

## JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 16-929

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DISQUALIFICATION: ATTORNEY IN CASE IS JUDGE-ELECT OF SAME MULTI-JUDGE COURT

### ISSUE

Is disqualification required for a judge presiding over a case involving a private attorney who, as a judge-elect, is scheduled to take the bench in the same court in the near future? **ANSWER:** The mere fact that the private attorney is a judge-elect to the multi-judge court in which he/she practices does not create a reasonable question as to the impartiality of the judges to whom the judge-elect's cases are assigned. However, there may exist special circumstances that create a situation in which a person of ordinary prudence might reasonably question the judge's impartiality, which would require disqualification.

### FACTS

A private attorney is running unopposed in an upcoming judicial election. As such, the private attorney will likely assume the bench in a court in which he practices. The private attorney has recently served as a Special Circuit Judge and was appointed briefly to fill a vacancy in the same circuit court.

### DISCUSSION

As a threshold matter, the Commission notes other jurisdictions have advised that a judge-elect may continue to actively practice law during any period after he/she is elected but before he/she takes the oath of office, including practicing before the court to which he/she has been chosen to serve. Cynthia Gray, Ethical Issues for New Judges (2003); Arkansas Advisory Opinion 96-9; Florida Advisory Opinion 00-39 ("It would be impractical to adopt a rule that would prohibit the newly elected judge from handling any case between the date of the election and the date of the judge's investiture."); Georgia Judicial Qualifications Commission Opinion 217 (1996) ("[I]t would be unfair and unrealistic to require an active trial lawyer to immediately withdraw as counsel in pending cases simply because he or she has been elected to serve as a judge for a term to begin several months after the election."); New York Advisory Opinions 94-30 and 98-92; Delaware Advisory Opinion JPC 1992-5; Kansas Advisory Opinion JE-11 (1984). (But there is no exception to Canon 5F's prohibition on practicing law that allows a new judge to wind-up pending cases after taking office.)

A judge's decision regarding disqualification should be made only after due consideration for his/her office and the Alabama Canons of Judicial Ethics. A judge should disqualify him/herself, pursuant to Canon 3C(1), in any proceeding in which his/her "impartiality might reasonably be questioned." Specific instances in which disqualification is required are listed in the subsections of Canon 3C(1), and include "a personal bias or prejudice concerning a party." ALABAMA CANONS OF JUDICIAL ETHICS, Canon 3C(1)(a).

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The judge presiding over a judge-elect's case should examine the attendant circumstances by using 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 – whether there is an appearance of 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 14-928.

The Commission has not directly addressed the issue of a judge presiding over a case involving a judge-elect, but prior analysis concerning a party-judge is instructive. In Advisory Opinion 09-898, the Commission noted that "the mere fact that a judge is a party ... does not create a reasonable question as to the impartiality of the judge to whom the case is assigned, i.e., a sufficient cause for disqualification under Canon 3C(1)." Assuming there is no actual bias under Canon 3C(1)(a), a judge presiding over a case involving a judge-elect does not require disqualification as a matter of course, even when the judge-elect will soon be a judge on the same court. Rather, a special circumstance would have to exist to disqualify the judge under Canon 3C(1)<sup>1</sup>:

Special circumstances ... may require disqualification, such as a social, financial, "non-judicial," or extraordinary relationship between the [now-attorney-judge-elect] and the judge to whom the case is assigned; the nature of the particular case; or its potential impact on future working relations between the [now-attorney-judge-elect] and the judge to whom the case is assigned.

Advisory Opinion 09-898. For example, in advising the judges of the Court of Civil Appeals to disqualify from participating in the action of a title company suing the chief justice for breach of contract, the Commission in Advisory Opinion 95-587 undoubtedly considered the particulars of the case, i.e., an action for monetary damages from the chief justice, and the future working relations of the judges and the chief justice.

Therefore, a judge presiding over a matter involving a judge-elect should conduct a fact-specific analysis to determine if disqualification is required. After this analysis, if the presiding judge does not find the presence of a "special circumstance," disqualification is not required. There is

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<sup>1</sup> Canons, in addition to 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; and
- Canon 3, requiring judges to perform the duties of his or her office impartially and diligently.

no indication of such a special circumstance that would generate a reasonable question as to the impartiality of the judge assigned to the judge-elect's case under the facts presented by the inquiring judge.

#### REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2; 2A; 3; 3C; 3C(1); 3C(1)(a); 5F

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

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

Alabama Advisory Opinions 14-928; 95-587; 09-898

Arkansas Advisory Opinion 96-9

Delaware Advisory Opinion JPC 1992-5

Florida Advisory Opinion 00-39

Georgia Judicial Qualifications Commission Opinion 217 (1996)

Kansas Advisory Opinion JE-11 (1984)

New York Advisory Opinions 94-30; 98-92

Cynthia Gray, Ethical Issues for New Judges (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.