives must reasonably reflect the amount of actual work the judge did on the case prior to assuming the bench. Advisory Opinion 97-659. In some circumstances, such as when the contingent-fee matter was nearly completed before the judge took office, the quantum meruit compensation might equal the agreed-upon percentage rate in the fee contract.
- The agreement for fees for work performed by the judge or the partnership agreement controlling the distribution of fees must be established before the judge takes the bench, even if the case is not final. Id. See also Advisory Opinion 84-215 (an agreement as to how much is owed the judge should be settled insofar as possible before the judge takes office).
- If further work is performed by the successor attorney after the judge takes office, the judge should make certain he or she is not compensated for that work. Advisory Opinion 97-659.

- The fee arrangement must otherwise be proper under the Alabama Rules of Professional Conduct. Canon 2A.

See generally Canon 5C(1) ("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."); 5C(3) ("A judge should manage his . . . financial interests to minimize the number of cases in which he is disqualified.").

Other judicial-ethics advisory bodies require any fee arrangement to be writing. However, where the arrangement is traditional or standard in the legal profession and the judge's former law firm, the lack of a written agreement does not necessarily prevent the judge from receiving the compensation due for work performed.

As long as the judge expects to receive any monetary settlement, there could be a question as to the judge's disqualification in any case in which any member of the judge's former law firm is involved. Advisory Opinion 86-248. But see Advisory Opinion 97-659 (if the judge's portion of the award is established, but not distributed before the judge is sworn in, the judge is not disqualified from hearing cases involving his former firm for that reason).

Accordingly, the inquiring judge may receive only his share of client fees for work he performed before becoming a judge pursuant to pre-bench fee agreement.

13-922

DISQUALIFICATION:

JUDGE IS FORMER ATTORNEY IN CASE

PARTY IS REPRESENTED BY JUDGE'S FORMER LAW PARTNER

PROBATE JUDGE, AS ATTORNEY, WITNESSED OR NOTARIZED WILL

In addressing the inquiring judge's disqualification questions, the Commission presumes the judge has already determined he does not have a personal bias in favor of his former clients or law partners or prejudice concerning a party. See Canon 3C(1)(a).

Notably, Alabama observes the Rule of Necessity: a judge—otherwise disqualified—may preside in a case in an emergency situation to protect life or property or to preserve the status quo of the situation where there is no other judge available who could render such immediate relief. Advisory Opinion 95-542. The judge should reveal the basis for the disqualification. Once the need for immediate action no longer exists, the judge should recuse and have the matter transferred to another judge. Id. This rule should be used sparingly. It cannot be invoked simply because another judge is not immediately available and the parties would have to wait until another judge could be found.

1. Is a judge disqualified from a case in which he or she is the attorney of record, if the judge's only judicial act is ruling on his or her motion to withdraw as counsel and have a special judge appointed?

A judge is disqualified from a proceeding or matter in which he or she served as an attorney in the "matter in controversy." Canon 3C(1)(b). This disqualification cannot be remitted by the parties. Canon 3D.

(The scope of this disqualification is the same "matter in controversy," rather than "case." The Alabama Supreme Court has broadly defined the phrase "matter in controversy": cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation, or question is relevant to both cases. Rushing v. City of Georgiana, 361 So. 2d 11, 12 (Ala. 1978). Thus, a judge is disqualified in any matter that is in any way related to the then-attorney-now-judge's former representation of or advice to a client. See Advisory Opinions 97-658; 95-546. See, e.g., Advisory Opinions 96-620 (a judge is disqualified from a case involving a provision of a will on which he gave a legal opinion while an attorney); 86-285 (a judge is disqualified from a challenge to the disposition of a decedent's estate where he served as a guardian ad litem for an accounting in a previous proceeding involving that estate).)

It is noteworthy that, even where a probate judge is disqualified to act, the judge does not create any appearance of impropriety in allowing the chief clerk of the probate court to act in an uncontested matter, in the judge's name, if § 12-13-14, Code of Alabama (1975), authorizes the chief clerk to so act and the judge does not take any action in the matter. Advisory Opinion 96-616. For example, where there is no contest, the chief clerk may issue letters testamentary, of administration and of guardianship; admit wills to probate and record and to pass and allow accounts of executors, administrators, and guardians; and do all other acts and things and perform all other duties, ministerial and judicial, that the judge may do and perform. § 12-13-14(a)(1), (4), and (5). Any such action taken, where the judge is disqualified, does not violate the canons.

