

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: AUGUST 27, 1999

ADVISORY OPINION 99-735

DISQUALIFICATION WHEN A RELATIVE OF THE JUDGE IS A POLICE OFFICER INVOLVED IN THE CASE

ISSUE

Is a judge disqualified to hear petitions in juvenile court filed by the judge's son as the complaining police officer or other cases in which his son is called to testify as a witness? **Answer:** A judge is disqualified to hear petitions filed by his son as the complaining officer and other cases in which his son is to the judge's knowledge likely to be a material witness, but disqualification in these instances is subject to remittal.

FACTS

The judge is a circuit judge in his jurisdiction's family court division. The judge's son is an officer with the local police department. The judge expects that cases will come before him in which his son filed the petition in juvenile court, as the complaining officer. The judge's son may or may not be called as a witness to testify in such cases. The judge's son may also be subpoenaed to testify by the State or the defense in criminal and domestic relations cases assigned to the judge.

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 case initiated by a petition filed by his son as the complaining officer. If the judge's son were to be a material witness in the case, 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 son is not to be a material witness, it is the son who would be initiating the proceeding, acting as the agent of the State, the other party to the proceeding.

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 parties involved in juvenile proceedings might reasonably question the judge's impartiality when the complaining officer is the judge's son even though the judge is not biased in fact.

In other cases in which the judge's son is subpoenaed as a witness, disqualification depends on whether the judge's son is a "material witness." The Commission has previously held that a person 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 Opinions 92-453 and 98-695. Thus, if the judge's son is the only witness to a fact affecting the merits of the cause, the judge is disqualified under Canon 3C(1)(d)(iii) from hearing a case in which his son is called as a witness.

Since the judge's disqualification in either situation presented 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).

Advisory Opinions 92-453 and 98-695.

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