

Judicial Inquiry Commission

800 SOUTH MCDONOUGH STREET
SUITE 201
MONTGOMERY, ALABAMA 36104

September 26, 1990

The Judicial Inquiry Commission has considered your request for an opinion concerning whether under the Alabama Canons of Judicial Ethics a judge is disqualified from sitting in a certain proceeding. Under the facts presented a lawsuit has been filed challenging the validity and, alternatively, the application of legislatively mandated expense allowances for certain non-state officials. The plaintiffs pray alternatively that these expense allowances be declared unconstitutional as being an increase in salary during a term of office in violation of Amendment 92 of the Constitution of Alabama, 1901; or that the state comptroller be directed not to honor vouchered expense requests claiming per diem or actual travel expense requests from certain state officials who receive a legislatively mandated lump-sum expense allowance. The circuit judge assigned the case notes that he and the fellow judges of his circuit receive a legislatively mandated expense allowance which may or may not be similar to those challenged. In an abundance of caution, the judge asks whether he and other judges of his circuit are disqualified from hearing this matter.

It is the opinion of the Commission that the circuit judges in question are disqualified from sitting to decide the described lawsuit. This opinion is based on Canon 3C of the Alabama Canons of Judicial Ethics, prior opinions of the Commission and other legal authorities.

Under the Alabama Canons of Judicial Ethics disqualification is governed primarily by Canon 3C. That Canon provides in pertinent part as follows:

- (1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where: ...
 - (c) He knows that he ... has a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the outcome of the proceeding;
 - (d) (ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

Further, remittal of disqualification is governed by Canon 3D.

- D. A judge disqualified by the terms of Canon 3C(l)(c) or Canon 3C(l)(d) may, instead of withdrawing from the proceeding, disclose in the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

The Commission has previously found that judicial disqualification must be determined on a case-by-case basis and that a judge must himself examine the facts before him to initially determine the existence of disqualifying facts. See e.g., advisory opinion 83-176. Further, in applying these Canons, the Supreme Court of Alabama has found that the test to be used in making this determination is whether "a person of ordinary prudence in the judge's position knowing all of the facts known to the judge finds that there is a reasonable basis for questioning the judge's impartiality." In re Sheffield, 465 So.2d 350 (Ala. 1984). In that same decision, the court recognized that the "person of ordinary prudence" could be members of the public, parties or counsel. We note further that in an Alabama case the United States Supreme Court has held that a party's right to due process under the Fourteenth Amendment of the United States Constitution is violated where a judge who has a direct, personal, substantial and pecuniary interest in a decision sits in issuing that decision. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 89 L.Ed. 2d 823, 106 S.Ct 1580 (1985). In that case, the judge was not a party to the proceeding before the court but was a party to a proceeding in another court. The judge's interest as raised in the second proceeding stood to be substantially affected by the matter pending before the judge. The Canons of Judicial Ethics, which are designed to promote confidence in the judicial integrity and independence, must be construed in light of this decision.

The matter in controversy here initially appears to involve two issues. The first issue is whether certain lump-sum expense allowances constitute an increase in salary in violation of Amendment 92. The expense allowances in question are provided for certain non-judicial state officers. This part of the controversy could not affect the judge's expense allowance since judicial officers through Amendment 328 are exempt from the provisions of Amendment 92 .

The second and more problematic issue before the court appears to be whether the named non-judicial officers, who receive certain specific statutory lump-sum expense allowances, may also receive the state allowance for per diem and actual expenses provided by general statute for all state employees and public officials. It is this issue which is of most concern to the trial judge since he and his fellow judges of the circuit

also receive a statutory lumpsum expense allowance as well as the general state per diem and actual expenses. The Commission has examined the statutes involved. The Commission finds that the statutes applicable to the judges are so similar to the statutes in controversy that a man of ordinary prudence would have reason to question the judge's impartiality, thus, disqualification occurs. This disqualification may, however, be remitted under the provisions of Canon 3D.

Sincerely,

JUDICIAL INQUIRY COMMISSION