

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

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The Judicial Inquiry Commission has considered your request for an advisory opinion whether a judge is disqualified to hear a certain Rule 32 Petition For Relief From Conviction Or Sentence. During the course of the defendant's trial, the judge observed belligerent conduct by the defendant which led to an altercation between the defendant and law enforcement personnel in a conference room during a recess in the trial, and a decision to restrain the defendant in shackles during the remainder of the trial for the protection of all present. The defendant later filed civil litigation in federal court, naming as defendants several individuals who were involved in the physical altercation in the conference room. The judge submitted an affidavit in that civil proceeding concerning what he had observed and done, and he was later deposed after receiving a subpoena. The defendant has moved for the judge's recusal in the Rule 32 proceeding, stating as grounds 1) that the judge testified in the civil rights action; 2) that the judge's deposition testimony will be an exhibit in support of the Rule 32 petition; 3) that the judge will be called as a witness at the hearing of the Rule 32 petition; and, 4) that the judge was listed as an "interested person" in the Certificate of Interested Persons filed with the federal appeals court in the civil rights action.

It is the opinion of the Commission that the judge is not disqualified from hearing the Rule 32 petition unless he has developed a personal bias or prejudice in the case, or he actually has been a "material witness" in the controversy or appears likely to be a "material witness" in the proceedings on the petition.

A judge is not disqualified due to being listed on a federal appeals court certificate as an "interested person" by virtue of the fact that he served as the trial judge in a related proceeding. The mere fact that a judge heard a prior related case is not ground for disqualification. Advisory Opinions 83-188, 86-267, 89-350, 89-375, 92-449, and 97-639.

Although a judge usually must disqualify himself if he has personal knowledge of disputed evidentiary facts, disqualification is not required where the judge's familiarity with the case is derived from having tried the case or a related case. Advisory Opinions 89-375, 93-510, and 93-511. "The rule against prior personal knowledge only applies to knowledge garnered from extrajudicial sources. Knowledge about matters in a proceeding that has been obtained by a judge within the proceeding itself or within another legal proceeding is permissible and does not call for disqualification." J. Shaman, S. Lubet, J. Alfani, Judicial Conduct and Ethics, §4.10 at 113 (1995).

The Commission has previously held that a judge is not disqualified to hear a petition collaterally challenging the validity of a conviction in a trial over which the judge presided absent personal bias against the petitioner or the presentation of sufficient facts to place the judge's impartiality in question. Advisory Opinions 89-385 and 97-636. The mere fact that the judge witnessed events during the course of the trial which form a petitioner's grounds for relief cannot be sufficient to raise a reasonable question as to the judge's impartiality, nor may a litigant's action in filing a separate action in which the judge will be called as a witness cause disqualification of a judge.

In this regard, the Commission notes that a litigant's actions during the course of a judicial proceeding do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result. Advisory Opinions 90-391, 92-452, and 95-574. Even the filing of a lawsuit or complaint with this Commission against a judge is usually not, in and of itself, enough to cause disqualification absent actual bias or prejudice on the judge's part. Advisory Opinions 77-29, 83-176, 86-273, 87-292, 88-326, 89-383, 90-403, and 92-447. In Advisory Opinion 77-29, the Commission held that a judge was not required to recuse himself from a case when the plaintiff had filed a civil rights action against him charging him with racial discrimination in his handling of the case where the judge stated that he remained impartial.

Disqualification is required under Canon 3C(1)(b) and 3C(1)(d)(iii) if the judge has been a material witness concerning the controversy or is to his knowledge likely to be a material witness in the proceeding. However, a judge is not a material witness unless 1) he will be giving testimony on a fact affecting the merits of the cause, and 2) there is no other witness who might testify to such fact. Advisory Opinion 92-453. Thus, unless the judge is the only witness to a fact affecting the merits of the cause, he is not disqualified under Canon 3C(1)(b) or Canon 3C(1)(d)(iii).

Yours truly,

JUDICIAL INQUIRY COMMISSION