JUDICIAL INQUIRY COMMISSION

DATE ISSUED: December 11, 2009 ADVISORY OPINION 09-903

DISQUALIFICATION: JUDGE'S RELATIONSHIP WITH BANK-LITIGANT

ISSUE

Is a judge automatically disqualified from a case where the plaintiff is a local bank and the judge has a multifaceted relationship with that bank?

FACTS

A party has "suggested" that the judge recuse from a lawsuit filed by a locally owned and operated bank in a rural community because of the following relationships the judge has with that bank: he has a long-standing checking account; he is signer on a secured $50,000 promissory note; he has an IRA through the bank, and it is managed by a bank employee; his nephew is a loan officer (but has no involvement in the current litigation); and the bank's chief executive officer is married to a former high school classmate and current acquaintance. Although the exact cause of action is not known to the Commission, the lawsuit appears to include the allegation of the bank's reliance on fraudulent documents in extending credit to a business-defendant. The judge, as factfinder, will be required to assess the credibility of the witnesses. The party suggesting the judge's recusal asserts that the witnesses could possibly include loan-department employees who work closely with the judge's nephew or the nephew's supervisors who may have influence in any promotion or increase in salary. While the judge has properly notified the parties of the circumstances of his relationship with the bank-plaintiff and is confident that he can be fair and impartial, he also acknowledges that these actions do not necessarily dispel any appearance of impropriety.[1]

DISCUSSION

Foremost, the Commission notes that the decision whether to recuse rests with the judge and cannot be decided for that judge by an advisory body. Advisory Opinion 09-902. The burden is solely on the judge, Advisory Opinion 84-221, and the Commission cannot invade that province of the trial court. *See also* Rule 18, Rules of Procedure of the Judicial Inquiry Commission. Thus, the Commission must restrict its advisory opinion to the inquiring judge to general advice regarding the application of the canons.

Under Canon 3C(1)(d)(ii), a judge should disqualify if his bank account, loan account, investment account, or bank/customer relationship could be substantially affected by the outcome of the case. Advisory Opinions 95-555; 89-369; 89-367; 86-249. In determining whether there is an interest that could be "substantially affected," the judge should consider any benefit or loss he might receive, whether that benefit or loss is such that a reasonable person might question the judge's impartiality as a result, and the remoteness of the interest and its extent or degree. Advisory Opinions 95-564; 95-554. What must be evaluated is not the size of the judge's interest but the extent to which that interest could be affected. United States

[1] The Commission assumes, from the judge's inquiry, that the judge does not have a personal bias for or against the bank or personal knowledge of a disputed evidentiary fact.

Advisory Opinion No. 101 (ownership of debt interest) The parties may remit such disqualification, if they follow the procedure in Canon 3D.

The Commission has repeatedly advised that the sole fact of the judge's customer or borrower relationship with the bank does not disqualify him. *See, e.g.*, Advisory Opinions 95-555 (checking and savings accounts); 89-367 (bank account); 86-276 (mortgage and unsecured small loans); 86-260 (checking and/or savings account); 86-249 (checking account); 76-5 (periodic promissory notes). *See also* Advisory Opinions 89-370 (daughter's money-market fund); 89-369 (wife's small unsecured loan). However, the Commission has further included the following advice: "While disqualification is not technically required in the situations involving the mere existence of a bank/customer relationship or a debtor/creditor relationship, the judge should advise the parties of the relationship, and to avoid even the appearance of impropriety, recuse himself if requested to do so." Advisory Opinions 89-370 and -371. *See also* Advisory Opinions 95-571; 95-558 and -559 (citing the general disqualification of Canon 3C(1) and noting that recusal upon request was particularly appropriate given the seven different debtor, customer, and other relationships involved); 86-276; 76-5.

Pursuant to the inquiring judge's opinion request, the Commission has reevaluated this language calling for a judge to recuse upon a party's request even though not technically required to do so and implying that the mere existence of a customer or borrower relationship with a bank presents a reasonable question of the judge's impartiality under Canon 3C(1). Upon reconsideration, the Commission advises the judge to follow the appropriate test.

> The test [under the general disqualification provision in Canon 3C(1)] that remains applicable at all times, the answer to which always depends upon the "totality of circumstances" of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

Ex parte City of Dothan Pers. Bd., 831 So.2d 1, 11 (Ala. 2002). The Commission no longer considers valid the inference of a reasonable question of the judge's impartiality from the mere existence of a standard checking, loan, or investment account with a bank. Instead, the judge is advised to assess the totality of the circumstances of the relationship juxtaposed against the particulars of the case pending before him.

Exemplifying this approach is the following discussion by the Indiana Commission of Judicial Qualifications, in Advisory Opinion 3-93, addressing the issue of disqualification where a bank has filed collections cases and the judge has a mortgage or commercial loan from that bank:

> The Commission members believe disqualification is not required in this case, assuming the judge's loan is ordinary in every respect and the merits of the particular case do not implicate the judge's business with the bank in any significant way.

