

## Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET  
SUITE 201  
MONTGOMERY, ALABAMA 36104

December 29, 1986

The Judicial Inquiry Commission has considered your request for an opinion concerning whether, under Canon 3C(l)(b) of the Alabama Canons of Judicial Ethics a judge is disqualified from sitting in a certain proceeding wherein a party is claiming to be a legal heir to a previously settled estate. Twenty-five years ago when the judge was a young lawyer, he was appointed and acted as guardian ad litem for minor and unknown heirs in the 1961 accounting for the estate in question.

Based on a review of the Alabama Canons of Judicial Ethics and other appropriate authority, it is the opinion of the Commission that the judge is disqualified from sitting in a proceeding involving an estate where he has served as a guardian ad litem in previous proceedings involving the same estate.

Canon 3C(l)(b) sets out the standard on which the Commission must base this opinion. That standard is as follows:

“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:

\* \* \* \*

(b) He served as a lawyer in the matter in controversy . . .”

The determination which must be made in this instance is whether by serving as guardian ad litem as set out above, the judge served as a “lawyer” in the “matter” now “in controversy.” The Supreme Court of Alabama in Rushing v. City of Georgiana, 361 So.2d 11, (1978) has given the phrase “matter in controversy” a rather broad definition. There, the court held that where the same course of events is relevant to different cases, the cases concern the same “matter in controversy.” According to the Court in Rushing this is true even though one case is civil and another criminal.

Further, Black’s Law Dictionary defines guardian ad litem as:

“A special guardian appointed by the Court to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation.”

Therefore, in the instant case if the judge had served as an attorney (or guardian ad litem) for any purpose for any claimants to the estate the same "matter in controversy" exists in both cases. In this instance the same result is reached even if the judge did not serve as guardian ad litem for the purpose of determining heirs, the matter in controversy in all of these actions is the proper distribution of the same estate.

While the result reached in this opinion may seem harsh, the Commission must consider the fact that many courts have recognized that the Canons of Judicial Ethics and similarly worded statutes have broadened the instances of judicial disqualification. The "duty to sit" as recognized by common law has been replaced by a duty to disqualify when the judge's "impartiality might reasonably be questioned." The emphasis has shifted from the "duty to sit" when viewed by the judge to how the public might reasonably perceive the judge's impartiality. In this instance, where the judge served as guardian ad litem for an accounting it would appear that he served as a lawyer in the matter in controversy, one of the instances specifically enumerated in the Canon as an instance in which the judge's impartiality might reasonably be questioned.

Sincerely,

JUDICIAL INQUIRY COMMISSION