

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: AUGUST 3, 2023

ADVISORY OPINION 23-957

## DISQUALIFICATION: RELATIONSHIP TO ATTORNEY WHO PREVIOUSLY APPEARED IN CASE

## DISQUALIFICATION: REMITTAL PROCEDURE

### ISSUES

Is a judge disqualified from cases where the judge's father previously served as a prosecutor in the case?

**Answer:** Yes.

If so, may that judge's disqualification be remitted under Canon 3D?

**Answer:** Yes.

### FACTS

The father of a recently elected circuit judge served as a part-time assistant district attorney in the district attorney's office within the judge's circuit. The judge's father typically handled matters exclusively in district court, including representing the State at first appearances and preliminary hearings, although he would sometimes handle post-conviction, non-jury matters in circuit court. The judge's father no longer works with the district attorney's office.

The judge has disclosed his father's previous employment with the district attorney's office. Upon disclosure, the judge received several motions indicating varying levels of the judge's father's participation in each case—from signing off on

discovery to actually participating in the preliminary hearing.

## DISCUSSION

### I.

Canon 3C(1), regarding disqualification of judges, provides:

A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceeding, or an officer, director, or trustee of a party.

This provision has been interpreted by the Commission to require a judge's disqualification when a relative of the judge or the judge's spouse within the fourth degree of relationship appears as an attorney. *E.g.*, Advisory Opinion 97-637. Additionally, the Commission has advised that a judge is disqualified from child support cases in which the judge's wife had previously served as an assistant district attorney. Advisory Opinion 91-414; *see also*

Advisory Opinions 91-415 and 95-549. Notwithstanding that advice, the Commission later advised that a judge was not required to disqualify from a case in which a relative of the judge, who was acting as an attorney for a party, withdrew from the case. Advisory Opinion 97-654. In that opinion, the Commission explained, “once a ground for disqualification ceases, recusal is no longer required provided no extraordinary circumstances giving rise to reasonable questions about the judge’s impartiality exist.” *Id.* Similarly, in Advisory Opinion 03-812, the Commission advised that a judge was not disqualified from presiding over post-trial matters, such as work release and house arrest requests from inmates, where the judge’s nephew had represented the inmate in the initial proceeding that led to their conviction and incarceration as long as the nephew’s representation had ceased and there were no extraordinary circumstances—e.g., if the post-trial matter involved issues regarding the judge’s nephew’s representation—that created a reasonable question as to the judge’s impartiality.

In considering its prior advice, the Commission is now of the opinion that a judge is disqualified from all cases in which a relative of the judge previously participated. Regarding disqualification generally, the Alabama Supreme Court has held, “Recusal is required under Canon 3C(1) when ‘facts are shown which make it reasonable for a member of

the public or a party, or counsel opposed to question the impartiality of the judge.’” *Matter of Sheffield*, 465 So. 2d 350, 355–56 (Ala. 1984) (quoting *Acromag-Viking v. Blalock*, 420 So. 2d 60, 61 (Ala. 1982)). The question is not whether the judge is impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge’s impartiality—whether there is an appearance of impropriety.” *Ex parte Duncan*, 638 So. 2d 1332, 1334 (Ala. 1994). “‘An independent and honorable judiciary is indispensable to justice in our society,’ and this requires avoiding all appearance of impropriety, even to the point of resolving all reasonable doubt in favor of recusal.” *Sheffield*, 465 So. 2d at 357 (quoting Canon 1) (emphasis in original); see also Canon 2A; cf. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.”)

Although the appearance of impropriety and partiality appears to cease when an attorney who is a relative of the judge withdraws from or is otherwise no longer involved with a case, it may potentially resurface when judges are asked to review matters that were handled by the judge’s relative. In *In re Aetna*

*Cas. & Sur. Co.*, 919 F.2d 1136, 1146 (6th Cir. 1990) (en banc) (Kennedy, J., concurring),<sup>1</sup> the Court held that a judge, whose daughter had acted as an attorney for a party during depositions, was disqualified from seven cases, which were consolidated, even though the judge's daughter was no longer employed with the firm representing the party. Judge Kennedy recognized:

The depositions taken in the consolidated action are a part of the proceedings in each case even when the cases are no longer consolidated. . . . Whether the depositions will be used or not, it is there to be used. Whether it will be important or not, it is there to become important.

*Id.* at 1147. Similarly, other judicial ethics committees have recognized that there is a reasonable question as to the judge's impartiality in cases where a relative of the judge within the prohibited degree participated in the case. Illinois Advisory Opinion 05-02 ("The fact that the judge might be required to review bond determinations in which the son-in-law participated or review the sufficiency of informations prepared and signed by the son-in-law could cause the judge's impartiality to be

reasonably questioned."); New York Advisory Opinion 93-116 (concluding that a judge's impartiality might be reasonably questioned in cases where the judge's spouse was involved as an assistant district attorney, even if only involvement was screening cases or taking witness statements).<sup>2</sup>

Unlike other opinions in which the Commission concluded that disqualification is no longer required after the ground for disqualification ceases, the inherent concerns that cause a judge's disqualification when a relative of the judge appears as an attorney for a party do not disappear once the judge's relative leaves the case. *See* Advisory Opinions 96-617 (judge previously owned stock in party), 94-516 (judge previously represented by attorneys appearing before him or her in unrelated litigation), and 92-454 (judge's spouse previously represented by attorney in unrelated litigation). Even though the judge's relative may no longer be involved in the case, the relative's work has become "a part of the proceedings" which the judge may or may not have to review after the attorney withdraws. *See Aetna Cas. & Sur. Co.*, 919 F.2d at 1147.

