

Judicial Inquiry Commission

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MONTGOMERY, ALABAMA 36104

August 21, 1992

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission. You question whether you should disqualify yourself under the following situation.

You are presently presiding over civil litigation involving an allegation of character damages suffered by an attorney who was named as a defendant in a lawsuit which was subsequently decided in his favor. In response to interrogatories, the defendant has named each circuit judge in the judicial circuit and practically every attorney practicing in that circuit as persons who might have knowledge of the damage to the attorney's character. You state you "have absolutely no knowledge relevant to the question asked and do not feel that it would give [you] any difficulty in continuing.

"Disqualification is required, when a judge, to his or her knowledge, may be a material witness in a proceeding." L. Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct 121 (American Judicature Society, 2nd ed. 1992). "A judge is disqualified if he or she has prior personal knowledge of evidentiary facts regarding a proceeding before the judge." Judicial Disqualification at 114.

In Callahan v. State, 557 So.2d 1292, 1307-1308 (Ala.Cr.App.), affirmed, 557 So.2d 1311 (Ala. 1989), the Alabama Court of Criminal Appeals noted:

"In construing a Florida statute providing for the disqualification of a trial judge based on, among other grounds, the fact that the judge is a material witness, the Florida Supreme Court held that a 'material witness' is 'a witness who gives testimony going to some fact affecting the merits of the cause and about which no other witness might testify.' Wingate v. Mach, 117 Fla. 104, 157 So. 421, 422 (1934) (emphasis added). From Wingate, it follows that where the trial judge is not a material witness under this definition, there is not error in the trial court's failure to recuse. Courts in other jurisdictions have adopted this view."

Furthermore, a litigant may not require the disqualification of a judge presiding over the litigation merely by alleging during the course of that litigation that the judge may be a potential witness.

The Commission strongly recommends that you make a specific finding on the record that you have no personal knowledge of the facts involved in this case if that, in fact, be true.

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This advisory opinion has been approved by the Commission. Please contact me if you have any questions regarding this or any other matter.