

Maryland Judicial Ethics Committee

Opinion Request Number: 1979-14

Date of Issue: November 20, 1980

O Published Opinion **G** Unpublished Opinion **G** Unpublished Letter of Advice

Judge May Invest in Municipal Bond Fund
But Not Sit in Case Involving Certain Issuers in Which Judge Has More Than \$ 1,000 Interest

The Committee has been advised by a judge that a _____ brokerage firm has established a mutual fund which deals only in bonds issued by governmental authorities in Maryland or in territories or possessions of the United States, the interest income being exempt from federal and Maryland income taxes; and he desires to know (a) whether a judge is precluded from investing in the fund because cases involving the agencies which issued the bonds may come before that judge; and (b) if a judge is permitted to invest in such a fund, whether he must disqualify himself from deciding such cases.

The securities portfolio for this mutual fund, as disclosed in the Prospectus, includes thirteen bond issues: one is a general obligation bond issued by the W Sanitary District, Maryland, backed by the taxing power of that governmental entity; the twelve others are revenue bonds supported solely by the revenues generated from specific projects. Although these revenue bonds are issued by local governmental authorities, the State of Maryland or a United States territory or possession (one bond is issued by the government of Puerto Rico), the real parties in interest are private enterprises which operate their own projects. Specifically involved are construction projects for several hospitals, X Company, Y and Z Corporation. Each hospital or corporation is liable for the repayment of the revenue bonds which relate to its particular project. At all events, none of the revenue bonds pledge the full faith and credit of a governmental entity. Finally, it should be noted that the mutual fund will not purchase any bonds other than those enumerated in the Prospectus.

As to the general obligation bond (which pledges the full faith and credit of the government), the real party in interest is the issuer itself, the W Sanitary District. As to the revenue bonds, the governmental issuer is only a conduit, and the real party in interest is the non-governmental entity for whose project the bond was issued. If the judge were the direct owner of any of these bonds, the propriety of the judge's investment would of course be measured against this direct ownership interest.

In the case of the particular mutual fund involved here, the real parties in interest are fixed as of the time the mutual fund is created and are therefore readily identifiable to the mutual fund investor; e.g., the one governmental entity which has pledged its full faith and credit and, as regards the revenue bonds, the private enterprises whose projects are being financed. Moreover, the financial solvency of the real parties in interest will directly affect the extent to which the principal and interest payments will be made to the mutual fund investors. Under these particular circumstances, we perceive no difference between the situation where the investor owns the bonds directly and where the investor owns a share of the mutual fund which directly owns the bonds. The mere existence of the mutual fund cannot insulate the judge from his obvious financial interest in the obligors of the bonds themselves.

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Therefore, the Committee is of the opinion that, for purposes of applying the Canons and Rules of Judicial Ethics, the judge who has invested in this particular mutual fund shall be deemed to have purchased the bonds themselves.

The Committee is also of the opinion that since the governmental entities which issued the revenue bonds are nominal parties only, the bond owner shall be deemed to have a financial interest only in the private enterprise which is the real party in interest and not in the conduit governmental issuer. On the other hand, if the securities are general obligation bonds, then the governmental entity which issued the bonds is the real party in interest.

Upon these premises we now address the two questions posed.

Under Canon XXV, "A judge shall abstain from making personal investments in enterprises which are apt frequently to be involved in litigation in the court ..." (Emphasis supplied.) Under Rule 2, a judge "shall not participate in any matter in which he has a significant financial interest ..." (Emphasis supplied.)

[Opinion Request No. 1979-10 (unpublished)] recently concluded that "if a judge holds a stock or other financial interest in a business entity and the value thereof is more than \$1,000, he would have a 'significant financial interest' and should disqualify himself, consent of counsel notwithstanding." Thus, in any matter before the judge involving the real party in interest to one of the bond issues held by this mutual fund, the judge must disqualify himself if he has a significant financial interest as above defined. The value of the judge's financial interest can readily be ascertained by applying his percentage of ownership in the mutual fund against the proportionate value that the bonds of the real party in interest involved in the litigation bears to the total value of the bond portfolio of the mutual fund.

As to the "frequency" problem, [Opinion Request No. 1979-10 (unpublished)] also concluded that "whether the personal investment represents a 'significant financial interest' or not, if the business entity is frequently involved in litigation in the court, then the judge should not continue to retain such investment ... We do not prescribe the number of occasions which should be denominated as 'frequent', the dictionary meaning of that word being the appropriate guide." Since the governmental issuer of a revenue bond is not the real party in interest, the judge need not concern himself with the fact that governmental issuer may be involved in frequent litigation before his court. The judge's concern need be limited to the frequency of appearance in his court of a real party in interest of any one of the bond issues held by this mutual fund.

Therefore, the Committee is of the opinion that the judge may not invest in the mutual bond fund if any of the real parties in interest to any of the bond issues held by the fund is frequently involved in litigation in the judge's court. If the frequency problem does not exist, thus permitting the judge to invest in the fund, the judge must disqualify himself in any case in which he has a significant financial interest in the real party in interest which is involved in litigation before that judge. In addition, the judge must also disqualify himself if the bond fund itself is involved in the litigation, and the judge's investment in the fund exceeds \$1,000.