

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 25-965

FINANCIAL ACTIVITIES: INVESTMENT PORTFOLIOS

percent of the securities in any publicly traded company.

DISQUALIFICATION: FINANCIAL ACTIVITIES

DISCUSSION

ISSUE

What limitations are there on a judge's investment activity?

Answer: A judge may hold and manage investments subject to the limitations in Canons 5C(1) and 5C(3).

Is a judge disqualified from a case in which a publicly traded corporation is a party where the judge holds only a de minimis portion of the securities of a publicly traded corporation?

Answer: No, unless the judge's interest might be substantially affected by the outcome or might otherwise still create a reasonable question as to the judge's impartiality.

FACTS

A judge is in the process of transferring a 401K retirement plan with his former law firm into an individual retirement account ("IRA"). The IRA will be managed by a financial services company. It is anticipated that the judge's IRA will include investments both in mutual funds consisting of publicly traded corporations as well as securities in individual publicly traded corporations. The judge states that the total value of the IRA would not be sufficient to hold more than one

A judge's financial investments are generally governed by Canon 5C(1) and (2). Together, those Canons provide that a judge may hold and manage investments, including real estate, or engage in other remunerative activity, including operating a business, so long as it does not reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, or exploit the judge's judicial position. Additionally, Canon 5C(3) provides, "A judge should manage his [or her] investments and other financial interests to minimize the number of cases in which he [or she] is disqualified." If a judge's investments or other financial activity cause his or her excessive disqualification, then that activity interferes with the proper performance of his or her duties and is no longer permissible under Canon 5C(1). Whether a judge's specific financial activity might violate the restrictions of Canon 5C must be determined by the judge on a case-by-case basis. Alabama Advisory Opinion 81-107.

A judge's financial activity can also have disqualification implications, even where the judge does not personally participate in the

management of his or her financial activity. *See* Canon 3C(2). Canon 3C(1) provides:

A judge should disqualify himself [or herself] in a proceeding in which his [or her] disqualification is required by law or his [or her] impartiality might reasonably be questioned, including but not limited to instances where:

. . . .

(c) He [or she] knows that he [or she], individually or as a fiduciary, or his [or her] spouse or minor child residing in his [or her] household, 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.

Canon 3C(3)(c) further defines financial interest:

“Financial interest” means ownership of a legal or equitable interest, or a relationship as officer, 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 securities held by the organization or institution;

. . . .

(v) Ownership of a *de minimis* portion of the securities of a publicly traded corporation is not a “financial interest.” A “*de minimis*” portion is an interest that could not raise a reasonable question as to a judge’s impartiality.

(Italics in original.) Thus, a judge is not disqualified from a case involving a specific publicly traded corporation if he or she invests in a mutual or common investment fund that holds securities in that same publicly traded corporation; however, a judge is disqualified if he or she directly holds a portion of the securities in the publicly traded corporation where that portion could create a reasonable question as to the judge’s impartiality.

Because the determination of whether a judge’s interest is *de minimis* depends on whether his or her interest creates a reasonable question as to the judge’s impartiality, this question is unsuited for a bright line rule. The

Commission, however, offers the following guidance in determining whether a judge's interest is, in fact, de minimis. In determining whether a judge's portion of securities in a publicly traded corporation is de minimis, the judge need only consider the total percentage of the judge's interest in the corporation relative to the total outstanding stock of the corporation. *In re Disqualification of Lavrich*, 657 N.E.2d 1330, 1331 (Ohio 1990). If the percentage of the judge's interest relative to the total outstanding stock of a publicly traded corporation could create a reasonable question as to the judge's impartiality, then the judge's interest is not de minimis and the judge must disqualify. The Commission notes, however, that the inquiring judge has represented that the total value of his IRA would not be sufficient to hold more than one percent of the securities in any publicly traded corporation. Based on this representation, it is unlikely that the judge's holdings in his IRA would be considered anything more than a de minimis interest.

