

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MARCH 28, 2002

ADVISORY OPINION 02-793

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## DISQUALIFICATION DUE TO PRIOR SERVICE AS AN ATTORNEY FOR THE DEPARTMENT OF HUMAN RESOURCES

### ISSUES

I. Is a judge who previously served as an attorney for the Department of Human Resources (DHR) disqualified to hear DHR cases pertaining to children and parents with whom he had no prior involvement as counsel for DHR? **Answer:** No, absent personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts.

II. Is a judge forever disqualified from hearing DHR cases involving a child or family with respect to whom he has previously filed petitions on behalf of DHR? **Answer:** Yes, unless the proceeding clearly does not involve the same matter in controversy.

### FACTS

A district judge served, prior to his elevation to the bench, as an approved attorney for the DHR. In this capacity, he filed petitions on behalf of DHR involving the areas of dependency, abuse and neglect.

### DISCUSSION

Canon 3C(1) provides, in pertinent part, as follows:

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

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it; . . .

### Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by the agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Canon 3C(1) requires disqualification of a judge whenever his impartiality might reasonably be questioned. The test under this canon is: "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984). The question under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another

person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

Canon 3C(1)(a) expressly provides that a judge's impartiality is reasonably questionable in any case in which the judge has an actual personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. This clearly would include cases where the judge has an actual bias or personal knowledge of disputed evidentiary facts arising from prior service as an attorney for DHR.

Canon 3C(1)(b) addresses prior service as an attorney in the matter by the judge, or by a lawyer with whom the judge practiced law during such association. A judge who formerly served as an assistant district attorney is not disqualified to hear criminal cases under Canon 3C(1)(b) so long as the judge did not participate in the case or have any knowledge of it as an assistant district attorney. Advisory Opinions 86-259, 92-460 and 94-522. In Advisory Opinion 92-460, the judge had also previously served as a contract attorney for DHR. The Commission applied the same principles, finding that the judge was not disqualified to hear separate matters but was disqualified to hear proceedings related to a prior matter in which the judge had served as legal counsel.

In cases where a judge has previously acted as a lawyer in the "matter in controversy," disqualification is required by the express terms of Canon 3C(1)(b). The Supreme Court of Alabama has given the phrase "matter in controversy" a rather broad definition. In *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (1978), the Court held that cases involve the same "matter controversy" where the same fact, event, course of events,

circumstance, situation or question is relevant to both cases.

It is the opinion of the Commission that a judge is disqualified to hear any DHR case involving a child or family with respect to whom the judge has previously filed a petition on behalf of DHR unless the current proceeding clearly does not involve the same matter in controversy. Cases such as this are rarely completely unrelated in every respect. In order to avoid a reasonable question as to his impartiality, a judge should not hear a DHR case if any fact, event, circumstance, situation or question in the case is relevant to a case he prosecuted for DHR before becoming a judge.

#### REFERENCES

- Advisory Opinions 86-259, 92-460, 94-522.
- Alabama Canons of Judicial Ethics, Canons 3C(1), 3C(1)(a), 3C(1)(b), Commentary to Canon 3C(1)(b).
- Ex parte Duncan*, 638 So.2d 1332 (Ala. 1994).
- In re Sheffield*, 465 So.2d 350 (Ala. 1984).
- Rushing v. City of Georgiana*, 361 So.2d 11 (1978).

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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, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: [jic@alalinc.net](mailto:jic@alalinc.net).