

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 17-933

DISQUALIFICATION: LAW PARTNER OF ANNOUNCED CANDIDATE OPPOSING JUDGE IN UPCOMING ELECTION REPRESENTS LITIGANT

APPOINTMENT POWER: LAW PARTNER OF ANNOUNCED CANDIDATE OPPOSING JUDGE IN UPCOMING ELECTION

ISSUES

- I. Is a judge automatically disqualified from presiding in any case in which the law partner of the current-campaign candidate opposing the judge represents a litigant? **Answer:** No.
- II. May the judge appoint, to represent indigent defendants in criminal cases, the law partner of the judge's current-campaign opponent? **Answer:** Yes, if the judge is not disqualified.

FACTS

An announced candidate opposing the judge in the upcoming election is in a small partnership with other attorneys. It is the practice of all law partners to appear in each other's cases, both in pleadings and in court appearances, without prior notice to the Court or to opposing parties and without regard to which attorney is formally listed in the court files as representing a certain party in the case.

DISCUSSION

I.

The disqualification provision of Canon 3C must be read in conjunction with Canon 7 and considered in light of the reality that judges in Alabama are subject to nomination and election through political campaigns. Advisory Opinion 91-420. In addition, lawyers are charged with advancing the administration of justice, which includes participating in the evaluation of judicial candidates and often encompasses supporting a judicial candidate.

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.

These rules apply only to the appearance of the candidate in the judge's court. Alabama does not have a blanket rule where disqualification arising from a particular attorney's appearance extends to any member of the attorney's law firm. See, e.g., Advisory Opinion 04-842 (disqualification due to the appearance of an attorney who represents a party-opponent in litigation involving the judge ordinarily applies only to the particular attorney involved in the litigation, not to other members of the attorney's firm).

Both this Commission and the appellate courts in this state have generally held that mere representation of a party by a political supporter of the judge or of an opposing candidate of the judge in a current election does not cause a judge's impartiality to be reasonably questioned. For example, in Advisory Opinion 91-420, the Commission advised the judge is not disqualified by the mere fact that a party is represented by (1) the judge's reelection campaign treasurer or a member of his/her firm or (2) a member of the judge's reelection advisory committee or members of their firms. However, the Commission cautioned that, under the provisions of Canon 7, a judge must be ever mindful that political entanglements do not become involved or appear to become involved in judicial decisions. See also Miller v. Miller, 385 So. 2d 54, 55 (Ala. Civ. App. 1980) (the judge was not disqualified although a litigant supported the judge's campaign opponent).

The campaign activity of the particular attorney before the judge should be evaluated for disqualification purposes, rather than imputing one attorney's disqualification to the other

attorneys in the firm. Thus, the judge would be disqualified where, because of that particular attorney's campaign activity, (1) the judge's impartiality might reasonable be questioned, Canon 3C(1), or (2) the judge has a personal bias or prejudice concerning a party. Canon 3C(1)(a).

As for the general provision of disqualification, the test is whether a "person of ordinary prudence in the judge's position knowing all of the facts known to the judge find[s] that there is a reasonable basis for questioning the judge's impartiality." (Emphasis added.) In re Sheffield, 465 So. 2d 350, 356 (Ala. 1984), quoting Thode, The Code of Judicial Conduct—The First Five Years in the Courts, 1977 Utah L.Rev. 395, 402.

In determining the existence of personal bias or prejudice concerning a party, the following should be considered:

"[T]he 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 that presumption and idea." Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987), quoting Fulton v. Longshore, 156 Ala. 611, 46 So. 989 (1908). Any disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source. Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837 (Ala. 1983); Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979). Thus,

[T]he disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a character, calculated to impair seriously his impartiality and sway his judgment, and must be strong enough to overthrow the presumption of his integrity.

Ross v. Luton, 456 So. 2d [249,] 254 [(Ala. 1984)], quoting Duncan v. Sherrill, 341 So. 2d 946, 947 (Ala. 1977), quoting 48 C.J.S. Judges § 82(b).

Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989).

Absent either narrow circumstance of disqualification—a reasonable question as to the judge's impartiality or the judge's bias or prejudice concerning a party—the judge is not disqualified. However, a judge may recuse from presiding when he considers the circumstances warrant such action. Once a motion to recuse is filed, the question expands beyond ethical considerations to factual and legal ones. Advisory Opinion 09-902.

II.

Unless the judge is disqualified under Canon 3C(1), the judge may appoint members of his campaign opponent's law firm to represent indigent defendants.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 3C; 3C(1); 3C(1)(a); 7.

Alabama Advisory Opinions 09-902; 04-842; 98-694; 95-548; 94-520; 91-420; 88-336.

Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989).

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

Miller v. Miller, 385 So. 2d 54, 55 (Ala. Civ. App. 1980).

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.