

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: FEBRUARY 2, 2001

ADVISORY OPINION 01-771

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### DISQUALIFICATION DUE TO PERSONAL KNOWLEDGE OF DISPUTED EVIDENTIARY FACTS

#### ISSUES

Is a judge disqualified to hear an action when it is alleged that it is likely that he has personal knowledge of disputed evidentiary facts due to prior service as city attorney for the defendant city? **Answer:** No, not if the judge has no actual knowledge of such facts.

#### FACTS

A circuit judge has been assigned to hear an action between two electric service providers that was filed in 1993. The plaintiff (a rural electric cooperative) alleges that the defendant (a city in the county in which the judge sits) is serving customers who should be served by the plaintiff, in violation of certain state statutes that were enacted in 1984 and 1985. The validity and constitutionality of these statutes have previously been challenged in other actions in which the plaintiff, the defendant, and virtually every other retail electric service provider in Alabama were parties. One such action was filed in 1986, consolidated with other lawsuits, and finally decided by the Alabama Supreme Court in July 1999.

The judge served as the city attorney for the defendant city from 1981 through 1988; he assumed the circuit court bench in January 1989. While he was city attorney, an outside law firm in Montgomery represented the city in all legal challenges to the statutes at issue. All of these matters were handled on the city's behalf by the Montgomery firm, and the judge

has no recollection of doing any work or of giving any legal advice regarding any challenges to these statutes. The judge also does not recall receiving any confidential information regarding the city's position or representation in these matters.

The plaintiff has filed a motion requesting the judge to recuse himself on the ground that, because of the judge's service as city attorney prior to 1989, he is "likely to have personal knowledge of disputed evidentiary facts concerning this proceeding." The minutes of city council meetings the judge attended as city attorney reflect that he was present when the city council discussed and voted to approve certain contracts to purchase electricity from a municipal electric authority, but these contracts are not mentioned in the pleadings in the current case and are not, to the judge's knowledge, at issue in the case. In addition, one of the meeting minutes reflects that the judge was present when the city council adopted a resolution in 1983 to politically oppose proposed legislation to adopt the 1984 Act.

#### DISCUSSION

Canon 3C(1)(a) of the Alabama Canons of Judicial Ethics requires a judge to recuse himself when he has "personal knowledge of disputed evidentiary facts concerning the proceeding."

The Commission has previously concluded that a litigant may not require the disqualification of a judge under Canon 3C(1)(b) merely by alleging during the course of the litigation that the judge may be a potential witness. Advisory Opinions 92-453

and 94-519. The Commission is similarly of the opinion that Canon 3C(1)(a) cannot cause the disqualification of a judge upon a mere allegation that the judge may have personal knowledge of disputed evidentiary facts. *See also, Ex parte Melof*, 553 So.2d 554, 556-558 (Ala. 1989).

No basis for disqualification is apparent in the present case if the judge is satisfied upon careful consideration of the matter that he has no personal knowledge of disputed evidentiary facts.

#### REFERENCES

Alabama Advisory Opinions 92-453, and 94-519.

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

*Ex parte Melof*, 553 So.2d 554 (Ala. 1989).

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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).