2. Is a judge disqualified from a case in which a party is represented by the judge's former law partner if the case was filed before the judge entered office? **Answer:** Yes.

"A judge should disqualify himself in a proceeding in which . . . his impartiality might reasonably be questioned, including . . . where . . . a lawyer with whom he previously practiced law served during such association as a lawyer in the matter [in controversy]. . . ." Canon 3C(1)(b). Thus, a judge is disqualified if the judge's former law partner represented the party in the same matter while the judge was associated with that lawyer in the same firm. Advisory Opinion 05-855. Under the proposed facts, that appears to be the case here, and the inquiring judge is disqualified. This disqualification applies even in uncontested matters, Advisory Opinion 95-546, and cannot be remitted under Canon 3D.

3. Is a judge disqualified from a case in which a party is represented by the judge's former law partner if the case was filed after the judge entered office?

Canon 3C(1)(b): Same "Matter in Controversy"

As explained above, the question is not when the case was filed; rather, it is whether the judge's former partner represented the client in the same matter while the judge was associated in the same firm with that lawyer. Advisory Opinion 05-855. If so, the judge is disqualified.

The inquiring judge's question is based on the proposed fact his former partner is the attorney of record. However, in addressing whether a lawyer with whom the judge previously practiced

"served as a lawyer in the matter," a judge should not limit his or her disqualification only to those cases in which that attorney is the attorney of record. A judge is disqualified if an attorney-client relationship was established on the same matter at any time the judge was in the firm. See Advisory Opinion 03-813. See, e.g., Advisory Opinions 95-547 (where the attorney merely gave legal advice, however slight); 86-261 (where the attorney withdrew prior to the case's conclusion).

Moreover, the disqualification in Canon 3C(1)(b) extends—beyond the specific lawsuit in which the judge's former partner is involved—to the same "matter in controversy." For example, the inquiring judge's former partner was appointed either the attorney for the petitioner or the guardian ad litem for the respondent in 264 involuntary-commitment cases. In those cases, it is inconceivable that subsequent involuntary-commitment proceedings involving the same respondent would be completely unrelated to the former commitment proceedings involving the judge's former partner. Thus, if the then-attorney-now judge was associated with that former partner while the judge's partner was involved in an involuntary-commitment proceeding, the judge would be disqualified from any subsequent involuntary-commitment case involving that same respondent. Cf. Advisory Opinion 02-793 (a judge is forever disqualified from any DHR case involving a child or family with respect to whom the judge, when a DHR attorney, filed a petition regarding matters of dependency, abuse, and neglect, unless the current proceeding clearly does not involve the same matter in controversy, and such cases are rarely completely unrelated in every respect). This prohibition applies regardless of how long ago the partner's involvement ended. Advisory Opinion 13-918. This disqualification may not be remitted by the parties. Canon 3D.

Canon 3C(1): Current Financial Dealings Between Judge and Former Law Partner

When a new judge has current financial dealings with a former law partner, the judge should not preside over cases involving that partner where the judge's financial dealing with the partner could be affected by the success of the litigation or the success of the partner's practice in general, or to some other situations involving continuous financial and business dealings between the judge and the former partner. Advisory Opinion 95-546. Under any of those circumstances, the judge would be disqualified, pursuant to Canon 3C(1), because his or her impartiality might reasonably be questioned. See, e.g., Advisory Opinion 82-128 (the judge is disqualified where the firm is substantially indebted to him under a Buy-Sell Agreement for two years and also under a vendor's lien deed securing a promissory note to be paid over a ten-year period for the judge's interest in a tract of land owned by the judge and his former law partners). 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).

Under some circumstances, however, a judge may not be disqualified from cases involving a former partner or firm that owes a financial obligation to the judge. For example, if the judge's portion of the award is established, but not distributed before the judge is sworn in, the judge is not disqualified from hearing cases involving his former firm for that reason. Advisory Opinion 97-659 (a portion of a contingency-fee award). Conditions for finding the judge is not disqualified include: the payment arrangement is fair; the term of the arrangement is as short as reasonably possible; the payments represent the fair market value; the amount of the debt is fixed; and the appearance of the attorney in the judge's court will not have a significant effect on

the attorney's ability to pay the indebtedness. Cynthia Gray, Ethical Issues for New Judges 18 (Am. Judicature Society 2003). If such conditions are met and the judge presides, the judge's disclosure would contribute to the dissipation of any appearance of impropriety or partiality.

