

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: June 26, 2018

ADVISORY OPINION 18-941

APPOINTMENT: HIRING JUDICIAL ASSISTANT FROM LAW FIRM/ATTORNEY WITH CASES PENDING IN JUDGE'S COURT

DISQUALIFICATION: ISOLATING EMPLOYEE FROM CASE

ISSUES

- I. Under the Alabama Canons of Judicial Ethics, may a judge hire, as his or her judicial assistant (“JA”), a current employee of attorneys and/or law firms that have cases pending before the judge? **Answer:** Yes, unless the appointment would cause more than occasional disqualification of the judge.
- II. If the judge appoints a JA who would not cause more than the judge’s occasional disqualification, could the judge take measures to avoid those few disqualifications? **Answer:** Yes, where isolating the JA from any involvement in those cases would be appropriate.

FACTS

A judge who needs to appoint a JA seeks guidance regarding interviewing and considering applicants who are currently employed by attorneys and/or law firms with cases pending in the judge’s court. The judge is the sole circuit judge in the judicial circuit.

DISCUSSION

The following Alabama Canons of Judicial Ethics are pertinent to this inquiry:

- Canon 1: A judge should uphold the integrity and independence of the judiciary.
- Canon 2: A judge should avoid impropriety and the appearance of impropriety in all his or her activities.
- Canon 2A: A judge should . . . conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- Canon 2B: A judge . . . should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

A judge should not allow his or her family, social, political, or other relationships to influence his or her judicial conduct or judgment. He or she should not lend the prestige of his or her office to advance the private interests of others; nor should he or she convey or permit others to convey the impression that they are in a special position to influence him or her.

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- Canon 3B(2): A judge should require his or her staff and court officials subject to his or her direction and control to observe the standards of fidelity and diligence that apply to the judge.
- Canon 3B(4): A judge should exercise his or her power of appointment only on the basis of merit, avoiding nepotism and favoritism.
- Canon 3C(1): A judge should disqualify himself or herself in a proceeding in which . . . his or her impartiality might be reasonably questioned. (The question 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, 1332 (Ala. 1994).)

Pursuant to Canon 3B(2), the Commission has applied the canons indirectly to a judge's confidential employee such as the judge's bailiff, secretary, judicial assistant, or law clerk. See Advisory Opinions 06-867; 97-638; 88-333; 85-231; 83-190. In fact, the same disqualification standards that apply to a judge apply in situations involving the judge's confidential employee. If the personal appointee would be disqualified were he or she the judge, that disqualification is imputed to the judge. Advisory Opinion 01-778 (a JA may not work part-time for an attorney whose firm appears before the judge because such employment would create a reasonable question as to the judge's impartiality).

Therefore, a judge, in exercising his or her appointment authority, must consider whether an applicant, if hired as the judge's confidential employee, would cause more than the occasional disqualification of the judge. If so, under the Canons of Judicial Ethics, the judge may not appoint that applicant. See, e.g., Advisory Opinion 98-707 (a judge may not hire, as her bailiff, the mother-in-law of a local attorney who handles numerous cases in the judge's court because the judge would be disqualified from those cases).

Pursuant to the general disqualification provision of Canon 3C(1), the inquiring judge would be disqualified from any matter in which the JA had been personally involved or had access to confidential information during his or her prior employment. Where the employer's staff is small, it is very likely that the applicant is personally involved in virtually all the matters pending during his or her employment. See generally New York Advisory Opinion 14-61. This disqualification would not be limited to the same case in which the JA was previously involved, but would include cases involving or arising from the same fact situation or matter in controversy, and may include similar or related matters. See Advisory Opinion 02-805. See also Rushing v. City of Georgiana, 361 So. 2d 11, 12 (Ala. 1978) (cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation, or

question is relevant to both cases). This disqualification would not be subject to remittal pursuant to Canon 3D.

Thus, the judge may appoint an applicant only if the applicant's employer has minimal cases pending in the judge's court or if the applicant can confidently state that he or she has had direct involvement with only a minimal number of his or her employer's cases pending in the judge's court. In other words, the judge's resulting disqualification would not be more than occasional, i.e., so infrequently that the judge could take all necessary steps to avoid an appearance of impropriety without undue interference with court operations or the proper performance of judicial duties.

If the judge appoints a JA who would cause no more than occasional disqualification, the judge could avoid disqualification by insulating the JA from having any involvement whatsoever with that case. To effectuate that insulation, the judge would have to "take every precaution" to "make sure that not even a possibility exists of the judge's employee becoming involved in any way." Advisory Opinion 97-668. See also Advisory Opinion 97-638 (isolation includes prohibiting the employee from discussing any aspect of the case with the judge); New York Advisory Opinion 99-72 (absolute isolation includes insulating the employee from all contact, e.g., not opening the mail or answering telephone calls).

In any case in which the judge were to isolate his or her JA, the judge would need to advise the parties of (1) the JA's prior employment; (2) the nature of the JA's exposure to the matter (e.g., the JA prepared, witnessed or notarized a will); and (3) the fact that the JA would be insulated from any aspect of the case. Should a party thereafter request the judge's disqualification or recusal, the judge should consider all relevant factors, including the overall effectiveness of insulating the JA.

In cases where the JA has had no prior personal involvement, insulation would not be necessary. Although not required in those cases, the judge could disclose the JA's former employment for a reasonable period after the JA's appointment. Disclosure would prevent any appearance of impropriety and put the parties on notice so they could bring to the judge's attention any additional circumstances.

If the judge's disqualifications resulting from his or her appointment of a confidential employee should become frequent, it is recommended that the judge seek advice from the Commission, as there may be additional factors for consideration of whether that staff member could continue employment with the inquiring judge.

Finally, any ongoing business or financial relationship between the JA and the JA's former employer could raise ethical concerns. Thus, the applicant should settle any such matters upon separation.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2; 2A; 2B; 3B(2); 3B(4); 3C(1); and 3D.

Alabama Advisory Opinions 06-867; 01-778; 02-805; 98-707; 97-638; 88-333; 85-231; 83-190; and 97-668.

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

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

New York Advisory Opinions 14-61 and 99-72.

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.