

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: June 8, 2018

ADVISORY OPINION 18-939

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### DISQUALIFICATION: EXPIRATION OF AUTOMATIC-DISQUALIFICATION PERIOD IN CASES INVOLVING JUDGE'S FORMER LAW PARTNER

#### ISSUE

Upon expiration of the judge's self-imposed period of automatic disqualification from cases in which his or her former law partner represents a litigant, does the judge remain disqualified from those cases? **Answer:** Yes.

#### FACTS

The inquiring judge's former law partner of 15 years practices law in the judge's jurisdiction. To avoid the appearance of partiality after the judge took the bench, the inquiring judge self-imposed an automatic disqualification period of two years on any cases involving the former law partner. During that period, those cases were reassigned to other judges, one of whom was recently seated on an appellate court and another of whom is approaching retirement. The inquiring judge's period of automatic disqualification soon ends.

#### DISCUSSION

The mere fact a judge was previously a partner of an attorney for one of the parties is not a basis for the judge's disqualification. Advisory Opinions 13-922; 06-855; 93-483. However, Canon 3C(1)(b) requires disqualification where a lawyer with whom the judge previously practiced law served during such association as a lawyer in the matter in controversy. See, e.g., Advisory Opinions 13-922; 05-855. Furthermore, Canon 2 provides, "A judge should avoid impropriety and the appearance of impropriety in all his activities." See e.g., Advisory Opinion 92-454 (where the attorney for the judge's spouse represents a party before the judge, public confidence in the integrity of the judicial process demands that the judge disqualify).

The Canons do not expressly address whether disqualification is required when a judge's former law partner appears before the judge on a matter that was not handled by the firm during the judge's association with it. Unlike some states, Alabama does not have a bright line rule that sets a specific period during which the judge may not hear a case in which a former partner or firm appears. Thus, the lodestar is Canon 3C(1), which requires a judge to disqualify from a matter when a person of ordinary prudence in the judge's position knowing all of the facts known to the judge finds 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).

Some judges avoid the appearance of partiality by observing a self-imposed rule of automatic disqualification for a specified number of years after leaving the firm, i.e., a reasonable period,

regardless whether or not the particular matter was pending before the judge left the firm. Advisory Opinions 13-922; 93-483. See also Advisory Opinion 01-770 (“While not required by the canons, it certainly is in keeping with the spirit and goals of Canon 1 and 2A for a new judge to refrain from hearing cases involving his former firm for a period of time after taking office where this is feasible and consistent with the proper functioning of the court.”)

Here, the inquiring judge automatically disqualified from any matter involving his or her former law partner for two years. That automatic disqualification time period will soon end. The Commission has advised generally that, “unless there are extraordinary circumstances that would require continued disqualification, a judge is not disqualified to hear an action after a circumstance causing the judge to be disqualified ceases to exist.” Advisory Opinion 98-714.

The Commission has applied this principle primarily in the context where a litigant is being represented by an attorney who is also representing the judge or the judge’s spouse in an unrelated matter. See, e.g., Advisory Opinions 98-692; 97-654; 92-454. That prior advice does not appear to have been espoused in the context presented here: the inquiring judge has been disqualified during the entire pendency of the case. See, e.g., Advisory Opinions 98-714 (the judge, who had presided in case for three years until it was recently assigned to a judge outside the circuit, could be reassigned the case because the party who was represented by the law firm that was the basis for disqualification was no longer a party); 98-692 (the judge is no longer disqualified after dismissal by the parties of the defendant whose representation had caused the disqualification of the judge); 97-654 (the judge’s disqualification based on the notice of appearance by judge’s first cousin ceased when, before significant proceedings occurred, the judge’s cousin withdrew as attorney of record); 92-454 (during the trial, the judge was notified that one of the attorneys was representing the judge’s wife; the attorney immediately resigned from representing the judge’s wife; and the judge could continue to preside over the matter).

Here, the inquiring judge disqualified from his or her former law partner’s cases for a self-imposed period of two years, ostensibly to avoid the appearance of partiality. The Commission is of the opinion that, where the judge determined that presiding in a case in which his or her former law partner is involved presents an appearance of partiality for a self-imposed period, that appearance of partiality continues in that particular matter after the expiration of the judge’s self-imposed period for automatic disqualification. See Advisory Opinion 96-616 (a judge could not continue a case that is not urgent until unrelated litigation in which he was represented by an attorney for one of the parties was resolved and then resume hearing the case; application of Canon 3C(1) continues even after the disqualification ceased. As such, the inquiring judge remains disqualified from those cases.

**REFERENCES**

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

Alabama Advisory Opinions 13-922; 06-855; 01-770; 98-714; 98-692; 97-654; 93-483; 92-454.

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

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

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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.