

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 04-832

DISQUALIFICATION WHEN CASE INVOLVES CONDUCT OF AND TESTIMONY BY ATTORNEYS WHO REGULARLY APPEAR BEFORE THE JUDGE

ISSUE

Is a judge disqualified to hear a matter in which he will have to determine the propriety of conduct of an attorney who regularly appears before him, based, in part, on assessment of testimony of attorneys who appear before him and have cases pending in his court? **Answer:** Under the facts presented, the Commission is of the opinion that the judge should recuse himself from the case.

FACTS

A local attorney who regularly practices in a circuit served as an arbitrator in a case. After the arbitration award was confirmed, a post-judgment motion to vacate was filed by a party defendant who argued that the award was the result of partiality, bias, and corruption on the part of the arbitrator. The trial judge denied this motion without a hearing. On appeal, the Alabama Supreme Court decided that the trial court erred in denying the motion without a hearing, finding that the motion was supported by evidence that, taken in its entirety, raised a threshold inference of possible bias based on the arbitrator's failure to disclose any interest or bias that might affect his judgment, including relationships with the plaintiffs' attorney. The plaintiffs had not submitted any evidence to contradict the assertions of arbitrator bias, but they had moved to strike evidence submitted in support of the motion on the ground of hearsay.

Because it is the province of the trial court to assess the admissibility and weight of the defendant's evidence, as well as of any rebuttal evidence, the Supreme Court did not comment on the merits of the defendant's allegations. It remanded the case to the trial court to conduct a hearing to determine

whether adequate, admissible evidence exists to grant the defendant's motion to set aside the judgment of confirmation. For guidance of the trial court, the Supreme Court discussed the legal principles that should govern its consideration of the facts pertaining to the defendant's assertion that the arbitrator's award was flawed by bias and partiality. It concluded that the "reasonable impression of partiality" standard should be applied. Under this standard, the trial court is to consider whether the defendant makes a showing, through admissible evidence that the court finds to be credible, that gives rise to an impression of bias that is direct, definite, and capable of demonstration, as distinct from a "mere appearance" of bias that is remote, uncertain, and speculative.

The determination that is to be made in the case is whether the local attorney who was the arbitrator in the case was actually biased or partial, or whether there is a "reasonable appearance of partiality." This will require direct testimony of that attorney and the plaintiffs' attorney, both of whom practice in the circuit and have numerous cases pending before the court. The defendant has filed a motion to recuse which is currently under advisement.

The defendant alleges a "secret deal" involving the arbitrator, the plaintiffs' attorney, and the attorney for another defendant who settled with the plaintiffs. These allegations have been publicized through the media. The attorney who represented the second defendant is now a district judge.

It has been the practice in the circuit for judges to recuse any time a member of the circuit bar is a party to a pending law suit.

DISCUSSION

Canon 3C(1) provides generally that a judge should disqualify himself in any proceeding in which his "impartiality might reasonably

be questioned.” 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 the mere fact that a party to a proceeding is an attorney who regularly practices before the judge does not cause disqualification of the judge. Advisory Opinions 82-136 and 98-701. Both of these opinions recognized, however, that the existence of special additional circumstances in a particular case might cause disqualification. For example, under Canon 3C(1)(a), the judge would be disqualified if he or she had a personal bias or prejudice toward or against the attorney. Advisory Opinion 82-136. The judge also could be disqualified based upon a special social or other extraordinary relationship with the attorney/party, or due to the nature of the particular case or its potential impact on future working relations among court officials. Advisory Opinion 98-701.

The Commission finds the principles stated in Advisory Opinions 82-136 and 98-701 applicable to the question at hand. If the inquiring judge does not feel that he can judge the matter impartially, he is disqualified under Canon 3C(1)(a). If he does feel that he can judge the matter impartially, the issue is whether special factors exist in this particular case that create a reasonable question as to the judge’s impartiality.

A ruling on a recusal motion is a legal matter for the judge, not the Commission, to make, and whether a judge is disqualified depends on the factual circumstances involved. How-

ever, upon careful consideration of both the enumerated facts and other facts provided to the Commission but not listed, and given the practice in the circuit of judges recusing when a member of the local bar is a litigant, the Commission is of the opinion that the totality of the facts does create a reasonable question as to the judge’s impartiality and, therefore, that the judge should recuse himself from the case even if he is not disqualified due to bias under Canon 3C(1)(a).

REFERENCES

Advisory Opinions 82-136 and 98-701.

Alabama Canons of Judicial Ethics, Canons 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.