

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-802

APPOINTING PROVIDER OF COURT-ORDERED SERVICE ; DISQUALIFICATION DUE TO APPEARANCE OF PROVIDER OF COURT-ORDERED SERVICE AS PROSECUTING WITNESS

ISSUES

I. May an individual who is an enforcement agent with the ABC Board be appointed as the sole provider of a court-ordered co-parenting program in a particular circuit? **Answer:** Yes, so long as, if there are any other competing providers of the service, there is an objective reason for the selection of his program.

II. If the individual may be so appointed, would the judges in the circuit be disqualified to hear criminal cases in which that individual is a material prosecuting witness? **Answer:** No.

FACTS

It has been proposed that the circuit judges in a particular circuit require all litigant parents in divorce and post-divorce modification proceedings to enroll in and complete a co-parenting strategy program prior to entry of a final decree. A fee of \$50.00 would be assessed to each participant for their enrollment.

The individual who operates the program under consideration is also an enforcement agent with the ABC Board. In that capacity, he frequently investigates, arrests and/or otherwise causes criminal charges to be brought against individuals alleged to have

violated criminal laws concerning controlled substances, alcohol and tobacco. By doing so, he is called upon to testify in trials and during other evidentiary hearings incidental to the criminal prosecutions.

The presiding circuit judge inquires whether it is ethically permissible to appoint this individual as the sole provider of the proposed court-ordered service and, if so, whether there would be an ethical conflict in the judges in the circuit hearing cases in which said individual is a material prosecuting witness for the State.

DISCUSSION

The two issues presented are interrelated, and involve consideration of several provisions in the Alabama Canons of Judicial Ethics.

Canon 3B(4) requires judges to exercise the power of appointment only on the basis of merit, avoiding both nepotism and favoritism. Canon 2 requires a judge to “avoid impropriety and the appearance of impropriety in all his activities.” Canon 2A provides, in pertinent part, that a judge “should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” In addition, a judge should not “convey or permit others to convey the impression that they are in a special position to influence him.” Canon 2C.

In Advisory Opinion 94-532, the Commission informed a judge that the Alabama Canons of Judicial Ethics were not violated by the mere fact that the judge ordered a defendant to receive education or treatment at a private drivers’ education facility so long as the judge

did not have a financial interest in the facility or receive any personal benefit from the referral.

In Advisory Opinion 93-468, the Commission responded to an inquiry involving the selection between two local rehabilitative facilities in sentencing spouse abusers. The Commission concluded that, to avoid any appearance of impropriety, the judge should make reasonable efforts to insure that neither facility was favored over the other unless there was an objective reason for sentencing a defendant to one particular facility, such as a difference in the quality or cost of services, or in the facilities' willingness to cooperate with the court.

In Advisory Opinion 94-538, the judge's bailiff taught a State-approved court referral program DUI school. The Commission advised the judge that he should not sentence any defendant to a DUI school taught by his bailiff. In the Commission's opinion, such an arrangement was "fraught with the appearance of impropriety" and did "not promote public confidence in the integrity and impartiality of the judiciary." Canons 1 and 2. The Commission also concluded that such sentences would be problematic under the Canon 2C proscription on conveying or permitting others to convey the impression they are in a special position to influence the judge.

In analyzing a situation involving appointing a particular individual as a general conservator, the Commission in Advisory Opinion 01-770 considered whether the proposed appointment would be improper because it would result in disqualification of the judge from hearing an excessive number

of cases. The Commission had previously counseled against a judge hiring the mother-in-law of a local attorney as the judge's bailiff where, under the facts presented, such employment would cause more than occasional disqualification of the judge. Advisory Opinion 98-707.

Canon 3C(1) provides generally that a judge should disqualify himself in any proceeding in which his "impartiality might reasonably be questioned." Several specific instances in which disqualification is required are listed in subsections of this canon. The first subsection includes cases in which the judge has a personal bias or prejudice concerning a party. Canon 3C(1)(a). The Commission assumes the judges have no bias or prejudice concerning a party related to the situation presented.

Since none of the other subsections of Canon 3C(1) potentially apply, the question is whether the judges' impartiality could reasonably be questioned in criminal cases where a material prosecuting witness was an individual who had been appointed to operate a co-parenting program that was required in certain domestic cases. The test under Canon 3C(1) 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).

The Commission has previously concluded that an inquiring judge was not disqualified to hear a case due to the fact that the clerk of the circuit court would be a material witness. The Commission wrote that the professional relationship between a circuit judge and a circuit clerk is not such as would cause a judge's impartiality to reasonably be questioned. Advisory Opinion 94-519. In the opinion of the Commission, the impartiality of the judges in a circuit would not be drawn into reasonable question in a case merely because a material prosecuting witness operated a co-parenting program in which participation was court ordered in certain domestic cases.

The individual operating the proposed program is not an employee of the judge, nor is he in a position of close confidence with the judge. The fact that he appears with some regularity before the circuit court as a prosecuting witness in criminal cases does not create the kind of problem with improper appearances that would exist if he was a confidential employee of the judge.

The Commission has not been informed as to whether there are any other comparable programs available to provide the proposed service. If there are any such programs, the ABC agent's program should not be selected as the *sole* provider of the service unless there is an objective reason for utilizing his program rather than another program. Canons 1, 2, and 3B(4); Advisory Opinion 93-468.

REFERENCES

Advisory Opinions 93-468, 94-519, 94-532, 94-538, 98-707, and 01-770.

Alabama Canons of Judicial Ethics, Canons 1, 2, 2A, 2C, 3B(4), 3C(1), and 3C(1)(a).

Ex parte Duncan, 638 So.2d 1332 (Ala. 1994).

In re Sheffield, 465 So.2d 350 (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, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.