Because this disqualification is pursuant to the general disqualification of Canon 3C(1), it may not be remitted by the parties. Canon 3D.

Canon 3C(1): Criteria for Determination Whether Circumstances Present Reasonable Question of Judge's Impartiality

Other than the disqualification grounds discussed above, Alabama does not have a bright line rule that sets a specific period during which the judge may not hear a case in which a former partner or firm appears. The mere fact the judge was previously a partner of an attorney for one of the parties is not a basis for the judge's disqualification. Advisory Opinions 05-855; 93-483. A policy requiring a judge to disqualify simply because he or she had a prior professional relationship with an attorney would be burdensome on the judiciary. Id.

Yet, some judges avoid the appearance of partiality by observing a self-imposed rule of automatic disqualification for a specified number of years after leaving the firm. See Advisory Opinion 93-483. See also Advisory Opinion 01-770 ("While not required by the canons, it certainly is in keeping with the spirit and goals of Canons 1 and 2A for a new judge to refrain from hearing cases involving his former firm for a period of time after taking office where this is feasible and consistent with the proper functioning of the court.").

Judicial ethics committees have identified the following criteria for judges to evaluate whether to recuse from cases in which a former partner or firm appears even if there is no continuing financial relationship or set disqualification period:

- the length of the judge's association with the attorney or firm;
- the closeness of the association;
- the amount of time since the association ended;
- the size of the firm;
- the size of the community or district;
- whether the judge continues to have personal relationships with former partners or associates;
- the burden disqualification will place on other judges; and
- whether the judge has a personal bias or prejudice toward the former partner or firm.

See Cynthia Gray, "Disqualification Issues Faced by New Judges," Judicial Conduct Reporter, Vol. 32, No. 3 (Fall 2010).

If, pursuant to this analysis, the judge determines that the facts known to him or her present a reasonable question as to his or her impartiality, this disqualification may not be remitted by the parties. Canon 3D.

Canon 3C(1)(d): Familial Relationship to Judge

Finally, in addressing any potential disqualification because of the judge's familial relationship with his father-partner, the judge should first apply any applicable disqualifying factor under Canon 3C(1)(a) and (b), which would not be remittable. If neither (a) nor (b) applies and the circumstances do not present a reasonable question of the judge's impartiality, the judge should follow Canon 3C(1)(d), which provides a judge is disqualified if a person within the fourth degree of relationship to the judge is a party to the proceeding. This provision includes the attorneys of the parties. Guthery v. Guthery, 409 So. 2d 844 (Ala. Civ. App. 1981). However, this disqualification may be remitted pursuant to the procedure specified in Canon 3D, i.e., the judge fully discloses, in the record, the basis of his or her disqualification; the parties and lawyers, independently of the judge's participation, agree in writing that the judge's relationship is immaterial or that the judge's financial interest is insubstantial; and the agreement, signed by all parties and lawyers, is incorporated in the record of the proceeding.

4. Is a probate judge disqualified from a petition to probate a will filed by the judge's former law partner if all necessary parties consent to the admission of the will to probate and to the issuance of letters testamentary and waive a hearing?

A judge is not disqualified merely because a party is represented by the judge's former partner. The judge should, however, assess the totality of the circumstances to determine whether any disqualifying circumstance is present, e.g., the disqualifiers discussed in Questions 2 and 3. If a judge is disqualified under any scenario, except Canon 3C(1)(d), discussed above, the parties may not remit or waive that disqualification. Canon 3D. The fact the proceedings are uncontested or are pursuant to an agreement or settlement between the parties does not affect disqualification, even disqualification that is remittable. Advisory Opinions 95-545. See, e.g., Advisory Opinion 85-236 (where the circumstances present a disqualification, a probate judge is disqualified even from performing certain non-adversarial functions, e.g., admitting a will to probate when waivers of notice of hearing have been filed).

5. Is a probate judge disqualified from a petition to probate a will the judge signed as a witness or notarized when the judge was an attorney if all necessary parties consent to the admission of the will to probate and to the issuance of letters testamentary and waive a hearing?

