

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 05-855

DISQUALIFICATION DUE TO PREVIOUS PROSECUTION OF THE DEFENDANT; COMPLAINTS BY THE DEFENDANT AGAINST THE JUDGE; FORMER EMPLOYMENT AS ATTORNEY FOR PLAINTIFF CITY; FORMER MEMBERSHIP IN FIRM REPRESENTING PLAINTIFF; AND/OR ALLEGED INVOLVEMENT OF JUDGE AND DEFENDANT IN EEOC AND FBI INVESTIGATION

ISSUE

Is a judge disqualified to hear a case because: (a) the judge prosecuted the defendant in an unrelated case many years ago; (b) the defendant alleges he has filed complaints against the judge; (c) the judge was employed by the plaintiff city many years ago; (d) the judge was, many years ago, a member of the law firm that represents the plaintiff city; and/or (e) the defendant alleges that he and the judge were involved in an EEOC and FBI investigation several years ago? **Answer:** No.

FACTS

A circuit judge has pending before him an action by a municipality for injunctive relief against an individual for conducting a business without having purchased a privilege license. After a hearing in February, the judge entered an order in March granting the relief sought by the city. Thereafter, the judge entered another order appointing a special master to prepare an accounting and determine the amount of license tax owed by the defendant. At the end of May, the defendant filed a motion for recusal in which he contends that the judge should recuse because (a) the judge prosecuted him when he was the city prosecutor; (b) he has filed three complaints against the judge with the Judicial Inquiry Commission and the Ethics Commission alleging the judge is biased against him; (c) the judge was formerly employed by the city; (d) the judge was formerly a law partner with

the firm that now represents the city in the pending case; and (e) he and the judge were "involved in an investigation conducted by the EEOC and the FBI in 1999."

The previous prosecution of the defendant by the judge was in 1984; it involved issues completely different from the issues in the present case and was resolved in favor of the defendant. The judge does not know how many complaints the defendant has filed against him; he has no personal or professional bias against the defendant. The judge has not been employed by the city since he became a circuit judge in January 1987, and he never handled any matter involving the defendant related to the issues in the present case while employed by the city. He left the law firm that is prosecuting the pending case in December 1986 and has not been connected with that firm in any way since then; the present case was not a matter in controversy when the judge was with the firm. The judge has no knowledge of any investigation by the EEOC or FBI involving him and the defendant.

DISCUSSION

Under Canon 3C(1), recusal is required when "facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." *Acromag-Viking v. Blalock*, 420 So.2d 60, 61 (Ala. 1982). Specifically, 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?" *Matter of Sheffield*, 465 So.2d 350, 356 (Ala. 1984).

The mere fact that a judge has prosecuted a party in a previous proceeding does not disqualify the judge from sitting in an unrelated later proceeding. Disqualification would exist, however, if the current proceeding in any way involved the matters

or facts previously prosecuted. Advisory Opinions 89-364 and 91-460. The prosecution of the defendant twenty years ago is unrelated to the case now pending before the judge. In the Commission's opinion, that prosecution does not create a reasonable question as to the judge's impartiality.

The Commission has long held that a litigant's actions toward or statements about a judge during the course of a judicial proceeding do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result. *See, e.g.*, Advisory Opinions 90-391 and 98-686. To hold otherwise would allow a litigant to control judicial proceedings by making complaints whenever the litigant becomes dissatisfied with the course of the proceedings, which would cause chaos in the conduct of those proceedings and in the administration of justice. *Id.* In Advisory Opinion 87-292, the Commission concluded that the mere fact that a litigant claims to have previously filed a complaint with the Commission does not cause the judge's disqualification. In Advisory Opinion 92-447, the Commission stated that it is "well-settled that a judge is not disqualified from sitting in a proceeding merely because the judge has been made aware that one of the parties has filed a complaint against the judge with the Judicial Inquiry Commission. . . . However, a judge must disqualify himself if the judge determines that the filing of the complaint has generated a personal bias or prejudice in the judge against the party." *See also*, Advisory Opinions 97-655 and 98-686. The Commission has also recognized that special circumstances might exist such that the filing of the particular complaint actually causes the judge's impartiality to be reasonably questionable. *See* Advisory Opinion 98-686 and opinions cited therein.

The judge in the present case has not been affected by any complaints that the defendant may have filed against him, and there are no special circumstances related to a complaint

that would cause the judge's impartiality to be reasonably questionable. Thus, it is the opinion of the Commission that the judge is not disqualified due to complaints that the defendant may have filed against him.

The Commission has previously concluded that a judge is disqualified from hearing cases in which former clients in unrelated matters appear for a period of two years from the time the representation ceases; after that time, a number of factors should be considered in determining whether the judge's impartiality continues to be reasonably questionable. Those factors include the nature of the prior and present cases; the nature of the prior representation; the frequency and duration of, and the time that has passed since, the prior representation. Advisory Opinion 99-740. The Commission is of the opinion that the inquiring judge is not disqualified on account of having been employed as the prosecutor for the plaintiff city almost twenty years ago.

Under Canon 3C(1)(b), a judge is disqualified to hear cases where a lawyer with whom the judge previously practiced law served during such association as a lawyer in the matter in controversy. In cases in which a judge's former law partner is representing a party, the Commission has held that a judge should disqualify himself from any such proceeding if the former law partner represented that party in the matter in question during the period of the partnership, but that the judge is not disqualified if the former law partner did not represent the party in the matter in controversy while he and the judge were partners. Advisory Opinion 95-546.

The judge states that he has no knowledge of the investigation in 1999 that the defendant alleges. The recusal motion does not provide an information about it. On the basis of the facts presented, the Commission finds no reasonable basis to question the judge's impartiality in connection with the asserted investigation.

The Commission has also considered the combination of circumstances alleged. It is of the opinion that the totality of the circumstances presented do not create a reasonable question as to the judge's impartiality and, thus, that those circumstances do not cause disqualification of the judge.

REFERENCES

Acromag-Viking v. Blalock, 420 So.2d 60 (Ala. 1982).

Advisory Opinions 87-292, 89-364, 90-391, 91-460, 92-447, 95-546, 97-655, 98-686, and 99-740.

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

Matter of 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.