

1980 S.C. Op. Atty. Gen. 132 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-82, 1980 WL 81964

Office of the Attorney General

State of South Carolina

Opinion No. 80-82

July 30, 1980

***1 SUBJECT: Judges**

An associate probate judge should not hear a case from which the regular probate judge is disqualified.

TO: Raymond C. Eubanks, Jr.

Judge

Probate Court

QUESTION:

If a probate judge is disqualified from a hearing pursuant to [S. C. Code Ann. Section 14-23-1080 \(1976\)](#), may the associate judge hear the case?

AUTHORITIES:

ABA Comm. on Professional Ethics, Formal Opinions, No. 33 (1931); ABA Comm. on Professional Ethics, Informal Opinions, No. 674 (1963); ABA Comm. on Professional Ethics, Informal Opinions, No. 1158 (1970); ABA Comm. on Professional Ethics, Informal Opinions, No. 1372 (1976); [American Can Company v. Citrus Feed Co.](#), 436 F.2d 1125 (5th Cir., 1971); [Cinema 5 Ltd. v. Cinerama, Inc.](#), 528 F.2d 1384 (2nd Cir., 1976); Disciplinary Rule 2-101(A), Rule 32 of the South Carolina Supreme Court Rules; Canon 2A, Code of Judicial Conduct, Rule 33 of the South Carolina Supreme Court Rules; [East Rome Town Co. v. Cothran](#), 81 Ga. 359, 8 S.E. 737 (1889); [Ledford v. Hubbard](#), 33 S.W.2d 345 (Ky., 1931); [Morissette v. Musgrave](#), 108 P.2d 123 (Okla., 1940); [People v. McDermott](#), 40 N.Y.S.2d 456 (1943); South Carolina Code of Laws (1976) [Sections 14-23-1030, 14-23-1080](#); [State ex rel. Ambler v. Hocker](#), 34 Fla. 25, 15 So. 587 (??).

DISCUSSION:

[Section 14-23-1080 of the South Carolina Code of Laws \(1976\)](#) provides that where a probate judge or associate judge is biased or prejudiced in favor of or against any interested party, the Chief Justice of the Supreme Court shall appoint a special judge to sit in the matter. By virtue of [Section 14-23-1080](#), a probate judge shall be disqualified if he has been counsel for one of the parties involved. It appears that, under these circumstances, a probate judge's associate judge, serving 'at his pleasure' as provided by [Section 14-23-1030 of the South Carolina Code of Laws \(1976\)](#), would also be disqualified.

The Code of Judicial Conduct provides as follows:

A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2A, Code of Judicial Conduct, Rule 33 of the Supreme Court Rules of South Carolina. The Code further provides that: A judge should disqualify himself in a proceeding in which his impartiality might be questioned, including . . . instances where . . . he has a personal bias or prejudice . . .

Canon 3C(1)(a), Code of Judicial Conduct, Rule 33 of the Supreme Court Rules of South Carolina. To allow an associate judge who was even possibly biased or prejudiced about a particular case to sit in the matter would be in violation of the Code.

There is no way to objectively determine the impartiality of an associate judge where the regular judge has been disqualified due to his former representation of a particular party. Therefore, the public confidence would not be promoted if an associate judge were to hear such a matter.

*2 While there are no official opinions of the Committee on Ethics and Professional Responsibility as to the disqualification of associate probate judges, the Committee has, in two informal opinions, suggested that a judge should avoid any appearance of impropriety. See ABA Comm. on Professional Ethics, Informal Opinions, No. 1158 (1970) and ABA Comm. on Professional Ethics, Informal Opinions, No. 1372 (1976). In addition, the Courts have held that a judge should not hear a matter where there is any doubt as to his impartiality. See [Ledford v. Hubbard](#), 33 S.W.2d 345 (Ky., 1931); [Morissette v. Musgrave](#), 108 P.2d 123 (Okla., 1940); [People v. McDermott](#), 40 N.Y.S.2d 456 (1943).

A situation where an attorney is disqualified from participation in a case is analogous to the case at hand. The Disciplinary Rules state that:

If a lawyer is required to decline employment or to withdraw from employment . . . no partner or associate of his or his firm may accept or continue such employment.

DR2-101(a), Rule 32 of the South Carolina Supreme Court Rules. The Courts and the Committee have dealt with disqualification of law partners in the same manner. See [American Can Company v. Citrus Feed Co.](#), 436 F.2d 1125 (5th Cir., 1971); [Cinema 5, Ltd. v. Cinerama, Inc.](#), 528 F.2d 1384 (2nd Cir., 1976); ABA Comm. on Professional Ethics, Formal Opinions, No. 33 (1931); ABA Comm. on Professional Ethics, Informal Opinions, No. 674 (1963).

Furthermore, the Courts have held that 'disqualification extends to a judge whose partners were of counsel in the case, although he personally was not connected with it.' 46 Am.Jur.2d [Judges](#) Section 189 (1969). See also [East Rome Town Co. v. Cothran](#), 81 Ga. 359, 8 S.E. 737 (1889); [State ex rel. Ambler v. Hocker](#), 34 Fla. 25, 15 So. 581 (1894). In either case, the relationship of a probate judge and his associate is analogous to that of law partners, and where a former law partner is disqualified due to association, so should an associate judge be disqualified.

CONCLUSION:

It is the attitude of the Courts and the Committee on Ethics and Professional Responsibility that the judiciary should avoid any appearance of impropriety, and it appears that the underlying rationale of the Code of Judicial Conduct would be frustrated if an associate judge were to hear a case where the regular probate judge was disqualified.

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