

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: AUGUST 7, 2025

ADVISORY OPINION 25-969

DISQUALIFICATION: PRIOR SERVICE AS ATTORNEY FOR DEPARTMENT OF HUMAN RESOURCES

ISSUE

Is a judge disqualified from cases in which motions for protective orders and in camera inspections of DHR records were filed either by the judge while serving as an attorney for DHR or by an attorney under the judge's supervision?

Answer: The judge is disqualified from cases in which she personally filed such motions, but she is not disqualified from cases where such motions were filed by attorneys under her supervision.

May the parties waive the judge's disqualification?

Answer: No. The judge's disqualification is not subject to remittal under Canon 3D.

FACTS

A judge previously served as an assistant attorney general for the Alabama Department of Human Resources ("DHR") and was a supervisor over the legal office in which the judge worked. The judge did not supervise any other divisions within the agency. In that capacity, the judge and attorneys under the judge's supervision routinely filed motions for protective orders and requests for in camera inspections of DHR records that had been subpoenaed by litigants in domestic relations cases—e.g., divorce, child custody, etc. The judge, however, did

not regularly review the motions filed by other attorneys in the legal office. While drafting these motions, the judge reviewed records responsive to the subpoenas to screen for confidential or privileged information. The judge, however, was not involved in any way in the creation of the records.

The judge was recently appointed and has been assigned domestic relations cases. Some of these cases are matters in which the judge, while an assistant attorney general, or attorneys under her supervision filed motions for protective orders and requests for in camera inspections of DHR records. In some of these cases, those motions are still pending.

DISCUSSION

Canon 3C(1) governs the disqualification of judges. That Canon provides, in pertinent part:

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

- (a) He [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding;

(b) He [or she] served as a lawyer in the matter in controversy, or a lawyer with whom he [or she] previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it.

Additionally, Canon 2 provides, “A judge should avoid impropriety and the appearance of impropriety in all his [or her] activities.” The test for disqualification under Canon 3C(1) 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). Accordingly, “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.” Advisory Opinion 02-793 (citing *Ex parte Duncan*, 638 So. 2d 1332, 1334 (Ala. 1994)).

First, a judge is disqualified under the specific instance enumerated in Canon 3C(1)(b) if the judge served as a lawyer in the matter in controversy before the judge. The phrase “matter in controversy” does not apply only

to the specific matter before the judge. Advisory Opinion 13-917. Cases involve the same “matter in controversy” if the same fact, event, course of events, circumstance, situation, or question is relevant to both cases. Advisory Opinion 02-793 (citing *Rushing v. City of Georgiana*, 361 So. 2d 11, 12 (Ala. 1978)).

Here, the cases before the judge are domestic relations cases—e.g., divorces, child custody cases, etc. At times, parties in these cases subpoena relevant records from DHR. DHR, in turn, files motions for in camera inspection of DHR records and for protective orders limiting the disclosure and use of the records only to those records that are “material to the issues before the court” or for other purposes allowed under state law. *See generally Ex parte Esteban*, 361 So. 3d 202, 207–11 (Ala. Civ. App. 2021) (discussing the confidential status of DHR records and whether those records may be subpoenaed). As an assistant attorney general for DHR and supervisor of a DHR legal office, the judge and attorneys under the judge’s supervision regularly filed these motions on behalf of DHR.

Matters involving the custody, care, and support of children are rarely ever completely unrelated. Advisory Opinion 02-793. Certainly, if the judge, while serving as a lawyer for DHR, had participated in any matter—e.g., providing legal advice during an investigation or assisting in the creation of any reports or

records—that would be relevant to the issues in the case at bar, then the judge would be disqualified under Canon 3C(1)(b). The judge, however, did not personally participate in the creation of any of the reports or records being subpoenaed nor in any of the investigations underlying those reports or records.

Furthermore, for a judge to have “served as a lawyer” in a matter, his or her prior involvement must have “been more than simply administrative or pro forma.” Arthur H. Garwin et al., *Annotated Model Code of Judicial Conduct* 329 (3d ed. 2016). The only involvement of DHR in these cases is responding to a subpoena for records. From the judge’s standpoint as a DHR lawyer, this process is routine and “pro forma” to ensure DHR’s compliance with the relevant confidentiality provisions of state law. Once the subpoena is issued, DHR must respond, and the trial court must review the records to determine if there is any material evidence contained in them. *Ex parte Riggs*, 423 So. 2d 202, 203 (Ala. 1982).

