

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: August 8, 2014

ADVISORY OPINION 14-928

DISQUALIFICATION: INVOLVEMENT OF OFFICE OF ATTORNEY GENERAL IN CASE WHILE THAT OFFICE IS PROSECUTING JUDGE'S ADULT CHILD

ISSUES

I. Should a judge recuse from the Office of the Attorney General's prosecution of violations of the Alabama Ethics Law on the argument that (a) the judge is biased, as allegedly evidenced by isolated comments about that office, and/or (b) that office is prosecuting the judge's adult child for attempted murder? **ANSWER:** The recusal determination is for the judge, but ground (b) alone does not require disqualification except in cases in which (1) any employee of the Office of the Attorney General participating in the prosecution of the judge's adult child is involved, or (2) extraordinary circumstances present a reasonable question as to the judge's impartiality.

II. Should the judge recuse from three other cases in which the Office of the Attorney General represents an entity of the state, *i.e.*, a prosecution for Medicaid fraud, a civil lawsuit in which the Department of Corrections is the defendant, and a civil lawsuit in which the Employees Retirement Systems is the defendant? **ANSWER:** See answer to the first inquiry.

III. While the Office of the Attorney General's prosecution of the judge's adult child is pending, should the judge recuse from all cases of any nature in which that office is representing a party? **ANSWER:** See answer to the first inquiry.

FACTS

The inquiring judge is presiding in the prosecution of two defendants for violations of the Alabama Ethics Law. The Office of the Attorney General is prosecuting those indictments. That office has asserted two grounds for the judge's disqualification or recusal: (a) the judge's comments in a motions' hearing that allegedly indicate the judge's bias against that office, and (b) that office is prosecuting the judge's adult child for attempted murder.

In a motions' hearing in the ethics-violations case, the judge commented to the prosecuting attorneys that "you-all" do not care about the welfare of a certain county because, otherwise, "y'all"—"the same office"—would not be closing the casino located in that county and thereby destroying that county's economy.

The inquiring judge attached, to his opinion request, a list of 70 cases assigned to him in which the Office of the Attorney General represents a party. He further asserted the two assistant attorneys general who are the counsel of record in the ethics-violations prosecution do not represent nor have they entered appearances on behalf of the State in any other case.

DISCUSSION

Foremost, although legal error and unethical misconduct are not mutually exclusive, and acts done in the exercise of judicial discretion may, in some circumstances, constitute unethical misconduct, the Commission does not have the authority to give its independent opinion as to the appropriate ruling on a motion to recuse filed in a specific case. Advisory Opinion 09-902. Once a motion to recuse is filed, the questions expand beyond ethical considerations to factual and legal ones in a potentially adversarial context. Thus, the Commission provides only general advice regarding the application of the Alabama Canons of Judicial Ethics for the judge's determination of the recusal issues. Although the canons are also used to define legal standards of judicial conduct, Ex parte Cotton, 638 So. 2d 870 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996), and have the force of law, the opinions of the Commission are rendered in connection with only the ethical conduct of the judge, are not binding, and do not affect a party's rights or remedies. Ex parte Balogun, 516 So. 2d 606 (Ala. 1987), abrogated on other ground, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996).

A judge's decision regarding disqualification or recusal should be made only after due consideration for his or her office and the Alabama Canons of Judicial Ethics. Canons other than Canon 3C to be considered here are:

Canon 1, requiring judges to uphold the integrity and independence of the judiciary;

Canon 2, requiring judges to avoid even the appearance of impropriety;

Canon 2A, requiring judges to always act to promote public confidence in the judiciary's integrity and impartiality;

Canon 2C, requiring a judge to not allow family relationships to influence the judge's conduct or judgment;

Canon 3, requiring judges to perform the duties of his or her office impartially and diligently; and

Canon 3A(1), requiring judges to be unswayed by partisan interests, public clamor, or fear of criticism.

Therefore, a judge should disqualify himself, pursuant to Canon 3C(1), in any proceeding in which his "impartiality might reasonably be questioned." Specific instances in which disqualification is required are listed in the subsections of Canon 3C(1).

Disqualification for Bias

Expressly included as a disqualifying ground in Canon 3C(1) is a judge's "personal bias or prejudice concerning a party." Canon 3C(1)(a). The inquiring judge should determine whether he is biased in fact because of the activity of the Office of the Attorney General in the certain county the judge noted and/or because that office is prosecuting the judge's adult child.

"Bias for or against an attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate a bias for or against the party itself." Henderson v. Dept. of Pub. Safety and Corrections, 901 F.2d 1288, 1296 (5th Cir. 1990). The theory in imputing bias against an attorney to the party has been rejected: "Read broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will." Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044, 1050 (5th Cir. 1975).