Following the instruction of the Alabama Supreme Court to avoid all

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<sup>1</sup> Judge Kennedy wrote a concurring opinion on the issue of disqualification, which seven of the twelve judges joined, thereby, making it the majority opinion on that issue.

<sup>2</sup> Both Illinois and New York's Codes of Judicial Conduct contain provisions that expressly require a judge's disqualification when a relative of the judge within the prohibited degree is acting as an attorney in the proceedings.

appearances of impropriety by “resolving all reasonable doubt in favor of recusal,” *Sheffield*, 465 So. 2d at 357, it is the opinion of the Commission that a judge continues to be disqualified under Canon 3C(1)(d), *see* Advisory Opinion 97-637, from any proceeding in which a person within the fourth degree of relationship to either the judge or the judge’s spouse was previously involved as an attorney, even if they do not appear as counsel of record or withdraw from the case.

Here, the inquiring judge’s father served as a part-time assistant district attorney. There is one degree of relationship between an individual and their parents. Therefore, the judge’s father is within the fourth degree of relationship. Additionally, the judge’s father was involved in several cases while working as an assistant district attorney—from signing discovery to appearing at first appearances and preliminary hearings on behalf of the state. Because the judge’s father is within the prohibited degree of relationship and was previously involved in several cases as an assistant district attorney, the inquiring judge is disqualified from those cases.

## II.

Canon 3D allows for disqualification under the terms of Canon 3C(1)(c) and Canon 3C(1)(d) to be remitted. Canon 3C(1)(d) provides for disqualification based on familial relationships. The Reporter’s

Notes to the 1972 Model Code of Judicial Conduct, which served as the template for Alabama’s Canons of Judicial Ethics, explain:

Because of the hardship to litigants that could be brought about in some jurisdiction by the delay in obtaining another judge to replace a disqualified judge, the Committee decided that under specified circumstances a judge’s disqualification based on an economic interest or a family relationship could be waived. . . . The Committee was aware that some lawyers and litigants would be willing to trust a judge to be impartial in a proceeding even though he has an economic interest that could be affected by the outcome of the proceeding or has a close family relationship with a lawyer or litigant in the proceeding.

E. Wayne Thode, *Reporter’s Notes to Code of Judicial Conduct* 71 (Am. Bar Ass’n 1973) (emphasis added).

Here, the judge’s disqualification is clearly based on a family relationship—i.e., the judge’s father’s previous involvement as an assistant district attorney. Therefore,

the judge's disqualification in these cases is subject to remittal.<sup>3</sup>

Regarding the process of remittal, Canon 3D provides:

A judge disqualified by the terms of Canon 3C(1)(c) or 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

(Emphasis added.) Based on the language of Canon 3D, there are three steps for remitting a judge's disqualification: (1) the judge must disclose the basis for his or her disqualification on the record, (2) the parties and lawyers must independently agree in writing that the judge's relationship or interest is

immaterial or insubstantial, and (3) the agreement between the parties and lawyers must be incorporated into the record.

Therefore, in all cases in which the judge's father previously participated as an assistant district attorney, the judge should disclose the relationship and the fact of his father's prior employment to allow an opportunity to determine whether the judge is disqualified based on the father's prior participation in the case. This disclosure may be written or may be given orally as long as it is made a part of the record of the proceeding. The Commission notes that, because Canon 3D requires the disclosure to be "on the record," the judge may not file a disclosure with the clerk as provided in Canon 3E.

#### REFERENCES

*Acromag-Viking v. Blalock*, 420 So. 2d 60 (Ala. 1982).

Alabama Canons of Judicial Ethics 3C(1), 3C(1)(d)(i), 3D.

Alabama JIC Advisory Opinions 91-414, 91-415, 92-454, 94-516, 95-549, 96-617, 97-637, 97-654, and 03-812.

Alabama Rules of Procedure for the Judicial Inquiry Commission 18.

<sup>3</sup> It is possible that a judge's disqualification may be based on multiple grounds, some of which may not be subject to remittal. For example, a judge who, prior to becoming a judge, practiced law with a relative who is also an attorney would be disqualified from a case involving a client of the judge's relative if the judge's

relative represented the client in the same matter in controversy during their association. In this instance, the judge's disqualification would be based on both Canons 3C(1)(d) and 3C(1)(b). Because a judge's disqualification under Canon 3C(1)(b) is not remittable, the judge must still disqualify from this proceeding.

E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 71 (Am. Bar Ass'n 1973).

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

Illinois Advisory Opinion 05-02.

*In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990).

*Matter of Sheffield*, 465 So. 2d 350 (Ala. 1984).

New York Advisory Opinion 93-116.

*Tumey v. Ohio*, 273 U.S. 510 (1927).

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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 Alabama 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; email: [jic@jic.alabama.gov](mailto:jic@jic.alabama.gov).