

Supreme Court of Kentucky

2021-SC-000134-RR

IN RE: JUDICIAL ETHICS OPINION JE-101

ON REVIEW FROM ETHICS COMMITTEE
OF THE KENTUCKY JUDICIARY

OPINION OF THE COURT BY JUSTICE VANMETER

Under SCR¹ 4.310, we are authorized at any time to review a judicial ethics opinion of the Ethics Committee of the Kentucky Judiciary. In light of this Court's opinion in *Abbott, Inc. v. Guirguis*, 2018-SC-0577-DG, 2021 WL 728860 (Ky. Feb. 18, 2021),² we undertake this review of JE-101, interpreting the disclosure and recusal obligations of a judge when a member of the judge's staff is married to an attorney who appears before the judge. Within this review, we also consider an informal opinion given to a judge whose law clerk is married to an attorney who works for Legal Aid of the Bluegrass.³

¹ Supreme Court Rules.

² *Abbott* involved two issues, judicial recusal and entitlement to real property underlying an abandoned railroad right-of-way. As of this writing, our decision is not final due to petitions for rehearing as to the real property issue. The portion of the opinion relating to judicial recusal is not raised in either petition for rehearing.

³ Legal Aid of the Bluegrass is the assumed name of Northern Kentucky Legal Aid Society, Inc., a Kentucky non-profit corporation which provides legal advice and representation in civil matters without cost to low-income persons. It is one of four such organizations in Kentucky incorporated under Kentucky Revised Statutes (KRS) Chapter 277 and in compliance with the Legal Services Corporation Act of 1974, 42

In JE-101, the Committee addressed two situations implicating an appearance of impropriety and a judge's obligation to recuse: a) the judge's secretary is married to an attorney appearing before the judge, and b) the judge's law clerk is married to a local assistant county attorney. In each instance, and relying upon SCR 4.300, Canon 3(E)(1), the Committee opined that public perception and the appearance of impropriety required disclosure and recusal. Importantly, however, the Committee noted that Canon 3(F) permitted the waiver of disqualification.

JE-101 was issued in 2002. The Code of Judicial Conduct ("Code") in effect at that time was based on the American Bar Association's 1990 Model Code of Judicial Conduct. As we have noted in several recent opinions, in 2018, we adopted a more recent ABA Model Code, the 2007 version. *Maze v. Jud. Conduct Comm'n*, 612 S.W.3d 793, 797 n.4 (Ky. 2020); *Presbyterian Church (U.S.A) v. Edwards*, 594 S.W.3d 199, 200 n.1 (Ky. 2018). The applicable Code provision is now found at Canon 2, Rule 2.11, Disqualification, which provides, in applicable part:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality^{*[4]} might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to

U.S.C. § 2996, *et seq.* Legal Aid of the Bluegrass's service area is thirty-three counties in Northern, Northeastern and Central Kentucky.

⁴ The Code contains defined terms which are marked by an asterisk.

either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

...

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

...

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

The substantive provisions of the former version of the Code, Canon 3(E)-(F), and the current version, Canon 2, Rule 2.11, are virtually identical and do not, therefore, entail a substantive change in the rules governing disclosure of conflicts and recusal.

Our decision in *Abbott* was noted by the Committee in its informal opinion letter. In that letter, the Committee initially recited JE-101, but then stated,

to the extent JE-101 required you to disqualify in cases where your Staff Attorney’s wife was practicing the case, the bar has been raised by the Kentucky Supreme Court in its recent decision, *Abbott[, Inc.], v. Guirguis*. . . . From now on, anytime an objective, reasonable person knowing all the surrounding facts and circumstances would believe that the judge’s impartiality might reasonably be questioned, a mandatory disqualification exists. In such a situation, both the **New Code** and the statute, KRS 26A.015, say “shall.”⁵

The Committee also appropriately noted that appellate review of a trial court decision not to recuse is subject to a *de novo* standard of review. *Abbott*, 2021 WL 728860 at *1. The appropriate appellate standard of review for recusal, however, does not alter the recusal rules; it merely requires an appellate court to consider all the facts and circumstances without deference to the trial court’s determination.

Important distinctions exist between *Abbott* and the questions underlying JE-101 and the Committee’s informal opinion. The dispute in *Abbott* involved a real property dispute. A conflict between William Donan, *Abbott*’s principal owner, and the trial judge had occurred approximately four years prior and had involved duck hunting on *Abbott*’s property in close proximity to the railroad right-of-way. *Id.* at *3. At that time, the future judge was an attorney in private

⁵ To the extent that the Committee emphasized both the New Code and statute use the word “shall,” we note the prior version of the Code, Canon 3(E), also used the word “shall.” The Preamble to the prior version stated use of “shall” or “shall not” are “intended to impose binding obligations.” SCR 4.300, Preamble (2017). The current Code states the mandatory nature of the rules, and draws distinctions with rules that contain permissive terms, such as “may” or “should.” SCR 4.300, Scope [2].

practice. After a heated exchange of letters, the future judge, by counsel, threatened to sue Donan for defamation. *Id.* at *2. When Abbott was joined in the lawsuit over the right-of-way, it filed its motion for the trial judge to recuse. *Id.* at *2-3. Based on all the facts and circumstances of the case, we held that a reasonable observer might reasonably question the judge’s impartiality. *Id.* at *7.

That actual conflict, in which a party moved for the trial judge’s recusal, stands in contrast to the questions asked of the Committee, involving matters that are waivable or involve no real impropriety. Under the Code, a trial judge may appropriately disclose on the record to the parties and their lawyers, facts of which the judge is aware that may raise a question of impropriety and may request parties and lawyers, outside of the judge’s presence, to consider whether the judge may proceed. Canon 2, Rule 2.11(C). Under this rule, the only non-waivable conflicts are bias and prejudice. Furthermore, the “judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Canon 2, Rule 2.11, Comment [5]. The use of the word “should” indicates that this disclosure is permissive, or, in other words, not mandatory. That noted, the purpose of disclosure on the record is to ensure that all parties and their lawyers are aware and that an appellate record is made.

The question to the Committee was for guidance when a trial judge’s law clerk’s spouse appeared in front of the judge in an adoption case, “if my [law

clerk] had no involvement in the case.” Our opinion is that the judge’s isolation of the law clerk plus disclosure of the marital relationship dictate that a reasonable observer, being aware of all the facts and circumstances, would NOT reasonably question the judge’s impartiality.⁶ In other words, the trial judge would not be required to recuse. The other inquiry addressed whether this procedure, isolation plus disclosure, would extend to other attorneys working out of the same office as the spouse attorney. We hold that this procedure should be followed for the particular Legal Aid of the Bluegrass office out of which the spouse attorney works but is not required with respect to the other three Legal Aid of the Bluegrass offices.

All sitting. All concur.

ENTERED: June 17, 2021.

⁶ A disclosure along the following lines and filed in the record should comply with this requirement:

This disclosure is made pursuant to Rule 2.11 of the Kentucky Code of Judicial Conduct. SCR 4.300. The undersigned, Judge _____ of the ____ Judicial Circuit/District, hereby gives notice to the parties and their counsel of record that his/her law clerk, _____, is married to Hon. _____, attorney of record for _____. The undersigned will isolate his/her law clerk from any involvement in this matter.

Entered this the ____ day of _____, 202__.

Circuit/District Judge