

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 99-730

DISQUALIFICATION WHEN A RELATIVE OF THE JUDGE IS A PROBATION OFFICER

ISSUE

Is a judge disqualified to hear motions to set aside a suspended sentence when the individual making or otherwise initiating the motion is a probation officer related to the judge within the fourth degree of consanguinity or affinity? **Answer:** Yes, but this disqualification is subject to remittal.

FACTS

The county in which the judge sits has a community corrections program that provides, among other things, county probation services for misdemeanor offenders. The judge's sister is the director of the county's work release program. At the present time, she is the only probation officer employed in the program. If the sentence of a defendant convicted of a misdemeanor is suspended conditioned on compliance with certain orders of the court and the defendant fails to comply with those orders, the work release director, as a probation officer, prepares a deficiency report and moves the court to set aside the suspended sentence. The motion could be made by the district attorney, but the basis of the motion would be the deficiency report prepared by the judge's sister. Most frequently, the deficiency reports issued in such cases list failure to pay as ordered, failure to complete some required program, failure to report, or commission of some other offense as the grounds to set aside the suspended sentence. The deficiency noted may not always require the judge's sister to be a material witness.

DISCUSSION

Disqualification is governed by Canon 3C(1), which provides the following, in pertinent part:

A judge should disqualify himself in a proceeding in which his ... impartiality might reasonably be questioned, including but not limited to instances where:

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is known to the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) Is to the judge's knowledge likely to be a material witness in the proceeding.

It is the opinion of the Commission that a judge is disqualified to hear any motion to set aside a suspended sentence that is based on a deficiency report prepared by the judge's sister. If the judge's sister were to be a material witness in the hearing on such a motion, the judge's disqualification would be required by the express terms of Canon 3C(1)(d)(iii). However, even in those cases in which the judge's sister is not to be a material witness, under the facts presented, it is the

sister who would be initiating the proceeding and preparing the associated deficiency report. She is acting as the agent of the State, the other party to the proceeding, in recommending revocation of probation. In addition, as the director of the probation program, she has an interest in the proceeding that could be substantially affected by its outcome.

The Commission also notes that recusal is required under Canon 3C(1) 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). The recusal test stated in Canon 3C(1) may sometimes bar trial by judges who have no actual bias. *Matter of Sheffield*, 465 So.2d 350, 356 (Ala. 1984). It is the opinion of the Commission that a criminal defendant faced with the potential loss of liberty by a recommendation from the judge’s sister might reasonably question the judge’s impartiality even though the judge was not biased in fact.

Since the judge’s disqualification is based on the provisions in Canon 3C(1)(d), it is subject to remittal under Canon 3D. The procedure for remittal under Canon 3D requires a written

agreement signed by all the parties and lawyers in the case that the judge’s relationship is immaterial, and this agreement must be made independently of the judge’s participation.

REFERENCES

Acromag-Viking v. Blalock, 420 So.2d 60, 61 (Ala. 1982).

Alabama Canons of Judicial Ethics, Canons 3C(1)(d) and 3D.

Matter of Sheffield, 465 So.2d 350, 356 (Ala. 1984).

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.