Though the act of filing the motions for protective orders and in camera inspections of records is administrative and “pro forma,” the judge is disqualified from conducting in camera inspections of records and ruling on the motions that the judge

personally filed. *See* Canons 2 & 3C(1). However, it is the opinion of the Commission that, for the purpose of Canon 3C(1)(b), the judge has not “served as a lawyer” in the underlying case pending before the judge because the judge’s limited act of filing motions for protective orders and in camera inspections of records was “pro forma.” As such, the judge is not disqualified under Canon 3C(1)(b).

Nevertheless, the judge is disqualified from the underlying cases in which she personally reviewed records responsive to these subpoenas under Canon 3C(1)(a). By reviewing the DHR records responsive to these subpoenas, the judge obtained, or at the very least has created the appearance of having obtained, personal knowledge of disputed evidentiary facts. *New York Advisory Opinion 20-43*. For a judge to be disqualified under Canon 3C(1)(a), the judge’s personal knowledge must be derived from an extrajudicial source—i.e., not learned in the judge’s official capacity. *Advisory Opinions 93-510 & 13-917*. Here, the judge’s knowledge comes from her prior service as an assistant attorney general for DHR.¹ *See Advisory Opinion 13-918*. Certainly, if the DHR records that the judge reviewed are found to be “material” to issues that are currently before the court, then those records may be used

¹ Although the judge’s prior service as a lawyer for DHR, in this instance, is not sufficient to require her disqualification under Canon 3C(1)(b), the judge is still

required to disqualify under Canon 3C(1)(a) if the judge gained personal knowledge while serving in that capacity since it is derived from an extrajudicial source.

as evidence to prove a disputed evidentiary fact. Even if the records are determined to not be “material,” and, thus, not subject to disclosure or use in the underlying case, a reasonable person might still question the judge’s impartiality where the judge had previously reviewed that evidence outside of a judicial proceeding. *See Sheffield*, 465 So. 2d at 357 (“As stated in Canon 1 of the Code of Judicial Ethics, ‘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 a reasonable doubt in favor of recusal.” (Italics in original.))

Additionally, the judge is disqualified from any cases in which she personally participated as a supervisor. While the judge may not have personally signed or filed the motions in each case, the judge still might have obtained personal knowledge of a disputed evidentiary fact in any case where she participated as the supervisor of the DHR legal office. The judge is disqualified even if her involvement was only minimal. New York Advisory Opinion 20-43. On the other hand, the judge is not disqualified from cases where she did not participate in any particular matter in her capacity as supervisor. *Id.*

Lastly, because the judge’s disqualification falls under Canon 3C(1)(a), the judge’s disqualification may not be remitted. Canon 3D

outlines the process for remittal of a judge’s disqualification. That Canon expressly limits the remittal process to disqualification under Canons 3C(1)(c) and 3C(1)(d). Therefore, the judge’s disqualification is not subject to remittal.

This remains true even if the parties and the parties’ attorneys agree to “waive” the judge’s recusal. *See Guthery v. Guthery*, 409 So. 2d 844, 846 (Ala. Civ. App. 1981). While it is possible that the issue of a judge’s recusal may be waived on appeal, *see General Motors Corp. v. Jernigan*, 883 So. 2d 646 (Ala. 2003), the judge’s duty to disqualify is an ethical obligation prescribed by the Canons. *See* Canon 1. Thus, once the judge is aware that he or she is disqualified from a case, the judge must disqualify himself or herself from that case unless that disqualification may be remitted under the procedure outlined in Canon 3D. Because the judge’s disqualification in this instance, is not subject to remittal, the judge must disqualify and the parties may not “waive” the judge’s disqualification.

REFERENCES

Alabama Canons of Judicial Ethics 1, 2, 3C(1), 3C(1)(a), 3C(1)(b), 3D.

Alabama JIC Advisory Opinions 93-510, 02-793, 13-917, 13-918.

Arthur H. Garwin et al., *Annotated Model Code of Judicial Conduct* 329 (3d ed. 2016).

Ex parte Esteban, 361 So. 3d 202
(Ala. Civ. App. 2021).

Ex parte Riggs, 423 So. 2d 202 (Ala.
1982).

General Motors Corp. v. Jernigan,
883 So. 2d 646 (Ala. 2003).

Guthery v. Guthery, 409 So. 2d 844
(Ala. Civ. App. 1981).

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

New York Advisory Opinion 20-43.

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.