

## Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET  
SUITE 201  
MONTGOMERY, ALABAMA 36104

June 27, 1997

The Judicial Inquiry Commission has considered your request for an advisory opinion concerning whether a judge is disqualified in certain proceedings. The first action involves a claim under the Federal Employer Liability Act against a party that the judge represented for twelve years. The second action involves a claim of negligence with regard to a yellow pages ad against a party that the judge represented when in private practice. The judge has represented each party with regard to similar claims, but has not represented either party for two years. The first case is to be tried to the judge alone.

It is the opinion of the Judicial Inquiry Commission that, under the Canons of Judicial Ethics, the judge is disqualified from hearing the first case. Depending on facts that are not stated, the judge may be disqualified in the second case. A recommended time period of two years is identified by the Commission for the duration of any disqualification because of the fact-specific nature of the inquiry.

Canon 3 C(l)(a) requires a judge's disqualification where the judge has a personal bias or prejudice concerning a party. The request does not indicate any basis for a determination of actual bias or prejudice as to either case.

Canon 3C(l)(b) provides that a judge is disqualified where he "served as a lawyer in the matter in controversy." The Alabama Supreme Court has explained that a "matter," as in a matter in controversy, is a "subject (as in a fact, event or course of events, or a circumstance, situation, or question) of interest or relevance." *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (Ala. 1978). The disqualification in Canon 3C(l)(b) is not limited to situations in which the same case in which the judge previously served as attorney is again before the judge. Rather, it includes cases involving or arising from the same fact situation and may include similar or related matters. However, it is the opinion of the Commission that the matters in controversy in issue in this request are not the ones in which the judge previously served as a lawyer. Thus, Canon 3C(l)(b) does not require the judge's disqualification in these cases.

The remaining question is whether the judge is disqualified under Canon 3 C(l) because "his impartiality might reasonably be questioned." A judge is not automatically disqualified from presiding over cases involving a former client that the judge represented in an unrelated matter. The judge will, however, be disqualified in such cases if there is a reasonable question regarding the judge's impartiality. As the Alabama Supreme Court has held:

Recusal is required under Canon 3C(l) when “facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.” *Acromag-Viking v. Blalock*, 420 So.2d 60, 61 (Ala. 1982). See also, *Wallace [v. Wallace]*, 352 So.2d 1376, 1379 (Ala. Civ. App. 1977)]. Specifically, the Canon 3C(l) test 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.” Thode, *The Code of Judicial Conduct - The First Five Years in the Courts*, 1977 Utah L. Rev. 395, 402.

*In re Sheffield*, 465 So.2d 350, 355-56 (Ala. 1984).

In Advisory Opinion 91-431, the Commission identified some of the factors to be considered in determining whether a judge’s impartiality might reasonably be questioned in cases such as this. Those factors include the nature of the prior and present cases, the nature of the prior representation, the frequency and duration of the prior representation, and the amount of time that has passed since the prior representation. In addition to those factors, the judge should consider whether the party the judge previously represented will be defending policies or practices the judge helped to formulate or defend or will be calling witnesses the judge previously worked with, prepared, or called to testify. Given the precise nature of the factual inquiry, no “bright-line” rule of time can be established. However, the Commission recommends two years as an appropriate waiting period prior to sitting in bench cases.

In the opinion of the Commission, the judge is disqualified from the first case. The duration of the judge’s representation and the substantial likelihood that the corporation has dealt with such claims relating to repetitive motion injuries in a consistent way over the past several years indicate that the judge’s impartiality may reasonably be questioned. These factors become even more significant if, as here, the case is to be tried to the judge.

The facts stated do not permit the Commission to answer the second question, but the Commission urges the judge to consider the factors set forth above in ruling on any motion.

Yours very truly,