

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 00-758

DISQUALIFICATION WHEN THE JUDGE HAS PREVIOUSLY FOUND AN ATTORNEY IN THE CASE GUILTY OF CONTEMPT

ISSUE

Is a judge disqualified to hear cases in which a party is represented by an attorney whom the judge previously found guilty of criminal contempt in connection with violation of one of the judge's court orders? **Answer:** No, not unless the judge has an actual bias or prejudice concerning a party as a result, or the particular circumstances create a reasonable question as to the judge's impartiality.

FACTS

A judge recently cited an attorney for contempt for violation of one of his court orders. The attorney was found guilty of criminal contempt and was sentenced to five days in jail, split to serve two days with three days suspended. After serving the incarceration, the attorney appealed. The attorney has now requested the judge to recuse himself in all of the attorney's cases during the pendency of the appeal, and has suggested that the judge should recuse himself from all future cases in which the attorney appears. The judge states that he has no animosity toward the attorney.

DISCUSSION

The Commission has not previously been asked to address disqualification in the context of a judge having found an attorney guilty of contempt. However, it has considered the issue of disqualification in the contexts of both hostility toward an attorney

and reports to the State Bar of attorney misconduct.

Although the judge in the present case states that he has no animosity toward the attorney in question, the following portion of the discussion in Advisory Opinion 99-728 is pertinent:

[H]ostility toward a party's attorney must be both personal and extreme before it is disqualifying. This is particularly so when the judge's behavior toward an attorney does not grow out of the particular case the judge is hearing at that time. Antipathy towards a lawyer will not necessarily be considered . . . as extending to the lawyer's client, and where the antipathy is against the lawyer but not against the client personally, recusal will not be required.

J. Shaman, S. Lubet, J. Alfani, *Judicial Conduct and Ethics* §4.08, at 109-110 (2d ed. 1995) (footnotes omitted). "[A] judge will be disqualified where he or she shows hostility to a lawyer that is of such a degree that it adversely affects the judge's state of mind toward the lawyer's client." *Id.*, at 110. Disqualification is usually considered on a case-by-case basis; blanket disqualification due to alleged bias toward counsel is very unusual. *Id.*, at 111.

In Advisory Opinion 85-243, a party was represented by an attorney against whom the judge had both filed a Bar complaint and

reported questionable conduct to the district attorney. The judge stated that he felt no personal conflict with the attorney.

The Commission decided that it was for the judge in the first instance to determine whether proper grounds for recusal existed under Canon 3C. Although personal bias and prejudice concerning a party are specifically addressed in Canon 3C(1)(a), the Commission cautioned the judge to be particularly mindful of Canon 3C(1). Canon 3C(1) provides that a judge is disqualified whenever “his impartiality might reasonably be questioned.”

In Advisory Opinion 89-363, the judge was a former prosecutor who had prosecuted the attorney to mistrial. The Commission held that the mere fact of such prosecution did not cause disqualification, but that the judge should carefully consider the facts and circumstances known to him by virtue of that prosecution and disqualify himself if, upon such examination, he found facts which would cause his impartiality to be questioned by a reasonable man.

In Advisory Opinion 97-656, the Commission held that a judge’s filing of a complaint with the State Bar against an attorney is not generally disqualifying. The Commission analogized the issue to the disqualification question that may arise in a contempt proceeding:

A judge is not automatically disqualified from presiding over contempt of court proceedings by virtue of the fact that the allegedly contemptuous behavior occurred in the presence of the judge or was directed at the judge. Even where the contemptuous conduct consists of strong, personal criticism of the judge, disqualification is not necessary. At

some point, though, a line will be crossed where disqualification from contempt proceedings is mandated where a judge has become biased or prejudiced. Thus, where a verbal attack upon a judge becomes particularly offensive, or where a judge becomes enraged at offensive conduct, recusal is necessary.

Advisory Opinion 97-565 (quoting *Judicial Conduct and Ethics*, §4.09 at 111).

It is the opinion of the Commission that the mere fact that a judge has found an attorney guilty of contempt does not disqualify the judge from hearing cases in which the attorney represents a party. The judge states that he feels no animosity toward the attorney in question. Thus, unless additional facts or circumstances create a reasonable question as to the judge’s impartiality, the judge is not disqualified to hear cases in which the attorney appears.

REFERENCES

Alabama Advisory Opinions 85-243, 89-363, 97-656, and 99-728.

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

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.