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Judicial Inquiry Commission

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June 1, 1976

The following Advisory opinion by this Commission is addressed to you in response to the questions posed by you in a letter dated February 19, 1976, to Honorable Joseph M. Hocklander, Presiding Judge of your Circuit. Judge Hocklander, on March 25, 1976, referred the matter to this Commission and the following are Advisory Opinions issued pursuant to Rule 17 of the Rules of Procedure of Judicial Inquiry Commission adopted by the Supreme Court of Alabama on April 9, 1974.

INTRODUCTION

The Canons of Judicial Ethics, which were adopted by the Supreme Court of Alabama pursuant to authority vested in it by the Judicial Article of the Constitution of the State of Alabama, became effective on February 1, 1976, and provided specifically that any person to whom the same became applicable should arrange his affairs as soon as reasonably possible to comply with them. We have addressed ourselves to the several questions contained in your request and we shall reply to them in the order in which they were presented.

You have stated that you have made full disclosure as required by Canon 6C, and these opinions will not, therefore, be addressed to the requirements of that Canon.

ADVISORY OPINIONS

76-3

1. Question: Does a judge violate the Canons by refusing to disqualify himself if he is a member of an unincorporated association commonly known as an "investment club" to which he contributes \$100.00 per month with five other persons, two of whom are attorneys practicing before his Court, for the purpose of investing for profit in securities and regularly buying and selling the same if:

- a. One of the attorneys or a member of his firm has a case before the judge; or
- b. One of the members of the club is a party to litigation to be tried by the judge;
or

c. If one of the corporations in which the club owns stock is a party to litigation to be tried by the judge?

OPINION

The answer to the above inquiry is covered by Canon 2 and Canon 3C (1) .

Canon 2 provides: “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities”.

We do not feel that membership in an investment club is impropriety; and we gather that you are concerned here with the appearance of impropriety based upon what we assume that you consider a close relationship between members of a small group (six persons), two of whom practice regularly before your Court, and the remaining three possible litigants in your Court. We do not, therefore, feel that you would be required to disqualify yourself in “a” and “b”, above unless your relationship creates a bias or prejudice in favor of a fellow member. See Canon 3C.

Canon 3 provides: “A Judge Should Perform the Duties of His Office Impartially and Diligently”.

The applicable section of this Canon which governs the answer to your inquiry under "c", above, is Section C(l), which provides:

“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, individually or as a fiduciary has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (emphasis added)”.

We shall not address ourselves to those instances in which a judge's “disqualification is required by law”; but we call your attention to Title 13, Section 6, Code of Alabama and the cases which have considered the mandates of that statute. We do feel that a judge's failure to disqualify himself when required to do so by law would not only be a violation of the Canons, but would also constitute “misconduct in office” under ARTICLE VI, Section 6.17, Constitution of Alabama.

Section C(3) of Canon 3 defines “financial interest” as used in that section as:

“* * * * ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of

a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund”.

A literal interpretation of the Canon would seem to dictate that if the investment club of which you are a member and in the management of which (we assume) you actively participate is the owner of securities in a party to litigation before you, that you should disqualify yourself.

In this instance we feel that you are governed by the provisions of Canon 3D. It is, of course, true that “D” does not apply unless you are disqualified under 3C(l)(c) or 3C(l)(d); and although this Commission feels that the literal interpretation is somewhat strained in the factual situation presented by your inquiry, we feel that the inclusion of the words “however small” in Section 3C dictates the conclusion that you would be disqualified from serving in such an instance.

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2. Question: Does the ownership of a policy of life insurance disqualify a judge should the company (either mutual or stock) be a party to litigation before the judge:

OPINION

It is our opinion that your ownership of a life insurance policy in an entity which is a party to litigation before you does not dictate that you should disqualify yourself unless “the outcome of the proceeding could substantially affect the value” of your interest. See Canon 3C(3)(iii).

If you should conclude that the outcome would substantially affect the value of your interest, then you should either (1) recuse yourself, or (2) proceed under Canon 3D.

The ultimate decision is, in the main, left to the discretion of the judge. Your failure to proceed as noted above could result in a breach of the Canons if you knew, or should have known, that your interest could be substantially affected.

Again we invite your attention to Title 13, Section 6, Code of Alabama.

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3. Question: Should a judge disqualify or recuse himself if he is indebted to a bank with which he regularly transacts business in the form of loans evidenced by promissory notes and the bank is a party to a proceeding before the judge:

OPINION

It is our opinion that this fact alone would not dictate that you disqualify or recuse yourself unless you were the owner of stock (“a financial interest”) in the bank, or unless your relationship created some personal bias or prejudice in favor of the bank; however, we do feel that even though there is no technical disqualification that you should, in order to avoid any appearance of impropriety, reveal the fact of a relationship with the bank to counsel of record (your question presupposes borrowing from time to time with the same bank) and if either counsel should interpose objection to you serving as judge then you should recuse yourself. See Canon 3C. (We do not infer that you should reveal the details of the relationship).

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4. Question: Does the ownership by a judge of stock in a closely-held corporation (ten stockholders or less) disqualify him from serving in litigation involving any of the stockholders? Is the answer different if the corporation is treated as a partnership for taxes due the United States of America (Subchapter S)?

OPINION

Canon 3C dictates that a judge should disqualify himself if “he has a personal bias or prejudice concerning a party”. If your relationship with the others is such that it created some personal bias or prejudice in favor of a fellow stockholder then you should disqualify yourself, or proceed under the provisions of Canon 3D.

The tax treatment elected by the stockholders for Federal income tax purposes is immaterial to this inquiry. Moreover, the number of stockholders is also immaterial if the same bias or prejudice should exist.

JUDICIAL INQUIRY COMMISSION OF ALABAMA