JUDICIAL INQUIRY COMMISSION

DATE ISSUED: April 30, 2020 ADVISORY OPINION 20-947

DISQUALIFICATION: REASONABLE PERCEPTION OF BIAS OR PREJUDICE AGAINST ATTORNEY ALLEGED IN MOTION TO RECUSE

ISSUE

Do the Alabama Canons of Judicial Ethics require a judge to grant a motion to recuse asserting that the following circumstances present a reasonable appearance of bias or prejudice against an attorney representing a party in which:

a. The movant-attorney, prior to his appearance in the pending case, represented his spouse in a lawsuit against the judge's sibling, in the sibling's capacity as a member of a governmental advisory board. (The sibling prevailed before the attorney entered the pending case).

b. The movant-attorney, after his appearance in the pending case, represented the ex-husband of the judge's deceased sibling on his claim against the sibling's estate. (The judge did not have any legal or financial interest in the case. Summary judgment was granted for the estate).

c. The movant-attorney, after his appearance in the pending case, alleged he had filed a complaint against the judge with the Judicial Inquiry Commission ("JIC").

d. The movant-attorney, prior to his appearance in the pending case, intervened on behalf of a plaintiff in a federal case, concerning the county's bail practices, and named the judge in the judge's official capacity as a defendant and, after his appearance in the pending case, the federal court issued a preliminary injunction.

e. While the pending case was on appeal, the judge attended the Court of the Judiciary proceeding involving a fellow judge, presumably in support of that judge; the movant-attorney also attended; and, that day, the judge's sibling made a statement in support of that judge to the media.

Answer: The question of recusal is solely within the discretion of the judge, to be exercised under the pertinent law; however, a judge must disqualify from the case where a reasonable person would perceive, from the totality of the facts and circumstances, known to the judge, potential bias or a lack of impartiality on the part of the judge.

FACTS

The movant-attorney was the fourth attorney to represent the petitioner in a guardianship-and-conservatorship case. He filed a notice of appearance after the case had been pending for two years. The first and second counsel had withdrawn because of differences of opinion with the petitioner. During their representation, the judge ruled unfavorably to the petitioner: a restraining order against her and denial of her objection to the sale of the ward's property. Two

days after the second counsel withdrew, the guardian ad litem and the conservator filed for $33,869 in attorney fees and costs against the petitioner, pursuant to the Alabama Litigation Accountability Act, § 12-19-270 et seq., Ala. Code 1975. The judge set a hearing for two months later.

Three days before that hearing, the third attorney filed a notice of appearance, and the hearing was continued for two months. Ten days before the rescheduled hearing, the fourth attorney (movant-attorney) filed a notice of appearance as co-counsel. That hearing was continued a second time. After no activity in the case for almost six months, the third attorney withdrew as co-counsel, and the judge ordered mediation. Mediation was not successful. On the day of a hearing 10 months later, the movant-attorney filed a motion for the judge to recuse—16 months after he had entered the case. The judge denied the motion, but continued the hearing explicitly to give counsel time to seek review of that ruling. He did not seek review. Instead, on the day of the rescheduled hearing six months later, he filed a second motion to recuse, adding only that he had filed a complaint against the judge with the JIC.

The attorney had succeeded in delaying, for two years, the judge's consideration of the motion for his client to pay $33,859.56 in attorney fees and costs. On an unfavorable final judgment, he appealed. The Court of Civil Appeals remanded the case for the judge to hold a hearing on the petitioner's motion to alter, amend, or vacate the judgment regarding the judge's award of attorney fees and costs. The movant-attorney filed his third motion to recuse, adding the allegation that the judge had attended the Court of the Judiciary proceeding involving a fellow judge, allegedly in support of that judge.

The judge seeks advice regarding the movant-attorney's third motion to recuse. The judge is confident she is not, and has not been, biased or prejudiced against the attorney or the attorney's client. There is no indication that, by words or conduct, the judge has expressed any antagonism toward the attorney or the attorney's client. Moreover, the movant-attorney has not filed recusal motions in all cases over which the judge is presiding despite his repeated assertions in the pending case that the judge is biased against him.