> The fairness of the outcome of a typical collections case is not reasonably suspect simply where the judge has an ordinary loan from the bank bringing the action. As with the disqualification rule involving economic interests, a de minimis interest does not force disqualification. See, Canon 3E(1)(c) and Terminology Section, 1993 Code of Judicial Conduct. Given the frequency with which these cases are filed, the relative simplicity of the issues, the insignificant impact of a given case on the bank's operations or on the judge's loan arrangements, impartiality cannot fairly be questioned based upon the fact of the judge's loan.
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> Added elements could, however, invoke the judge's duty to consider disqualification. If the judge were presently appealing to the bank for a loan or an extension, for example, questions about impartiality might arise. Certainly, if the case involved a judicial determination of an issue which would have an significant impact on the judge's finances, the judge's impartiality could reasonably be questioned and, additionally, disqualification would be specifically required pursuant to Canon 3E(1)(c), on the basis of economic interest.

Compare McQueen v. First Nat. Bank of Wetumpka, 26 Ala. App. 348, 160 So. 723 (1935) (judge who has outstanding loan with the party-bank did not have to recuse in a lawsuit seeking $200 from the bank); *Ausherman v. Bank of America Corp.*, 352 F.3d 896, 899 n.2 (4th Cir. 2003) (judge whose mortgage on his principal residence is held by party-bank is not disqualified; the litigation could in no way affect a routine debt like a mortgage, which is fully secured by appraised value in excess of the debt); *People v. Jones*, 564 N.E.2d 944, 946 (Ill. App. Ct. 1990) (judge's status as bank depositor and borrower did not disqualify him from a criminal prosecution for forgery of a check drawn on that bank, given the highly tenuous connection between the passing of a small, forged check and its effect on a highly regulated, insured banking institution); *Allum v. Valley Bank of Nevada*, 915 P.2d 895, 897 (Nev. 1996) (any interest that the justice had in the appellee-bank based on his personal indebtedness and his business's indebtedness to that bank was too attenuated to constitute a disqualifying, direct interest in the outcome of the appeals); United States Advisory Opinion No. 107 (a judge need not recuse from proceedings involving banks and other lenders to his spouse's business where the relationship with the spouse's business involved traditional bank accounts and loans and no special circumstances were present, such as unusually favorable terms); United States Advisory Opinion No. 94 (maintaining a bank account or owing money to a bank does not require a judge to recuse where the bank is a party, absent special circumstances such as unusually favorable terms or default); New York Advisory Opinion 04-50 (the mere fact of the judge's debtor relationship with the bank is not disqualifying, "given the ubiquity and routine nature of home mortgage and automobile loans, and the fact that such transactions are rarely predicated on a special or personal relationship between the borrower and the institutional lender") *with* Advisory Opinion 02-803 (where a litigant was the only broker/advisor in the investment firm's local office where the judge had his investments and retirement accounts and the only person

with whom the judge dealt, the judge was disqualified because the relationship was "one of considerable trust, not unlike that with an attorney or a physician").

In regard to the judge's familial relationship with a bank employee, the mere fact of the bank's employment of the judge's nephew is insufficient to create a reasonable question as to the judge's impartiality. *See generally* Advisory Opinion 04-841. Rather, disqualification does not result from that relationship unless (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding, as a result of his nephew's employment (Canon 3C(1)(a)); (b) the judge's nephew is an officer, director, or trustee of the bank (Canon 3C(1)(d)(i)); (c) the judge's nephew is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding, e.g., the outcome might affect salary or employment status (Canon 3C(1)(d)(ii)); (d) the judge's nephew is to the judge's knowledge likely to be a material witness in the proceeding (Canon 3C(1)(d)(iii)); or, (e) the judge's nephew has some other personal involvement in the matter in controversy that casts the judge's impartiality into reasonable question (Canon 3C(1)). Advisory Opinions 04-841; 99-726; 95-560; 89-366. All but situations (a) and (e) are remittable by the parties' compliance with the remittal procedure found in Canon 3D.

The judge's past and present acquaintance with the spouse of the bank's chief executive officer is insignificant. Such represents a judge's ordinary relationships with his fellow citizens, not a disqualifying one. *See* Advisory Opinion 01-782.

In conclusion, the Commission has commented on each circumstance presented by the inquiring judge and the factors that would require recusal in the context of each respective circumstance. However, if the inquiring judge does not find any one circumstance to require recusal under those guiding principles, he should survey the totality of the facts of his multifaceted relationship with the plaintiff-bank and the circumstances of the case before him – not each relational facet in isolation – to determine whether he should recuse.

REFERENCES

Advisory Opinions 09-902; 04-841; 02-803; 01-782; 99-726; 95-571; 95-564; 95-560; 95-559; 95-558; 95-555; 95-554; 89-371; 89-370; 89-369; 89-367; 89-366; 86-276; 86-260; 86-249; 84-221; 76-5.

Alabama Canons of Judicial Ethics, Canons 3C(1); 3C(1)(a); 3C(1)(d)(i); 3C(1)(d)(ii); 3C(1)(d)(iii); 3D.

Rules of Procedure of the Judicial Inquiry Commission, Rule 18.

Ex parte City of Dothan Pers. Bd., 831 So.2d 1, 11 (Ala. 2002).

McQueen v. First Nat. Bank of Wetumpka, 26 Ala. App. 348, 160 So. 723 (1935).

Ausherman v. Bank of America Corp., 352 F.3d 896, 899 n.2 (4th Cir. 2003).

People v. Jones, 564 N.E.2d 944, 946 (Ill. App. Ct. 1990).

Allum v. Valley Bank of Nevada, 915 P.2d 895, 897 (Nev. 1996).

Indiana Advisory Opinion 3-93.

New York Advisory Opinion 04-50.

United States Advisory Opinions Nos. 107; 101; 94.

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 18 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.