Nebraska Judicial Ethics Advisory Committee

Advisory Opinion 92-5

Facts

Prior to his appointment, a recently appointed judge in a multi-judge district was a member of a large law firm. The firm had instituted a retirement plan in which the new judge was a participant. The law firm is the plan administrator. A local national bank is the trustee for the plan. The judge has opted to remain a participant in the retirement plan in order to take advantage of a low management fee and to avoid substantial adverse tax consequences that would result from his withdrawal from the plan due to a home improvement loan the judge took against his interest in the plan prior to his appointment. In order to maintain tax deferred status, the judge would be required to pay the loan balance in full upon withdrawal from the plan.

The plan allows former members of the law firm to remain as participants in the plan with the interest they had accumulated prior to leaving the firm segregated for accounting purposes. The firm makes no further contributions to the former member's account. The standardized master plan, summary plan description, provided us by the inquiring judge, states there is no plan provision which reduces, changes, terminates, forfeits, or suspends the benefits of. . . a separated participant's vested benefit amount. The firm's future activities cannot enhance or diminish a former member's separate account. The firm has no claims against the judge's account. The plan's annual reports to the former member contain only information applicable to the former member's segregated account and do not reveal any information about the firm's plan activities or any information about other participants.

Once a year the trustee bank sends a form to each plan participant on which each plan participant elects one of three management options for the ensuing year. Two of these options do not involve former members in active management of their accounts. The third option, however, is self-management. Under this option, the self-managing plan participant makes all investment decisions and communicates the investment decisions to the trustee. The trustee executes the investment decisions for the self-managing plan participant.

The judge plans to hear no cases in which his former firm is involved in a representative capacity. The judge has inquired whether he has the option, as a sitting judge, to remain as a participant in his former firm's retirement plan.

Questions Presented

(1) By the judge's continued participation in his former firm's retirement plan, under the facts described above, does the judge hold a disqualifying interest under Canon 3C:

(a) with respect to cases in which the judge's former firm is involved in any way?

(b) with respect to cases in which the trustee bank is involved as a party?

(c) with respect to cases in which the plan itself or any question relating to the plan's assets or administration is involved in any way?

(2) Is the judge's continued participation in his former firm's retirement plan, under the facts described above, a prohibited interest under Canon 5C?

(3) Is the judge required to avoid hearing cases in which his former firm is involved under Canon 2A?

Because of the variables involved, these questions are not amenable to straightforward yes and no answers.

Discussion

Question 1

Under Canon 3C(1), judges must disqualify themselves from all proceedings in which their impartiality might be subject to reasonable question. Canon 3C(1)(c), as relevant to this opinion, provides:

> A judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to instances where: . . .a judge knows that he or she . . . 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.

It must be noted that Canon 3C(1)(c) creates two types of disqualifying interests. Financial interests in the parties or the subject matter of proceedings before judges holding such interests require recusal irrespective of whether the outcome of the proceedings could affect the financial interests involved. Other interests must be subject to outcome related substantial effects before recusal is required. L.W. Abramson, Judicial Disqualification under Canon 3 of the Code of Judicial Conduct, 70 (2d ed. 1992).

Thus, the definition of "financial interest" is crucial to resolution of Question 1. Under the relevant provisions of Canon

3C(3)(c)(i):

> "financial interest" means ownership of a legal or equitable interest, however small. . . except that, 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.

Question 1(a)

Under the given facts, the judge holds no apparent financial interest in the judge's former law firm. As a former member of the firm, the judge's interest in the plan's assets is kept separate from the interests of the active members. In addition, legal title to the assets of the plan is held by either the trustee national bank or the plan itself as a separate legal entity.

The only question relating to the former firm under Canon 3C this committee is unable to address is the function of the firm as plan administrator vis-a-vis the judge. As long as the former firm, acting as plan administrator, has no control nor any way to affect the judge's interest, and as long as the judge does not participate in the management of the plan, we see no problem under Canon 3C.

Question 1(b)

Cases to which the trustee bank is a party present a problem for the inquiring judge, but only during those years in which the judge elects the self-management option. As long as the judge does not participate in the management of the plan assets held for him, the judge does not have a financial interest in the trustee bank's assets devoted to the common investment fund underlying the retirement plan.

For any year in which the judge elects self-management, the judge does appear to have a disqualifying financial interest. Even for those years, the judge could disclose the interest and the parties could agree to a remittal of the judge's disqualification under Canon 3D, but in a multi-judge district, the need to seek remittal is reduced.

This committee can carry this point no further, because more detailed consideration would require analysis of ERISA as it applies to the judge's retirement plan. ERISA seems to apply to all such plans, but this committee has no authority to involve itself in such analyses. The plan summary the inquiring judge supplied this committee even advises plan participants of their ERISA-granted rights under the plan.