In all likelihood, a will the then-attorney-now-judge signed as a witness or notarized was a matter in his law firm while he was associated in the same firm with the partner handling the matter. Therefore, pursuant to the discussion in Question 3 above, the judge is disqualified, and this disqualification is not remittable under Canon 3D. Further, as noted above, the fact the proceedings are uncontested or are pursuant to an agreement or settlement between the parties does not affect disqualification. Advisory Opinions 95-545.

In addition, a will may be made self-proved, by acknowledgment by the testator and affidavits of the witnesses, meeting the requirements of § 43-8-132, Code of Alabama (1975). Thus, a will may be admitted to probate without the testimony of any subscribing witness. Although the probate of a will may be routine and uncontested, the fact the judge is the same person whose affidavit serves, in part, to self-prove the will would create an appearance of impropriety, in violation of Canon 2.

13-923

APPOINTMENTS: JUDGE'S FORMER LAW PARTNER

May a judge appoint his or her former law partner to represent a party or serve as a guardian ad litem?

Canon 3B(4) provides a judge "should exercise his power of appointment only on the basis of merit, avoiding . . . favoritism." Consent by the parties to an appointment does not relieve the judge of this duty. Commentary, Canon 3B(4). In addition, any appointment should promote public confidence in the integrity and impartiality of the judiciary. Canon 2A. Thus, an appearance of favoritism is to be condemned as much as the impropriety itself.

Furthermore, a judge should not appoint an attorney to serve in any capacity if the involvement of that person in a case would cause more than occasional disqualification of the judge, e.g., where the judge has financial ties or obligations with his or her former partner. See Advisory Opinions 01-770; 98-707. Compare Advisory Opinion 01-770, where potential disqualification was not a factor because the judge had self-imposed a year-long period for automatic disqualification from cases involving his or her former firm, the appointee was well qualified, and the judge did not have any remaining financial ties with the firm; under such circumstances, the judge could appoint an attorney associated with the judge's former firm. Moreover, in assessing potential disqualification, the question of the judge's impartiality could be impacted by how often the judge appoints a former partner in comparison with the appointment of other potential qualified appointees.

In specific regard to an appointment of a guardian ad litem, a judge's significant prior association with the proposed appointee could present a reasonable question as to the judge's impartiality because of the nature of the duties of a guardian ad litem to the court. Notably, the guardian ad litem stands in the place of the real party in interest. Advisory Opinion 97-661 (hence, the judge may not appoint, as a guardian, an attorney who is a relative within the prohibited degree, Canon 3C(1)(d), and the parties may not remit that ordinarily-remittable disqualification because such appointment creates an appearance of impropriety). Moreover, the credibility of the guardian is important because a judge seriously considers and often credits the guardian's views on weighty issues. A lengthy, recently-dissolved association with a former law partner could affect the judge's assessment of credibility. New Hampshire Advisory Opinion 2002-ACJE-06. Therefore, if under the totality of the circumstances—which only the judge can assess—a reasonable person could question the judge's impartiality in a case in which the judge's former law partner was serving as the guardian ad litem, the judge should not appoint his or her former partner in that matter.

REFERENCES

Alabama Constitution, art. VI, § 147

Alabama Canons of Judicial Ethics, Canons 2; 2A; 3B(4); 3C(1); 3C(1)(a), (b), and (d); 3D; 5C(1) and (3); 5F

Commentary, Canon 3B(4)

Advisory Opinions 13-918; 05-855; 01-770; 93-483; 02-793; 01-770; 98-707; 98-699; 97-661; 97-659; 97-658; 96-620; 96-616; 95-547; 95-546; 95-545; 95-542; 90-402; 86-285; 86-261; 86-248; 85-236; 84-215; 82-128; 81-114

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

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

Guthery v. Guthery, 409 So. 2d 844 (Ala. Civ. App. 1981)

Ala. Code, § 12-13-14(a)(1), (4), and (5) (1975)

Ala. Code, § 43-8-132 (1975)

Arizona Advisory Opinion 00-7

Florida Advisory Opinion 2006-01

Nevada Advisory Opinion 98-3

New Hampshire Advisory Opinion 2002-ACJE-06

New York Advisory Opinions 96-128; 95-20

Utah Advisory Opinion 98-7

U.S. Compendium of Selected Opinions § 2.7(g) (2001)

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Cynthia Gray, Ethical Issues for New Judges 18 (Am. Judicature Society 2003)

J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics §7.10A (4th ed. 2007)

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.