

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: April 19, 2018

ADVISORY OPINION 18-938

DISQUALIFICATION: LAWYER ATTORNEY WITH WHOM JUDGE PREVIOUSLY PRACTICED LAW IN LARGE FIRM SERVED DURING SUCH ASSOCIATION AS LAWYER IN MATTER IN CONTORVERSY

ISSUE

Is an appellate judge disqualified from a case if members of the judge's former law firm represented a party in the same matter while the judge was associated with that firm even though the large firm has offices in multiple states, the attorneys were not in the same office as the judge, and the judge had no knowledge of the case, had never associated with any firm attorney concerning the case, and had never accessed any file or was privy to any internal or external communications regarding the case? **Answer:** Yes.

FACTS

An attorney representing a party in a case on appeal has filed a motion to recuse a judge of the appellate court on the basis of the following disqualification provision: a lawyer with whom the judge previously "practiced law served during such association" as a lawyer in the matter in controversy. Canon 3C(1)(b). The judge ascended the bench one year ago after having been a practicing attorney and partner at a large law firm for over fifteen years. The firm has more than 200 attorneys and offices in multiple cities in multiple states. The firm's attorneys who have represented a party in the case for approximately seven years were not in the same physical office as the then-attorney-now-judge. In addition, the then-attorney-now-judge had no knowledge of the case; had never associated with any firm attorney concerning the case; and had never accessed any file or was privy to any internal or external communications regarding the case.

DISCUSSION

A judge must avoid even the appearance of impropriety, Canon 2, and always act to promote public confidence in the judiciary's integrity and impartiality. Canon 2A. The Commission presumes the inquiring judge does not have a personal bias in favor of the client of his/her former law firm or the members of that firm or prejudice concerning a party. See Canon 3C(1)(a).

A judge must disqualify him/herself in any proceeding in which the judge's impartiality might reasonably be questioned. Canon 3C(1). When a judge's former law firm represents a party in a case pending in the judge's court, one of the threshold determinations is application of Canon 3C(1)(b): whether a lawyer with whom the judge previously "practiced law served during such

association” as a lawyer in the matter in controversy. (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).) A judge is disqualified if a member of the judge’s former law firm represented the party in the same matter while the judge was associated with that lawyer in the same firm. Advisory Opinions 13-922; 05-855. This prohibition applies regardless of how long ago the partner’s involvement ended. Advisory Opinions 13-922; 13-918. It cannot be remitted by the parties. Canon 3D.

Canon 3C(1)(b)’s disqualification does not operate in only cases the judge, when a member of the firm, knew about or only cases assigned to a firm member in the same physical office. In determining whether a lawyer with whom the judge previously practiced “served as a lawyer in the matter,” 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 Opinions 13-922; 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). “[A] firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” Comment, Rule 1.10, Ala. R. Prof. Conduct. Moreover, an attorney’s knowledge about a matter is imputed by law to every other attorney in the firm. When considering disqualification, it is irrelevant if the judge, while an attorney, had no part in the litigation now pending before him/her if he/she was a member of the law firm that gave counsel as to the pending matter. See, e.g., Tesco American, Inc. v. Strong Industries, Inc., 221 S.W.3d 550 (Tex. 2006) (an appellate justice, who was an attorney of a law firm with 500-plus attorneys at the same time another attorney with the firm, unbeknownst to the judge, briefly served as counsel in the early stages of the case was disqualified).

The Commission has found only one concession to the rule: by the New York Advisory Committee on Judicial Ethics, in NY Jud. Adv. Op. 16-36. There, a new appellate judge who was previously an equity partner in a large international law firm (1,000-plus lawyers), with thousands of clients in the firm’s databases, most of which were unknown to the judge, sought advice regarding disqualification in a case where a party is a former or current client of the judge’s former firm, but is not being represented by the firm in the case on appeal.

The Committee believes it would be unduly burdensome and unnecessary for the judge to run every party appearing before him/her through the law firm’s database to determine if a client relationship exists or ever existed during the judge’s former employment with the firm. If the judge is entirely unaware that a party appearing in an appeal, or one of the

party's subsidiaries or affiliates, is also being represented in other matters by the judge's former firm, the parties will suffer no actual, apparent, or reasonably perceived prejudice due to the client's prior or current relationship with the judge's former law firm (see Opinion 13-54).

That advice is limited to its extraordinary facts. Particularly where the judge's former firm is representing the litigant in the judge's court or where former or current representation by the judge's former firm is otherwise brought to the judge's attention, the judge must take reasonable measures to determine whether the case on appeal presents the same matter in controversy.

REFERENCES

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

Advisory Opinions 13-922, 13-918, 05-855, 03-813, 97-658, 95-547, 86-261

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

Comment, Rule 1.10, Ala. R. Prof. Conduct

Tesco American, Inc. v. Strong Industries, Inc., 221 S.W.3d 550 (Tex. 2006)

NY Jud. Adv. Op. 16-36

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.