

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 05-856

DISQUALIFICATION DUE TO REPRESENTATION OF A WITNESS/VICTIM

ISSUE

Is a judge disqualified to hear a capital murder case because he briefly represented a predicate crime victim/witness in the case, standing in for his law partner, who was the individual's attorney? **Answer:** No, the judge's impartiality is not reasonably questionable given the very limited representation provided.

FACTS

A circuit judge has been assigned to hear a number of capital murder cases that were previously assigned to a judge who has retired. The indictments in each case include several counts of capital murder and two counts of kidnaping; some of the capital murder counts charge intentional killing during the course of a kidnaping.

Last year, before elevation to the bench, the judge briefly represented the individual named in the indictments as the person alleged to have been kidnaped (hereinafter, Mr. A). Mr. A will be a witness in the cases now assigned to the judge. At the time, the judge's then law partner was Mr. A's attorney in unrelated cases against Mr. A.

The judge's first involvement with Mr. A was in April of 2004, when the judge stood in for his partner at a pretrial hearing for Mr. A. Mr. A was late and a warrant was issued for his arrest, but Mr. A then appeared and the writ was recalled. A deputy district attorney told the judge that Mr. A was a witness in the capital murder case; he did not disclose any additional information. A trial date was obtained for Mr. A. The deputy district attorney informed the judge that the State was deciding whether to proceed in one of the cases pending against Mr. A. He indicated there was a possibility that one of the wit-

nesses was reluctant to pursue the matter, and that they did not know if they would pursue that case. The judge obtained Mr. A's address and a relative's cell phone number in case they were needed by his law partner.

The judge's next involvement with Mr. A was in May 2004, when the District Attorney's office called his law office. The judge believes the call was for his law partner, but it was given to him. The caller indicated the district attorney's office wanted Mr. A to testify in a case; that case also was unrelated to the pending capital murder cases. The judge tried to contact Mr. A but was unable to get in touch with him. He then called the assistant district attorney back and told him he could not get in touch with Mr. A but would try to find out additional information about him and call back. The judge then told his law partner about the telephone conversations and did not take any further action.

The judge has made oral disclosure of the foregoing facts in all but one of the cases at issue. He has not had an opportunity to make an oral disclosure in the remaining case; he has been considering making a written disclosure in that case.

The judge spoke briefly with Mr. A on the occasion of the pretrial in April 2004. The judge did not find out anything from Mr. A about either the cases which were pending against him or his knowledge of the capital murder cases. The judge believes he met with Mr. A no more than 30 minutes. The judge's partner had told him that Mr. A was a witness in a capital murder case and that he had fled from the scene.

The judge does not feel his brief representation of Mr. A would in any way influence any decisions he might make in the capital cases assigned to him.

The cases against Mr. A are still pending and the judge's former law partner is still repre-

senting Mr. A in those cases. The former law partner has not served as a lawyer in the matters in controversy pending before the judge.

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 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 general standard in Canon 3C(1) is followed by a list of subsections stating circumstances in which it is presumed that a reasonable question as to the judge’s impartiality exists. Canon 3C(1)(b) states, in pertinent part, that a judge’s impartiality might be reasonably questioned when the judge “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.” The judge did not represent Mr. A in the matter in controversy, and the judge’s law partner did not represent Mr. A in the matter in controversy during their association.

Since none of the other subsections potentially apply, the remaining issue is whether the judge is disqualified under the general provision in Canon 3C(1).

The Commission has not addressed disqualification in the context of prior representation

of a witness. Since the witness in the cases at issue is also an alleged victim, the Commission believes it appropriate to apply the principles it has utilized when a judge has represented a party in an unrelated matter.

Before Advisory Opinion 99-740, the Commission held that a judge was not automatically disqualified from presiding over cases involving former clients whom the judge represented in unrelated matters, but that a judge might be prohibited from presiding over a case involving a former client depending on the particular facts in the case. Advisory Opinions 91-431, 93-481, and 97-658. In Advisory Opinion 99-740, the Commission 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. Noting that a two-year period is observed in the federal courts under an interpretation of the provision in the Code of Conduct for United States Judges, the Commission found this period of time appropriate for determining that there is a reasonable question as to a judge’s impartiality under Canon 3C(1). In unusual circumstances, the Commission recognized, a judge might remain disqualified after the two-year period, if the nature or extent of the representation was such that a reasonable question as to the judge’s impartiality remained.

The Commission continues to believe that the two-year period is an appropriate measure for assessing whether a reasonable question exists as to a judge’s impartiality due to prior representation of a party in an unrelated manner. However, the Commission finds the present case illustrates that, just as there are unusual circumstances in which a reasonable question may remain after a two year period, there are sometimes unusual circumstances in which there is no reasonable question as to the judge’s impartiality before that period expires.

The representation provided by the judge was

not only very brief, it was of a very limited nature and character. On one occasion, the judge only was filling in for his law partner at a pretrial, and he did not even talk with the client about the facts of the case. On the other occasion, he merely unsuccessfully tried to reach the individual by phone. See Advisory Opinion 91-431 (listing factors to consider when a prior client appears).

The Commission finds no reasonable question as to the judge's impartiality under the facts presented. Thus, the Commission is of the opinion that the judge is not disqualified in the capital murder cases he has been assigned to hear.

REFERENCES

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

Advisory Opinion 91-431, 93-481, 97-658, 99-740.

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

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

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.