

1974 WL 27582 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 7, 1974

*1 Mr. H. Kelley Jones
General Counsel
S. C. Department of Insurance
2711 Middleburg Drive
Columbia, SC 29204

Dear Mr. Jones:

You have inquired whether a Probate Judge may require an administrator's bond and then act as the agent for the sale of such bond. This Office cannot condone such a practice because it creates an inherent conflict of interest between the probate judge's financial gain and the broad discretion invested in him by the South Carolina Code, and it also raises serious questions under Supreme Court Rule 33, Code of Judicial Conduct.

South Carolina Code of Laws of 1962, sections 19-433 to 19-443 govern the use of bonds by administrators and invest the Probate Judge with broad discretion as to the amount of the bond (§§ 19-433, 19-434, 19-438 & 19-442), whether the surety is entitled to relief from the bond (§ 19-437) and whether the cost of the bond may be charged against the estate (§ 19-441). A Probate Judge who acts as the agent for the surety company has an inherent conflict of interest between his own financial aggrandisement in the receipt of commissions, and the proper use of his discretion in determining the amount of the bond, relief from the bond and the person or entity who must ultimately pay for the bond.

In addition to creating a conflict of interest, this practice appears to violate several Canons of the South Carolina Code of Judicial Conduct, Supreme Court Rule 33.

Canon 3, Section C(3)(c) defines financial in part:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

...

(c) he knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy . . .

Canon 3, Section C(3)(c) defines financial interest as 'ownership of a legal or equitable interest, however small . . .'
A Probate Judge acting as the agent for the sale of an administrator's bond receives commissions that are dependent upon the amount of the bond itself, thereby giving him a direct financial interest in the subject matter in controversy (the amount of the bond).

Canon 5, Section C(1) states.

A judge should refrain from financial and business dealings 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 Probate Judge acting as the agent for the sale of an administrator's bond certainly appears to be engaging in business dealings that might reflect adversely on his impartiality, and could possibly interfere with the proper performance of his judicial duties. The best advice this Office can give to any Probate Judge presently engaged in this practice is to follow the mandate of Canon 5, Section C(3).

*2 'As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.'

Very truly yours,

John L. Choate
Staff Attorney

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