Moreover, the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon the presumption and idea of impartiality. Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other ground, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996). Any disqualifying prejudice or bias as to a party must be of a personal nature and stem from an extrajudicial source. Id. Disqualifying favor does not necessarily comprehend every bias or partiality the judge may entertain with reference to the case, but must be of a character, calculated to seriously impair his impartiality and sway his judgment, and be strong enough to overthrow the presumption of his integrity. See id.

Advisory Opinion 09-901.

The Commission has long advised that the bias necessary to disqualify a judge generally must arise from an extrajudicial source and must involve an opinion on the merits based on something other than what the judge has learned from participating in the particular case or a prior case. Advisory Opinion 98-685. In Ex parte Bryant, 675 So. 2d 552, 554 (Ala. Cr. App. 1996), the court, in addressing whether the judge's prior disparaging remarks about an attorney showed bias against that attorney, observed, "As regards the disparaging remarks, we believe the exercise of weak judgment or a lack of judgment on a collateral matter is seldom grounds for a judge's recusal."

Disqualification Pursuant to a Reasonable Question as to the Judge's Impartiality

Assuming the inquiring judge has no actual bias, the issue of disqualification is based on the objective test under Canon 3C(1): "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). This test may sometimes cause disqualification of a judge who has no actual bias. Advisory Opinion 99-731.

The Commission has long advised that, under Canon 3C(1), a judge is disqualified to hear cases involving an attorney who is currently representing a party-opponent to the judge or the judge's spouse in unrelated litigation. See Advisory Opinions 02-795; 00-759; 99-731; 95-588; 95-582. However, this disqualification ordinarily applies only with respect to the particular attorney involved in such litigation. Advisory Opinions 00-759; 99-731; 88-337. It usually does not extend to the attorney's partners or associates who are not involved in the judge's case, *i.e.*, those who have not provided any professional assistance such as performing research or writing. Id. See also Ex parte City of Dothan Personnel Board, 831 So. 2d 1, 11 (Ala. 2002) (the judge was not disqualified where the judge's attorney withdrew from representing a party in litigation assigned to the judge and the attorney's law partner took over representation of the litigant).

In Advisory Opinion 02-795, the Commission advised that, absent the judge's involvement in the lawsuit filed against his adult child by a local store for a credit-card bill, extraordinary circumstances would have to exist to disqualify the judge, under Canon 3C(1), in unrelated cases involving the attorney representing the plaintiff. Even assuming, however, the judge is disqualified from any case in which a party is represented by the attorney for the judge's adult child, the Commission advised, in Advisory Opinion 96-623, that a judge is not disqualified to hear a case merely because an associate of a party's attorney is representing the party-opponent to the judge's adult son in unrelated litigation in which the judge has no direct involvement.

Because the disqualification question arises under the general provision in Canon 3C(1), *i.e.*, whether the judge's "impartiality might reasonably be questioned," extraordinary circumstances occasionally exist in which disqualification extends to other members of the attorney's firm or for a period after representation by the attorney ceases. See Advisory Opinion 00-759.

Pursuant to the principles stated, the inquiring judge would be disqualified in any case involving any employee of the attorney general's office who is participating in that office's prosecution of the judge's adult child, *e.g.*, assistant attorney general, investigator, material witness, etc. There

is one caveat to this advice that applies generally: where the disqualifying attorney or employee appears late in the case before the judge. In regard to the late appearance of an attorney who would disqualify the judge, the Commission has recognized that the appearance of new counsel in a case sometimes causes significant damage to judicial economy and/or may be otherwise detrimental to the proper administration of justice. Advisory Opinions 05-849; 88-336. Thus, the Commission has advised judges that they would not violate the canons were they to make a legal determination that the attorney is disqualified. *Id.*; Advisory Opinion 95-548 (whether the attorney is disqualified is within the judge's discretion upon consideration of the facts of the case and the factors generally applicable to questions involving changes of counsel and requests for continuances associated therewith). This advice is due, in part, to the principle that a party cannot engage in "judge-shopping" by manufacturing a ground for disqualification that previously did not exist. Advisory Opinions 95-586; 94-520.

With respect to others in the Office of the Attorney General who have no involvement in the prosecution of the judge's adult child, the judge is not disqualified absent extraordinary circumstances presenting a reasonable question as to the judge's impartiality.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2; 2A; 2C; 3; 3A(1); 3C; 3C(1); 3C(1)(a)

Alabama Advisory Opinions 09-902; 09-901; 05-849; 02-795; 00-759; 99-731; 98-685; 96-623; 95-588; 95-586; 95-582; 95-548; 94-520; 88-337; 88-336

Ex parte City of Dothan Personnel Board, 831 So. 2d 1, 11 (Ala. 2002)

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

Ex parte Cotton, 638 So. 2d 870 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

Ex parte Balogun, 516 So. 2d 606 (Ala. 1987), abrogated on other ground, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

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

Ex parte Bryant, 675 So. 2d 552, 554 (Ala. Cr. App. 1996)

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.