Specifically, regarding allegation (d), the intervenor complaint the movant-attorney filed in the federal lawsuit contesting the county's bail practices, the movant-attorney named the judge, the only circuit judge assigned criminal cases at the time, as a defendant. The two district judges were subsequently added as defendants. The relief sought was a declaratory judgment (non-monetary). One year after the movant-attorney entered the pending case as co-counsel and six months after becoming sole counsel for the petitioner, the federal court issued a preliminary injunction. That ruling is on appeal.

DISCUSSION

As explained in Advisory Opinion 09-902:

> [Rule 18, Rules of Procedure of the Judicial Inquiry Commission,] does not give the Commission the authority to give its independent opinion as to the appropriate ruling on a motion to recuse filed in a specific case. *See* Advisory Opinion 07-883. Once a motion to recuse is filed, the question expands beyond ethical considerations to factual and legal ones, and the motion is then in an adversarial context. The Commission has no authority to determine the correctness of the respective legal and factual positions. *See* Advisory Opinion 89-384. Such is beyond the Commission's jurisdiction, for it is not an adjudicatory body. *See* Advisory Opinion 93-503. Moreover, the Commission has no authority to require any judge to take or refrain from taking any action. Pursuant to Rule 18, the Commission may address only "a certain specified action contemplated or proposed to be taken by the judge" and, even then, only in the context of the application of the Canons of Judicial Ethics.
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> The decision whether to recuse rests solely with the judge . . . , Advisory Opinion 84-221, and the Commission cannot invade the province of the trial court. . . .
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> Thus, after a motion to recuse has been filed, the Commission restricts its advisory opinion to the inquiring judge as to general advice regarding the application of the Canons.

In determining the merits of a motion to recuse, a judge must act in a manner that avoids the appearance of impropriety, Canon 2, and that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2A. Accordingly, a judge should disqualify from any proceeding in which, under the totality of the circumstances, his/her impartiality might reasonably be questioned. Canon 3C(1).[1]

The movant-attorney asserts bias in the context of the general catch-all test for disqualification: where there is a reasonable question as to the judge's impartiality. Canon 3C(1). The focus therefore is not whether the judge is subjectively biased against the movant-attorney's client, under Canon 3C(1)(a) (a judge is disqualified if he/she "has a personal bias or prejudice concerning a party").[2] Instead, it is whether a reasonable person would perceive potential bias or

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[1] See Ex parte Cotton, 638 So. 2d 870, 871-82 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996):

> It becomes the judge's responsibility to initiate the action of removing himself from the case under Canon 3(C)(1) only when he is disqualified. Generally, the grounds for recusal are as well known to the parties as they are to the judge, but facts leading to disqualification are often known only to the judge.

[2] The movant-attorney asserts that bias or prejudice includes "personal bias or prejudice concerning . . . a party's lawyer." See Model Code, Rule 2.11(A)(1). However, Alabama's Canon 3C(1)(a)'s prohibited bias or prejudice is limited to that of a party. Bias for or against an

a lack of impartiality on the part of the judge. Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996). It is disqualification for reasonable appearance of bias or impropriety; actual bias is not necessary for a judge to recuse. Ex parte Smith, 282 So. 3d 831, 840 (Ala. 2019). In making this objective determination, the judge should consider the totality of the facts and circumstances known to the judge, even those unknown to the movant.[3] Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 11 (Ala. 2002). The law will not suppose a possibility of bias in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon the presumption and idea of impartiality. Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other ground, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996).

The following advice, discussing the circumstances asserted by the movant-attorney, is confined to application of the Canons, i.e., excluding the legal consideration and any facts and circumstances known to the judge, but unknown to the movant-attorney.

(a) The movant-attorney's representation of his spouse in a case against the judge's sibling.

