

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 08-02
(October 24, 2008)

**Disqualification of a Judge When
Financial Interest is Involved**

Issues

1. Do survivor's benefits paid in part by a hospital constitute a financial interest in the hospital within the scope of Canon 3E(1)(c)?

Answer: Yes, if the benefits are an "interest of substance" which they are under these facts.

2. Is the judge required to disqualify himself or herself in all cases where the hospital is party?

Answer: Yes, as long as he or she continues to receive survivor's benefits which are funded in part by the hospital.

3. May the judge permit the parties to waive disqualification under the remittal provision in Canon 3F?

Answer: Yes, with caution.

Facts

A superior court judge receives the survivor's portion of the retirement pension from his deceased spouse who worked for many years at a local hospital. The pension fund is managed by a national financial services firm but the investments do not generate enough income to cover all pension payments. As a result of this shortfall, the hospital must make a large contribution to the fund each year. The hospital appears regularly in this county's court as a party in medical malpractice cases.

Discussion

Issues One and Two

Canon 3E(1)(c) requires a judge to disqualify himself or herself if the judge has a financial interest in a party to the proceeding because the judge's impartiality might reasonably be questioned. In the terminology section of the Arizona Code of Judicial Conduct, "financial interest" is defined in part as ". . . a legal or equitable interest of substance." The terminology section further defines "interest of substance" as ". . . any financial interest in a closely held corporation or business and, in the case of a publicly held corporation denotes a legal or equitable interest, the value of which is likely to be increased or decreased to any material extent by the outcome of the litigation."

There is no question this judge has a financial interest of substance in the hospital. Due to conditions in financial markets, the hospital must make a substantial contribution for all the pensioners to receive their full allotment. If the hospital sustained a large verdict against it which

exceeded its insurance coverage and had to satisfy the verdict, it could affect its ability to meet its financial obligations, including the obligation to contribute to the pension fund. If the hospital is not financially stable and viable or if that viability is threatened, the judge's survivor pension could be at risk or be perceived to be at risk.

At common law, a pecuniary interest was the only thing that disqualified a judge from sitting on a case. John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). This was because "the lure of lucre is a particularly strong motivation, and therefore judges ought to be prohibited from presiding over cases in whose outcome they have a direct financial interest." *Del Vecchio v. Ill. Dept. of Corr.*, 31 F. 3d 1363, 1373 (7th Cir. 1994). The Arizona Supreme Court has made clear it will closely scrutinize a judge's conduct to insure a "fundamental right our system holds dear: the right to have one's day in court before an impartial tribunal." *In re Anderson*, 168 Ariz. 432, 435 (1991).

The judge's ethical duty to disqualify himself or herself would extend to all cases where the hospital is a party because of the judge's financial interest in the hospital. Other jurisdictions have strictly interpreted the requirement to disqualify when a financial interest is involved. "Once a pecuniary interest is shown to exist, the judge is disqualified no matter how slight the interest." *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W. 2d 556, 558 (1993) (citations omitted). Only when the pension fund, or that part of the fund that provides the judge's survivor's benefits, becomes fully funded with no further contributions by the hospital will the requirement to disqualify expire.

Issue 3

Pursuant to Canon 3F, a judge who is disqualified under Canon 3E may invoke a remittal procedure which would permit the judge to preside over the case if all parties and lawyers agree in writing that the judge should not be disqualified. Although the procedure is available and could be invoked in minor cases involving an insubstantial amount in controversy, the remittal approach should be avoided when the stakes are high and there exists the possibility of joinder of other parties, as in medical malpractice cases. If the judge chooses to invoke the remittal provision and provide the parties an opportunity to waive the conflict, Canon 3F should be strictly followed with the parties and counsel having an opportunity to confer outside the presence of the judge. If an agreement to waive the conflict is reached, it must be on the record.

Conclusions

Because under the facts of this case the judge has a financial interest in the hospital, disqualification is required in all cases where the hospital is a party. Although the parties may invoke the remittal procedure of the code, it should be used sparingly and cautiously, and only in those cases where the financial exposure of the hospital is insubstantial.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3E(1)(c) and 3F and related commentary.

Arizona Code of Judicial Conduct, Canon 3F and Commentary.

References

American Bar Association, *Annotated Model Code of Judicial Conduct* (2004).

Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 2d, 1992.

Richard E. Flamm, *Judicial Disqualification*, 2d, 2007.

John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947).

Del Vecchio v. Ill. Dept. of Corr., 31 F. 3d 1363, 1373 (7th Cir. 1994).

In re Anderson, 168 Ariz. 432, 814 P.2d 773 (1991).

Gulf Maritime Warehouse Co. v. Towers, 858 S.W. 2d 556, 558 (1993).