

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: August 4, 2017

ADVISORY OPINION 17-932

APPOINTMENT POWER: ANNOUNCED CANDIDATE OPPOSING JUDGE IN UPCOMING ELECTION

ISSUE

May a judge appoint an announced candidate opposing the judge in the upcoming election to represent indigent defendants in criminal cases? **Answer:** No.

FACTS

An attorney, who has announced his candidacy against a judge running for re-election, has requested the judge continue to appoint him to represent indigent defendants and thereafter have the presiding judge appoint a judge from another county to hear those cases.

DISCUSSION

Ethics opinions in other jurisdictions are split on the issue whether a judge is disqualified in cases where an attorney representing a litigant is an announced candidate against the judge in the upcoming election. See, for example, opinions listed in Kentucky Judicial Ethics Opinion JE-83. However, in Alabama, the rules are clear:

- Where the case was filed after the attorney announced his/her candidacy, the judge is disqualified. Advisory Opinions 98-694; 94-520.
- Where the case was pending before the judge prior to the attorney's announcement of his/her candidacy and the attorney was in the case at that time, the judge is not automatically disqualified. Rather, the judge is disqualified only if (1) facts and circumstances exist arising out of the campaign that cause the judge to harbor a personal bias or prejudice toward either the attorney or his/her clients, Canon 3C(1)(a), or (2) other facts or circumstances exist that cause the judge's impartiality to be reasonably questioned. Canon 3C(1).
- Where the candidate appears late in the case, the judge—for the sake of judicial economy and to the end that justice may be fairly administered—might consider whether, as a matter of law, the attorney should be disqualified from making a late appearance in the proceeding. Advisory Opinion 88-336. In Advisory Opinion 95-548, the Commission explained:

[T]his appears to be a matter committed to the judge's discretion upon consideration of the factors generally applicable to questions involving changes of counsel and requests for continuances associated therewith. In

other words, it is the Commission's opinion that the judge in such a situation should determine whether a change of counsel and concomitant continuance is appropriate under the facts in the case. If it is, then the judge should recuse himself . . .; if it is not, then he may proceed with the lawsuit and refuse to permit employment of new counsel.

Here, the attorney has announced his candidacy against the judge. Therefore, the judge is disqualified from any new case in which his current-campaign opponent represents a litigant. Because of this disqualification, the judge cannot appoint that attorney to represent indigent defendants in any cases assigned to the judge. "[D]isqualification of Canon 3C as applied by this Commission extends to any act which may be performed by a judge in a judicial proceeding except the act of entering an order of disqualification." Advisory Opinions 87-316 through -319 (disqualification extends to the appointment of attorneys for indigent defendants in criminal cases if the attorney, if appointed, would cause the judge's disqualification); 82-138; 80-91. See also Advisory Opinion 06-865 (the limitation against the use of the judge's appointment power should be read consistently with the disqualification provisions in Canon 3C(1)).

In summary, a judge may not appoint his/her upcoming-election opponent to represent indigent defendants.

REFERENCES

Alabama Canons of Judicial Ethics: Canon 3C; 3C(1); 3C(1)(a).

Alabama Advisory Opinions 06-865; 98-694; 95-548; 94-520; 88-336; 87-316 through -319; 82-138; 80-91.

Kentucky Judicial Ethics Opinion JE-83.

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.