(That case was dismissed 18 months before the movant-attorney entered a notice of appearance in the pending case.) Where a judge was not involved in a lawsuit filed by an attorney against a judge's relative, only extraordinary circumstances would create a reasonable question as to the judge's impartiality in unrelated cases involving that attorney. See, e.g., Advisory Opinion 02-795 (the judge, whose adult son had been sued by a local store for a credit-card bill, was not disqualified to hear cases in which a party was represented by the attorney representing the local store in the case against the judge's adult child nor was the judge disqualified in cases in which the local store was a party).

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attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate a bias for or against the party itself. Advisory Opinion 09-901.

The external indicia of the subjective personal bias or prejudice of Canon 3C(1)(a) are difficult to determine precisely, and it is very difficult to determine what is in a judge's heart. Charles Gardner Geyh et al., Judicial Conduct and Ethics § 4.06 (5th ed. 2013). Consequently, when actual bias is suspected, the easier route may be to assert and analyze the issue as a matter of perceived bias or partiality under the reasonable-question-of-impartiality test rather than as a matter of actual bias or prejudice. Id.

(b) The movant-attorney's representation of the ex-husband of the judge's deceased sibling in a lawsuit against the sibling's estate, and

(c) The movant-attorney's alleged filing of a JIC complaint against the judge.

With any bias-against-an-attorney allegation, the judge should assess whether the facts indicate the attorney acted deliberately and with the intent to create the artificial appearance the judge could be biased and prejudiced against him/her. Where a party or a party's attorney acts toward a judge in a manner calculated to create bias or prejudice to control the process by "judge shopping," disqualification of the judge on the basis of bias or prejudice will not ordinarily be required—unless of course the judge is actually personally biased or prejudiced or the judge's impartiality is reasonably questionable. See Advisory Opinions 07-876; 98-686; 97-636; Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.06 (3d ed. 2000). For example, a litigant may not cause the disqualification of a judge in pending litigation merely by filing a lawsuit against the judge in other proceedings or by filing a complaint with the JIC. The facts here provide even less, i.e., filing a lawsuit against the judge's deceased sibling's estate and merely alleging filing a JIC complaint.

(d) The movant-attorney intervened on behalf of a plaintiff in a federal case, he named the judge in the judge's official capacity as a defendant (the judge was the only circuit judge assigned criminal cases at the time), he seeks only a declaratory judgment (non-monetary) and, after his appearance in the pending case, the federal court issued a preliminary injunction.

The Commission has long held that a judge is disqualified, pursuant to the general provision of Canon 3C(1), to hear cases in which a party is represented by an attorney currently representing a party-opponent to the judge in unrelated litigation, whether the unrelated litigation involves the judge in an individual, fiduciary, or official capacity. Advisory Opinion 98-704 and opinions cited therein. However, despite the longevity of the rule, the Commission has few advisory opinions applying it to official-capacity lawsuits.

The Commission has recognized two exceptions to the mandatory-disqualification rule. One exception is Advisory Opinion 96-629, where the judge was named a defendant in his official capacity as presiding circuit judge in a lawsuit regarding violations of state law in the selection and retention of contract counsel to represent indigent criminal defendants; the lawsuit sought declaratory and injunctive relief; and the suit did not appear to allege any personal malfeasance by the judge.[4] The other exception involved a class-action lawsuit concerning the system of financially compensating district and circuit judges, and the judge was merely a member of the class. Advisory Opinion 95-581.

[4] When Advisory Opinion 96-629 was issued, the pertinent statues stated that the presiding circuit judge administered the indigent-defense system (§ 15-12-3, Ala. Code 1975), and that contracts with contract counsel were subject to the approval of the presiding circuit judge. (§§ 15-12-4(e)(4) and -12-26.)

In that latter opinion and subsequent ones, the Commission advised that a judge who is a named party, an intervenor, or a monetary contributor to the expense of the litigation is personally involved in the litigation and, thus, disqualified to hear cases in which a party is represented by counsel for either the plaintiffs or the defendants in the judicial-compensation suit. See Advisory Opinions 96-597 (intervenor); 95-584 (personal involvement in the matter in controversy); 95-582. However, the application of this rule would have mandated disqualification in Advisory Opinion 96-629, because the judge was a named party; yet the Commission advised that the judge was not disqualified.

