

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: January 9, 2019

ADVISORY OPINION 19-945

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DISQUALIFICATION: VICTIMS OF CRIMES OF “OFFERING FALSE INSTRUMENT FOR RECORDING AGAINST PUBLIC SERVANT” ARE FELLOW JUDGES

### ISSUE

Is a judge disqualified from presiding over a bench trial in which the alleged victims of the criminal charges of “offering false instrument for recording against public servant” are fellow judges in the same circuit in which the judge serves? **Answer:** No, where the judge can be fair and impartial.

### FACTS

The inquiring judge has two cases pending on his/her criminal docket against a defendant charged with filing false, multi-million dollar liens against a local district judge and a fellow circuit judge, violations of § 13A-9-12(c), Ala. Code 2015.

The two indictments charge that the defendant offered false instruments for recording in the county probate office against public servants that falsely purport to represent liens, writs of seizure, and writs of execution on nonexistent judgments against two judges. The sole basis for the lien filing against each judge was his/her performance of his/her official judicial duties. The inquiring judge has a professional relationship with both victim-judges, although that with the circuit-judge victim is closer and that judge’s office is next door to the inquiring judge’s office.

The defendant has waived his/her right to a jury trial, so the inquiring judge will preside over the defendant’s bench trial and serve as the trier of fact. The judge is confident that he/she can be fair and impartial.

### DISCUSSION

Under Canon 3C(1), a judge is disqualified whenever the judge’s “impartiality might reasonably be questioned.” The test for this general provision is: “Would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find 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 a person, knowing all of the circumstances, might reasonably question the judge’s impartiality. Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994).

Generally, the mere existence of a professional relationship between the judge presiding in the case and the alleged victim(s) is not a reasonable basis for questioning the judge’s impartiality. In Advisory Opinion 98-701, the Commission advised:

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[N]either the fact that a party is employed in some capacity within the court or law enforcement system, or that the legality of actions taken by such persons in their official capacity is questioned in the action, is sufficient to cause disqualification. Advisory Opinions 94-519 and 98-684. The mere fact that another judge is a party in the proceeding cannot create a reasonable question as to the impartiality of the judge to whom the case is assigned. See Advisory Opinion 92-442.

Special circumstances, however, may require disqualification, such as a social, financial, “nonjudicial,” or extraordinary relationship between the victim and the judge to whom the case is assigned; the nature of the particular case; or its potential impact on future working relations between the victim and the judge to whom the case is assigned. See Advisory Opinion 98-701.

The circumstances here do not include any special factor that would create a reasonable question as to the judge's impartiality, particularly given the nature of the cases, i.e, prosecution of a former litigant for filing baseless, incomprehensively large liens against judges, whether due to disappointment with his/her litigation or anarchic malice. See Judicial Conference Comm. on Codes of Conduct, Advisory Op. 103 (2009) (reviewing patently frivolous litigation against a judicial colleague “will not ordinarily give rise to a reasonable basis to question the assigned judge’s impartiality, and disqualification would rarely be appropriate”). See also United States v. Swallers, 897 F.3d 875 (7th Cir. 2018) (recusal not required when a disappointed litigant filed fraudulent liens against the presiding judge’s fellow judges because the victim judges did not suffer any serious or long-lasting injury; the liens were a mere annoyance; and the harms were easily remedied); United States v. Petersen, 2009 WL 3062013, at \*7 (D. Minn. Sept. 18, 2009) (“Th[e] Court's impartiality will not be compromised simply because Defendant's alleged crimes were directed against other federal judges.”). Cf. United States v. Hill, 622 F. App'x 193, 194 (4th Cir. 2015) (recusal not required when defendant filed false lien against the judge presiding over the case); U.S. v. Cooley, 1 F.3d 985, 993-94 (10th Cir. 1993) (a party’s baseless lawsuits against the judge do not require the judge’s recusal).

Moreover, efforts by litigants and third parties to attempt to manipulate or abuse the judicial process and judicial system, if allowed, could undermine the public’s confidence in the integrity of the judiciary. Disqualification is not necessary or appropriate when a party files fraudulent liens against the presiding judge and/or that judge’s colleagues when such actions can be reasonably regarded as efforts to prompt recusal and/or impede the orderly and efficient functioning of the judiciary. See U.S. v. Thanh Viet Cao, 526 F. App'x 798, 799 (9th Cir. 2013).

#### REFERENCES

Alabama Canons of Judicial Ethics, Canon 3C(1)

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Alabama Advisory Opinion 98-701

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

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

§ 13A-9-12(c), Code of Alabama (2015)

United States v. Swallers, 897 F.3d 875 (7th Cir. 2018)

United States v. Hill, 622 F. App'x 193, 194 (4th Cir. 2015)

U.S. v. Thanh Viet Cao, 526 F. App'x 798, 799 (9th Cir. 2013)

U.S. v. Cooley, 1 F.3d 985, 993-94 (10th Cir. 1993)

United States v. Petersen, 2009 WL 3062013, at \*7 (D. Minn. Sept. 18, 2009)

Judicial Conference Comm. on Codes of Conduct, Advisory Op. 103 (2009)

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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.