

## Judicial Inquiry Commission

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The Judicial Inquiry Commission has considered your request for an advisory opinion on certain questions related to probate proceedings in which a party is represented by an attorney who also represents the judge in unrelated litigation.

In response to your first set of questions, the Commission confirms that a judge is disqualified from hearing cases in which a party is represented by an attorney who represents the judge in unrelated litigation and that such disqualification includes cases where the judge has been sued in his or her official capacity in the unrelated litigation. See Advisory Opinions 80-74, 88-337, and 93-484. Ordinarily, such disqualification only applies to the particular attorney who represents the judge and not to other members of that attorney's firm, and such disqualification ceases when the litigation concludes or the representation otherwise ceases. However, since the disqualification arises under the general provision in Canon 3C(1) where disqualification is required because the judge's "impartiality might reasonably be questioned," extraordinary circumstances occasionally exist in which disqualification extends either to other members of the attorney's firm or for a period after representation ceases. See Advisory Opinions 78-53, 88-337, 88-377, 92-443, 92-454, 93-484, 94-516, 96-590, 96-582, and 96-606. The test under Canon 3C(1) is whether "a person of ordinary prudence in the judge's position knowing all of the facts known to the judge [would] find that there is a reasonable basis for questioning the judge's impartiality." In re Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The judge should examine the facts in each case for any unusual circumstances under which his impartiality might still be reasonably questioned either after representation by the attorney ceases or in a case involving another member of his attorney's firm. The Commission would be happy to address any specific factual situation that arises.

With regard to your second inquiry, the Commission has previously held that disqualification was not required when a DHR attorney in a case who had been representing the judge's spouse withdrew from the spouse's case and another DHR attorney was assigned to represent the spouse. Advisory Opinion 92-454. It is likewise the opinion of this Commission that ordinarily disqualification would not be required in a case in which an attorney who represents the judge in an unrelated matter withdraws and allows another attorney in the firm (who does not represent the judge) to handle the case. However, as with the situation discussed in the preceding paragraph of this opinion, the facts of each case should be examined by the judge to determine whether a reasonable basis for questioning the judge's impartiality would continue to exist despite the change in counsel.

Your third inquiry is whether a probate judge may continue a case that is not urgent until unrelated litigation in which he is represented by an attorney for one of the parties is resolved and then resume hearing the case. The Compliance provisions of the Alabama Canons of Judicial Ethics state that “[a] probate judge should dispose promptly of the business of the court...” Compliance with the Canons of Judicial Ethics, Section C, Probate Judge. Further, Canon 3C(1) states that “[a] judge should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned.” It is the opinion of the Commission that a probate judge may not continue a case in which he is disqualified until the disqualification ceases.

Your fourth inquiry is whether the Chief Clerk of the Probate Court may continue to perform the functions authorized by Section 12-13-14, Ala. Code 1975, when the probate judge would be disqualified because a party is represented by an attorney who also represents the judge in unrelated litigation. The powers listed in Section 12-13-14(a) Ala. Code 1975, generally involve ministerial and judicial matters where there is no contest. Under Section 12-13-14(b), such acts by a chief clerk must be performed in the name of the probate judge except when there is a vacancy in that office.

A chief clerk of probate is not directly subject to the Canons of Judicial Ethics, but the question remains whether the probate judge has any ethical responsibility under the Canons to prevent actions by the chief clerk in the judge’s name in cases in which the judge himself is disqualified to act. “It is desirable that a probate judge should ... require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.” Compliance with the Canons of Judicial Ethics, Sec. C, Probate Judge. However, this appears to instruct a probate judge to require his staff and subordinate court officials to disqualify themselves from proceedings in which they would be disqualified, not in cases in which the judge is disqualified. Moreover, some of the powers of a probate judge that are listed in Section 12-13-14 of the Alabama Code are ministerial rather than judicial in character and, in the opinion of this Commission, disqualification does not extend to such powers.

Ordinarily, disqualification that is required under Canon 3C applies even to uncontested judicial proceedings. However, in a totally uncontested judicial proceeding in which a chief clerk of probate is statutorily authorized to act in the judge’s name and where the probate judge will take no actual action in the case, the Commission finds no appearance of impropriety in allowing the chief clerk to act as so authorized in the judge’s name when the judge’s disqualification is due to his being represented in an unrelated case by an attorney for one of the parties.

Your final questions concern remittal of the disqualification caused by representation of the judge by an attorney involved in a case. This disqualification is not subject to remittal because remittal only applies to disqualification under Canon 3C(1)(c) and 3C(1)(d). Advisory Opinions 80-78, 92-443, and 92-454.