The conclusions in those seemingly conflicting opinions were correct. However, the Commission takes this opportunity to refine its advice. The test is whether the judge is so personally involved in the cause of action directed at the judge's institutional or official role that his/her impartiality might reasonably be questioned under Canon 3C(1) in an unrelated case where the attorney who commenced the lawsuit appears. Merely being named a defendant may not suffice as the requisite personal involvement, as was the case in Advisory Opinion 96-629. See, e.g., Advisory Opinion 88-337 (where, in a federal lawsuit challenging the method in which all circuit judges are elected, the Alabama Supreme Court justice is a named defendant in his official capacity as the chief administrative officer of the court system and, as such, directs the actions of the attorneys representing him, he is disqualified from sitting in any proceedings in which the plaintiffs' attorneys represent a party, as long as the federal lawsuit is pending). See also Advisory Opinion 98-709 (the judge is disqualified from presiding in any case in which a litigant is represented by counsel who is also representing the plaintiffs in a pending class-action lawsuit regarding judicial-salary supplements where, although not a party, the judge filed a statement opposing the class action and disagreeing with the plaintiffs' factual and legal positions, supplied an affidavit that was filed by the intervenor-opponents, and had various communications with counsel for the intervenors).

Here, the intervenor complaint naming the judge had been pending only three months when the movant-attorney entered the guardian-and-conservatorship case, as the fourth attorney for the petitioner, after that litigation had been pending two years. The movant-attorney did not have any question regarding whether the judge was so personally involved in the federal litigation that the judge's impartiality might reasonably be questioned—until he filed a motion for recusal 16 months after he entered the case as co-counsel—and 4 months after the federal court issued its preliminary injunction—and on the day set for the trial. He did not have a question of the judge's impartiality when, despite the judge's resetting the trial so he could seek review of the judge's denial of the motion to recuse, he did not seek that review. Furthermore, he did not file his second motion for recusal until the day of the rescheduled trial six months later. The movant-attorney's late assertion of the alleged perception of bias or prejudice undercuts his claim. See Arthur H. Garwin et al., Annotated Model Code of Judicial Conduct, 246 (3d ed. 2016) (delay in filing a motion to recuse "imposes unnecessary disruption on the judicial system and litigants and may evidence a belief that the judge is not in fact biased").

(e) The judge attended the Court of the Judiciary proceedings involving a fellow judge, presumably in support of that judge; the movant-attorney also attended; and, that day, the judge's sibling made a statement in support of that judge to the media.

The significance of these facts is not apparent. The judge should assess them within the context of the judge's personal knowledge.

In summary, the decision on the movant-attorney's third motion to recuse is specifically to be left to the judge for determination: "whether a reasonable person would perceive, from the totality and facts known to you, potential bias or a lack of impartiality on your part." This determination should include an assessment to this point of the personal involvement of both the judge and the movant-attorney in the pending federal litigation.

This opinion addresses only the ethical considerations of the facts presented; obviously, it does not express any advice regarding possible facts known only to the judge nor does it express any view regarding application of the substantive law that governs the question of recusal.

REFERENCES

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

Alabama Advisory Opinions 09-902; 09-901; 07-876; 02-795; 98-709; 98-704; 98-686; 97-636; 96-629; 96-597; 95-584; 95-582; 95-581; 88-337

Ex parte Smith, 282 So. 3d 831, 840 (Ala. 2019)

Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 11 (Ala. 2002)

Ex parte Cotton, 638 So. 2d 870, 871-82 (Ala. 1994), abrogated on other ground by Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other ground, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996)

Ala. Code 1975, §§ 12-19-270 et seq.; 15-12-3, -12-4(e)(4), and -12-26

Model Code, Rule 2.11(A)(1)

Charles Gardner Geyh et al., Judicial Conduct and Ethics § 4.06 (5th ed. 2013)

Arthur H. Garwin et al., Annotated Model Code of Judicial Conduct, 246 (3d ed. 2016)

Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.06 (3d ed. 2000)

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.