

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 91-14**

Issued June 14, 1991

*[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]*

*[Not Current- subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997; See In re Disqualification of Lavrich, 74 Ohio St. 3d 1216 (1990).]*

**SYLLABUS:** A judge's ownership of stock in a party to a proceeding creates an appearance of partiality. Therefore, a judge's ownership of bank stock is a financial interest which requires disqualification when the bank in which the judge owns stock is a party to a proceeding, even though the stock is held in a retirement plan of which another bank is trustee and in which the judge does not participate in the management. Code of Judicial Conduct Canon 3 C (1) (c). A judge should also disqualify him/herself under Canon 3 C (1) (c) for "any other interest that could be substantially affected by the outcome of the proceeding." Finally, a judge should also consider whether he/she should disqualify him/herself under the general standard of disqualification in Canon 3 C (1) that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3 D does allow a judge disqualified by the terms of Canon 3 C (1) (c) to follow a procedure for remittal of disqualification.

**OPINION:** We have before us a request for an advisory opinion on whether a judge who owns bank stock should disqualify him/herself from a proceeding in which the bank is a party. The question is based on the following premises: the stock was purchased years prior to the proceeding and is held in the judge's individual retirement plan (Keogh plan); the trustee of the plan is a bank not involved in the proceeding; the judge does not participate in the management of the plan; at the time of the proceeding the judge would own approximately 200 shares of 151,000 shares of outstanding stock; and the 200 shares would have an estimated value of \$11,500.

Investments by judges are not prohibited by the Code of Judicial Conduct (Judicial Code), but are regulated by the Judicial Code. Under Canon 5 C (2) "a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business." This provision is subject to the requirement of Canon 5 C (1) that "[a] judge should refrain from financial and business dealing that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he

serves." A further restriction is found within Canon 5 C (3) that "[a] judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require disqualification."

As one commentator has suggested "[i]nvestment is the single area of economic activity which cannot reasonably be prohibited to judges, due to the need to permit some fruitful disposition of a judge's savings." S. Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges 13 (1984). Commentary to Canon 5 C supports this view: "Owning and receiving income from investments do not as such affect the performance of a judge's duties."

However, in counterbalance to allowing a judge to make investments lies the fundamental goal of the legal system - equal justice under the law through a system which insures an impartial judge. Thus, Canon 3 C (1) and 3 C (1) (c) provide that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial 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). Canon 3 C (2) places a duty upon a judge to inform him/herself about his/her personal and fiduciary financial interests.

Canon 3 C (3) (c) defines financial interest and identifies certain activities and ownerships which are not considered financial interests under Canon 3.

[F]inancial interest means 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;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a deposit or in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

Code of Judicial Conduct Canon 3 C (3) (c).

The Judicial Code's reference to a "substantial financial interest" in Canon 3 C (1) (c) and its definition of a financial interest as a "legal or equitable interest, however small" in Canon 3 C (3) (c) raises the question of whether a judge should disqualify him/herself only when he/she has a substantial financial interest or when he/she has a financial interest however small. The drafters of the ABA Code of Judicial Conduct, rejected a "substantial interest" test in Canon 3 C (1) for two reasons: doubt as to its constitutionality and the ambiguity of the test. See, E. W. Thode, Reporter's Notes to Code of Judicial Conduct 65 (1973).

Several state ethics committees have considered disqualification issues involving a judge's ownership of stock in a bank which is a party to a proceeding. A judge may own stock in banks (outside his/her district) in which he/she owned stock prior to taking judicial office, but must not hear cases in which either bank is a party and must be cautious of hearing cases in which the outcome would affect the banks or the value of the judge's stock. Nebraska SupCt, Op. 89-4 (1989). A judge who owns stock in a bank cannot write a default order in a case filed by the bank - even a small amount of stock is a financial interest and signing the default order creates the appearance of impropriety and partiality. West Virginia SupCt App, Op. October 14, 1988.

A judge's ownership of stock in a party to a proceeding creates an appearance of partiality. Therefore, it is this Board's opinion that a judge's ownership of bank stock, even though held in a retirement plan (Keogh plan) of which another bank is trustee and which the judge does not participate in the management, is a Canon 3 C (1) (c) financial interest for which the judge should disqualify him/herself. Further, under Canon 3 C (1) (c), a judge should also disqualify him/herself for "any other interest that could be substantially affected by the outcome of the proceeding." For example, if it is known to a judge that the outcome of a proceeding could substantially affect a judge's retirement plan, then a judge should disqualify him/herself. Finally, a judge should also consider whether he/she should disqualify him/herself under the general standard of disqualification in Canon 3 C (1) that "[a] judge should disqualify himself from a proceeding in which his impartiality might reasonably be questioned." Canon 3 D does allow a judge disqualified by the terms of Canon 3 C (1) (c) to follow a procedure for remittal of disqualification.

In closing, the Board advises that it does not have the authority to answer whether or not a judge is disqualified from any particular proceeding. Under the constitution and laws of the State of Ohio, determination of judicial disqualification is a judicial function.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**