

Opinion No. 07-02
September 7, 2007

Topic: Duty of Judge regarding receipt of retirement benefits from former law firm.

Digest: A judge, receiving pension benefits from a former law firm, is usually disqualified from presiding over cases where a party is represented by the firm. After full disclosure, the parties may remit the disqualification.

References: Illinois Supreme Court Rule 63C(1); 63C(1)(c); 63C(1)(d); 63D 63E; and 65C(1); In re Bias Affidavit, 947 P. 2d 1152, 1156 (Ut., 1997); ABA Committee on Professional Ethics and Grievances, Informal Opinion 594 (October 22, 1962); Alabama Judicial Inquiry Commission, Opinion 91-417 (April 30, 1991); Commonwealth of Virginia Judicial Ethics Advisory Committee, Opinion 01-03 (March 28, 2001); Delaware Judicial Ethics Advisory Opinion 2004-2 (2004); Georgia Judicial Qualifications Commission. Opinion 221, (August 22, 1997); Kansas Judicial Advisory Committee, Opinion JE - 19 (March 17, 1987); New York Advisory Committee on Judicial Ethics, Opinion 04-02 (March 11, 2004).

FACTS

The judge was formerly a partner in a law firm which provides retirement benefits to partners through an unfunded plan. The judge is receiving that distribution. The amount to be paid is defined by the retiring partner's years of service as a partner and the retiree's partnership income during that time period. The benefit is paid in 120 equal installments without interest. The amount is paid from the firm's current revenues. The judge's benefit is neither secured nor collateralized. Members of the judge's former firm have appeared in cases assigned to the judge. Certain of its lawyers have disclosed the fact of the payments and questioned whether recusal is required.

QUESTION

Whether the receipt of pension benefits from a former firm is a financial activity that tends to reflect adversely on a judge's impartiality, thus requiring disqualification?

OPINION

Supreme Court Rule 65C(1) states that a judge should refrain from financial and business dealings which tend to reflect adversely on the judge's impartiality or interfere with the proper performance of the judge's judicial duties ... or involve the judge in frequent transactions with lawyers ... likely to come before the court on which the judge serves. As will be explained below, other courts and advisory boards who have considered this issue have found that the continuing receipt of pension benefits from a former law practice impacts on the three stated aspects of Rule 65C(1).

This Rule amplifies the requirement of disqualification found in Rule 63C(1)(c). That portion of the Code provides that a judge's impartiality might reasonably be questioned when a firm or lawyer involved in the proceeding was associated with the judge in the private practice of law within the prior three years. Some jurisdictions have suggested this presumed period of disqualification was created to allow sufficient time for a new judge to sever all financial ties with former colleagues or firm. See, e.g., Delaware Judicial Ethics Advisory Opinion 2004-2 (2004). There is some support for that position found in Rule 65C(4) which requires judges to divest themselves of investments or financial interests which will cause frequent disqualification in a manner which would not cause serious financial detriment.

In the instant matter, the pension liability is unfunded. Hence, the payments are dependent on the continued viability of the firm. This has been found to be sufficient to suggest that an objective observer would reasonably question the judge's impartiality. This appearance would continue for the entire time such benefits are paid and received. New York Advisory Committee on Judicial Ethics, Opinion 04-02 (March 11, 2004).

In a similar vein, the continued receipt of payments for the judge's stock interest in the former firm, uncollected fees and work in progress was deemed a prohibited financial interest with persons likely to appear before the judge. Such an arrangement would also require disqualification. This result obtains despite the fact that the collection and management of these monies was delegated by the judge to the trustee of a blind trust. Kansas Judicial Advisory Committee, Opinion JE - 19 (March 17, 1987).

The Committee acknowledges that once the three years (seven if the litigation involves a former client) have passed the mere fact that an attorney or firm and the judge were previously associated in the practice of law does not raise any *per se* inference of bias or impartiality requiring disqualification under Rule 63C(1)(c). See ABA Committee on Professional Ethics and Grievances, Informal Opinion 594 (October 22, 1962). Rather, the judge is called upon to consider additional factors such as a continued financial interest in the firm, continued close personal relationships with members of the firm, nature of any relationship with the client whose matter is being litigated, and any current employment relationship between the firm and members of the judge's immediate family. In re Bias Affidavit, 947 P. 2d 1152, 1156 (Ut., 1997). It is our considered opinion that the judge's receipt of pension benefits funded solely by the firm's ongoing operation creates a financial interest that is more than *de minimis*. 63C(1)(d).

This situation differs markedly from those where the judge removes pension benefits from the firm's management by rolling them into an IRA or negotiating a lump sum payment. Georgia Judicial Qualifications Commission. Opinion 221, (August 22, 1997); Delaware Judicial Ethics Advisory Opinion 2004-2 (2004). Authority exists to suggest that disqualification is not required where the judge creates a sub-account within the firm's plan, pays all management fees personally and directs the investments, even if these decisions are limited by the firm's selection of investment vehicles. Alabama Judicial Inquiry Commission, Opinion 91-417 (April 30, 1991); Commonwealth of Virginia Judicial Ethics Advisory Committee, Opinion 01-03 (March 28, 2001). These decisions are premised on the

assumption that neither the judge nor the firm will be making additional contributions to the plan.

It is clear that the judge's continuing receipt of funds from the firm's unfunded pension plan requires recusal pursuant to Rule 63C(1) because it creates an impermissible financial relationship with the former firm. However, upon full disclosure of the basis of the judge's decision, the parties and attorneys may remit the disqualification by complying with the procedure outlined in Rule 63D.

The judge also must be concerned with the volume of cases where the disqualification is not remitted. Conceivably, the judge's personal financial activities could unduly burden colleagues with additional case loads. This would result in the judge's inability to discharge the duty to hear and decide cases. This could form the basis of a violation of Rule 65C(1). If, as it appears in this instance, the judge would be unable to promptly liquidate the benefit by receiving a lump sum payment of the present value of the pension benefit, the judge should seek an assignment which would minimize firm's appearance in matters that require recusal.

CONCLUSION

A judge's impartiality is reasonably questioned when a law firm providing pension benefits to the judge appears in a matter in that court. Disqualification is required; however the disqualification can be remitted after complete disclosure of the financial arrangement. If the retirement benefits are solely within the control of the judge and the former firm makes no financial contribution either to the fund or for administrative expenses neither disqualification nor disclosure is required. Judges should exercise their best efforts to sever all financial ties with a former firm or colleagues with whom the judge associated in the practice of law within the three years provided by Rule 63C(1)(c)the Code of Judicial Conduct.