

# JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 99-726

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DISQUALIFICATION WHEN RELATIVE OR MEMBER OF FIRM IS CITY/COUNTY ATTORNEY OR PROSECUTOR

involving the city for which a member of the firm is the prosecuting attorney.

## ISSUE

I. Is a judge disqualified to hear civil cases in which a city or county is a party due to his son or a member of his son's firm being retained as the city or county attorney if the city or county is represented by other counsel in the proceeding? **Answer:** The mere fact of retention as city/county attorney does not cause disqualification, but the existence of certain additional circumstances would cause disqualification.

II. Is a judge disqualified to hear municipal misdemeanor appeals due to his son or a member of his son's firm being the city/county attorney? **Answer:** No, so long as the judge's son has no participation in the case.

## FACTS

The judge's son is retained as the city attorney for a municipality within the judge's jurisdiction. Another member of the firm is retained as the county attorney, and also is retained as the city attorney for three cities in the county. A third member of the firm is retained as the city attorney for a fourth city in the county, and this attorney also is the prosecuting attorney for one of the cities that the second member of the firm represents. The judge does not participate in any case in which any member or associate of this firm appears as attorney of record. The judge also does not participate in municipal appeal cases

## DISCUSSION

The first issue posed is similar to one that this Commission has addressed on several prior occasions: whether a judge is disqualified when a party is the employer of a close relative of the judge. In such a situation, the Commission has held that the judge is not disqualified unless (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding, as a result of his relative's employment (Canon 3C(1) (a)); (b) the judge's relative is an officer, director, or trustee of a party (Canon 3C(1)(d)(i)); (c) the judge's relative is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding (*e.g.*, the outcome might affect the relative's income or employment status) (Canons 3C(1)(c) and 3C(1)(d)(ii)); (d) the judge's relative is to the judge's knowledge likely to be a material witness in the proceeding (Canon 3C(1)(d)(iii)); or, (e) the judge's relative has some other involvement in the matter in controversy that requires disqualification through causing the judge's impartiality to be reasonably questionable (Canon 3C(1)). Advisory Opinions 81-103, 86-286, 88-322, 88-345, 97-632, and 99-721. It is the opinion of the Commission that these same circumstances govern when a judge is disqualified to hear a civil case in which a city/county is a party where the judge's son or a member of his son's firm is retained as the city/county attorney but is not handling the case.

In Advisory Opinion 93-491, the Commission stated that the fact that an attorney-relative has given legal advice to a party is not a basis for the judge's disqualification where the relative does not participate in the case at issue, but where the judge knows that the relative has given legal advice related to the matters in controversy, a reasonable basis to question the judge's impartiality exists and the judge is disqualified.

The Commission notes that where a lawyer in a case is affiliated with a law firm with which a lawyer-relative of the judge is affiliated, a judge is not disqualified unless the lawyer-relative is known by the judge to have an interest which could be substantially affected by the outcome of the proceeding (Canon 3C(1)(d)(ii)), the judge has a personal bias concerning a party as a result of the representation (Canon 3C(1)(a)), or additional factors exist under which the judge's impartiality might reasonably be questioned (Canon 3C(1)). Advisory Opinions 88-338, 90-411, 91-426, 93-491, 95-565, 96-628, 97-652, and 99-724.

Disqualification under Canons 3C(1)(c) and (d) are subject to remittal under the procedure specified in Canon 3D. Other causes of disqualification are not subject to remittal. Advisory Opinions 93-491, 95-565, 97-652, and 99-724.

With regard to the second issue presented, the Commission notes that it has previously consistently held that a judge is not disqualified from sitting in criminal cases due to the employment of a relative as a prosecutor for the jurisdiction involved where the relative does not have any participation in the case in question. Advisory Opinions

80-90, 80-101, 83-171, and 86-277. In Advisory Opinion 87-305, the municipal judge's spouse was an assistant city attorney and the city attorney's office prosecuted municipal misdemeanor cases. The Commission held that the judge was only disqualified to sit in proceedings in which his spouse had participated.

Accordingly, it is the opinion of the Commission that the judge is not disqualified to hear municipal misdemeanor appeals cases from cities where his son or another member of his son's firm is retained as the city attorney where his son has no participation in the prosecution of the case.

#### REFERENCES

Alabama Advisory Opinions 80-90, 80-101, 81-103, 83-171, 86-277, 86-286, 87-305, 88-322, 88-338, 88-345, 90-411, 91-426, 93-491, 93-500, 95-565, 96-628, 97-632, 97-652, 97-653, 99-721, and 99-724.

Alabama Canons of Judicial Ethics, Canons 3C(1), 3C(1)(a), 3C(1)(c), 3C(1)(d)(i), 3C(1)(d)(ii), and 3C(1)(d)(iii).

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This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; e-mail: [jic@alalinc.net](mailto:jic@alalinc.net).