ERISA application and meaning could be important enough that the judge needs to inquire further, because this committee is aware that an argument is sometimes made under ERISA to the effect that the trustee bank is not the legal entity holding title to the plan's assets, but that the plan itself is a legal entity separate from the trustee bank. Under that approach, the plan itself is the entity holding legal title to the assets underlying the judge's account. If the plan is a separate legal entity holding title to those assets, then the judge has no financial interest in the bank.

Question 1(c)

Cases to which the plan itself is a party or in which a question is presented relating to the plan's assets or administration create obvious problems for the inquiring judge. We do not anticipate the likely number of such cases to create a need for frequent disqualification. Irrespective of whether the judge holds a disqualifying financial interest, these cases form a class of cases the inquiring judge is advised, both under Canon 3C and under Canon 2A, to not hear.

Question 2

This question arises under Canon 5C. Canon 5C prohibitions are not subject to the escape hatch of remittal of disqualification under Canon 3D.

Canon 5C(1), as relevant here, provides:

> A judge should refrain from financial and business dealings that tend to reflect adversely on his or her impartiality . . . or involve him or her. . . in frequent transactions with lawyers or persons likely to come before the court . . .

Canon 5C(3), as relevant here, provides:

> A judge should manage his or her. . .financial interests to minimize the number of cases in which he or she . . . is disqualified.

As previously stated, under the facts here, the inquiring judge's interest in this retirement plan, does not constitute a "financial interest" under Canon 3, except during years in which the judge elects self-management. The only definition of "financial interest" in the Nebraska Code of Judicial Conduct is the definition found in Canon 3C. Common sense interpretation requires us to use the same definition whenever the term is used in the Code, in the absence of a different definition. Thus, the judge's interest in the retirement plan does not constitute a

"financial interest" under Canon 5C(3), except during years in which the judge elects self-management.

Application of Canon 5C(1) to the facts here presents slightly different considerations. The self-management election would trigger the need for frequent transactions with the trustee bank, an entity likely to come before the judge, assuming the bank and the plan are not separate legal entities. If the bank and the plan are separate legal entities, the Canon 5C(1) problem evaporates for all years during which the judge does not elect self-management. If the bank and the plan are separate entities, then the committee believes the likelihood of the plan coming before the judge is so low as to create no problem under Canon 5C(1), especially in a multi-judge district. Thus, the judge can avoid the Canon 5C(1) prohibited interest problem as related to the bank and the plan simply by not electing self-management.

There is a potential Canon 5C(1) problem related to the former firm's status as plan administrator. If the plan administrator's role would require the judge to engage in frequent transactions or financial and business dealings with the former firm, then the judge would face a Canon 5C(1) prohibited interest problem. Canon 5C problems cannot be cured by disclosure and remittal of disqualification. From the facts as we understand them, the plan administrator has no continuing role that would require such contacts between the judge and the former firm.

We advise the judge to investigate the role of the plan administrator and the question of whether the judge will need to engage in any financial and business dealings or other frequent transactions with the firm in its role as plan administrator. Even though the judge plans to disqualify himself from any cases in which the firm is involved, his disqualification does not remove the Canon 5C(1) prohibition.

Question 3

The propriety of judges hearing cases in which their former firms appear in a representative capacity is a nearly unresolvable problem under the best of circumstances. We will avoid the debate on the general question in this opinion. We believe the facts here lead to an inevitable conclusion.

Canon 2A requires that judges behave in way that promotes public confidence in the impartiality of the judiciary. There is no escape from the fact that the judge is still a participant in his former firm's retirement plan. It would be very difficult to explain to the public that the judge's continuing link to his former firm is far more formal than real. Since the judge serves in a large multi-judge district, invoking a rule of necessity does

not help.

The judge plans on disqualifying himself from all cases in which his former firm is involved. We agree with the judge's plan and advise that he not hear any cases in which his former firm is involved as long as he remains a participant in the firm's retirement plan.

Finally, one committee member has raised the question of whether the judge's former firm can affect the judge's interest in the retirement plan by dissolving the plan, for whatever reason. If the firm can do so, then both Canon 5C and 2A present insurmountable problems for the judge in maintaining his interest in his former firm's retirement plan. We cannot reach a conclusion on the question without analyzing the judge's rights under ERISA.

Again, we are not an ERISA advisory group. However, we believe the former firm cannot do anything that would affect the judge's vested interest in the retirement plan. If the judge's interest is vested, he is fully protected from any attempt to divest or adversely affect his interest. The firm cannot dissolve the plan as such. It can cease contributing to the plan, but nothing more. The judge is entitled to no more contributions anyway, so any decision the firm makes on cessation of contributions does not affect the judge. If our belief on the judge's ERISA rights in this regard is incorrect, then different conclusions might follow. Thus, the judge is advised to seek advice from a proper ERISA advisor on this point and behave accordingly.

Adopted this 6 day of July, 1992.

William Bles
Chair