Although a judge's interest in a publicly traded corporation might be de minimis, the Commission strongly encourages judges to fully disclose such interests to the parties pursuant to the provisions of Canon 3E.¹ The Commission has recognized that

providing such a disclosure serves two purposes: it will avoid any issue of appearance of impropriety that may arise and will give the parties the opportunity to supply any additional relevant information not yet considered by the judge. Alabama Advisory Opinion 03-816. Moreover, where the judge's interest is not de minimis and the judge is disqualified, the judge's disqualification may be remitted pursuant to the provisions of Canon 3D.

Even if the judge's interest is de minimis for the purposes of Canon 3C(1)(c), he or she should still examine the totality of the circumstances to determine whether there is a reasonable question as to the judge's impartiality. *See Huffman v. Ark. Judicial Discipline and Disability Comm'n*, 42 S.W.3d 386, 391-92 (Ark. 2001). As the text of Canon 3C(1) makes clear, the list of specific instances in Canons 3C(1)(a) through (d) is not exhaustive. Thus, even though a judge may not be disqualified under one of the specific instances, the judge must still consider whether he or she is disqualified under Canon 3C(1)'s general provision.

The test to determine whether a judge is disqualified under Canon 3C(1)'s general provision is: "Would a person of ordinary prudence in the

¹ This does not apply to a judge's interest in a mutual fund as such an interest does not qualify as a financial interest according to Canon 3C(3), and, thus, does not need to be disclosed.

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) (quoting Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 Utah L. Rev. 395, 402). Unlike the Canons' definition of *de minimis*, this test is not limited to the portion of the overall shares of a publicly traded corporation that are held by a judge. Rather, judges must consider whether a reasonable person, knowing all of the facts known by the judge, would find a reasonable basis for questioning the judge's impartiality. This includes the total value of the judge's holdings in a publicly traded corporation.

In *Huffman*, the Arkansas Supreme Court denied the judge's petition for a writ of certiorari asking the Court to review the Arkansas Judicial Discipline and Disability Commission's admonishment against him for failing to disqualify from a case involving Wal-Mart where the judge and his wife held approximately 12,000 shares of Wal-Mart stock totaling \$700,000. 42 S.W.3d at 388, 391. The Court held, "If Judge Huffman's economic interest in Wal-Mart would create in reasonable minds a preception that the judge's ability to carry out the judicial responsibilities in a case involving Wal-Mart with integrity, impartiality, and competence is impaired, then it does not matter that Judge Huffman's economic interest in

Wal-Mart is *de minimis* to the extent that his economic interest could not be substantially affected by this proceeding." *Id.* at 393 (italics in original). The Court explained, "While there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a miniscule percent of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest . . . ignores the more basic issue of appearance of impropriety and impartiality." *Id.* at 391–92. Therefore, even where a judge's interest might be only a *de minimis* portion of the securities of a publicly traded corporation, the judge should still consider whether a reasonable person knowing all of the facts known to the judge might have a reasonable basis for questioning the judge's impartiality. If so, then the judge must disqualify.

Lastly, this opinion, so far, has addressed only the circumstance where a publicly traded corporation in which a judge holds securities is a party to a proceeding pending before the judge. A judge should also disqualify himself or herself, however, from any proceeding in which the judge knows that he or she has "an interest that could be substantially affected by the outcome of the proceeding." Canons 3C(1)(c) and 3C(1)(d)(ii). When determining whether a judge's financial interest could be substantially affected by the outcome of the proceeding, the judge

should consider the extent of his or her interest and whether any benefit or loss that the judge may receive would raise a reasonable question as to his or her impartiality. Alabama Advisory Opinion 03-811 (citing L. Abramson, *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct* 64–65 (Am. Judicature Soc’y 1986)).

REFERENCES

Alabama Canons of Judicial Ethics 3C(1), 3C(1)(c), 3C(1)(d)(ii), 3C(2), 3C(3)(c), 3D, 3E, 5C(1), 5C(2), 5C(3).

Alabama JIC Advisory Opinions 81-107, 03-811, and 03-816.

In re Disqualification of Lavrich, 657 N.E.2d 1330, 1331 (Ohio 1990).

Huffman v. Ark. Judicial Discipline and Disability Comm’n, 42 S.W.3d 386, 391–92 (Ark. 2001).

Matter of Sheffield, 465 So. 2d 350, 356 (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 18 of the Alabama 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; email: jic@jic.alabama.gov.