

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-805

DISQUALIFICATION DUE TO PRIOR SERVICE AS A LAWYER IN THE MATTER IN CONTROVERSY

ISSUES

Is a judge disqualified to hear a murder case when he previously represented the victim's mother in an action to obtain custody of the victim and defendant's child after the victim's death? **Answer:** Yes.

FACTS

A circuit judge recently was assigned a criminal case in which the defendant is accused of murder in the death of his girlfriend. At the time of the victim's death, the judge was still a practicing attorney and, a few days after the victim's death, her mother retained him to bring an action to obtain custody of the child of the victim and the defendant. During the initial conference with the victim's mother, she described in detail what she knew of her daughter's death; the information she provided directly relates to the question of the defendant's guilt. A few days after he obtained temporary custody of the minor child for his client, the judge was appointed to the bench and he withdrew from the case.

DISCUSSION

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 the canon, including the following:

(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, . . .

Some general principles applicable to the question presented are stated in J. Shaman, S. Lubet, and J. Alfani, *Judicial Conduct and Ethics*, §4.16, pages 140, 141 and 142 (3rd ed. 2000):

Judges must disqualify themselves from cases in which they were personally involved before they became . . . judges. One court articulated the test for disqualification in this instance as "whether there was a prior knowledge of the facts [in a case before the judge] or a prior interest in an issue arising out of them."

Several courts and commissions have endeavored to define the extent of involvement as an attorney that is necessary to require later disqualification as a judge. . . .

A judge may . . . be disqualified from sitting in on cases which involve prior clients of his or her law practice . . . Obviously, a judge would be disqualified from presiding over a case involving the same matter or arising from the same fact situation in which he or she previously served as an attorney. The main concern is possible judicial prejudice because of

the judge's previous representation of the party and the judge's knowledge of the facts regarding the case . . .

The appearance of partiality can also be created when a judge presides over a case which involves a party whom the judge previously represented in a similar or related matter. In fact, even if the current case involves a different controversy and different parties than the former case, recusal may be required if "the same course of events is relevant to both cases."

The case cited for this final proposition is *Rushing v. City of Georgiana*, a decision by the Alabama Supreme Court. In *Rushing*, the Court gave the phrase "matter in controversy" a rather broad definition, holding that cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation or question is relevant to both cases. *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (1978).

Thus, the disqualification in Canon 3C(1)(b) is not limited to situations in which the same case in which the judge previously served as an attorney is before the judge. Rather, it includes cases involving or arising from the same fact situation and may include similar or related matters.

It appears to the Commission that the former custody proceeding and the current criminal case involve the same "matter in controversy" within the meaning of Canon 3C(1)(b). Thus, it is the opinion of the Commission that the judge is disqualified under Canon 3C(1)(b).

REFERENCES

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

J. Shaman, S. Lubet, and J. Alfini, *Judicial Conduct and Ethics*, §4.16 (3rd ed. 2000).

Rushing v. City of Georgiana, 361 So.2d 11 (1978).

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.