



COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY
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ANTHONY M. WILHOIT
COURT OF APPEALS

Benjamin L. Dickinson
DISTRICT COURT

Daniel Schneider
CIRCUIT COURT

B. M. WESTBERRY, CHAIRMAN
ATTORNEY

UHEL O. BARRICKMAN
ATTORNEY

Judicial Ethics Opinion

JE-84

April 7, 1993

Question: Must a Domestic Relations Commissioner disqualify from cases in which the attorney who represents her in her divorce appears before her? Where her present husband is also being represented by counsel in his divorce, must she disqualify from cases in which those attorneys appear before her?

Answer: The answer to both of the above questions is yes.

Question: Are these disqualifications waivable?

Answer: Yes.

Question: May the judge tell the attorneys the disqualification is waivable?

Answer: No.

I. A JUDGE MUST DISQUALIFY WHEN AN ATTORNEY
WHO REPRESENTS THE JUDGE IN A PERSONAL
MATTER APPEARS BEFORE HIM.

The Committee has stated in two prior informal and unpublished opinions that a judge must disqualify when an attorney who represents the judge in a personal matter appears before him. Informal Judicial Ethics Opinion LR-65 and Informal Judicial Ethics Opinion LR-112. The disqualification extends to the attorney's entire firm and ends when the representation ceases. Many, though not all, ethics opinions from other jurisdictions agree with this opinion. D. Solomon, The Digest of Judicial Ethics Advisory Opinions: (AL Opinion 78-53 (1978)); (AL Opinion 80-74 (1980)); (AL Opinion 87-137 (1982)); (AL Opinion 82-168 (1982)); (AL Opinion 87-313 (1987)); (AL Opinion 88-336 (1988)); (FL Opinion 79-2/Issue 1 (February 1, 1979)); (FL Opinion 86-9 (May 13,

1986)); (FL Opinion 88-21 (November 10, 1988)); (GA Opinion 54 (June 8, 1984)); (MI Informal Opinion CI-306 (1977)); (MI Informal Opinion CI-543 (November 4, 1980)); ((MI Informal Opinion CI-1108/Issue 2 (September 4, 1985)); (MO Opinion 101 (June 4, 1984)); (NM Opinion 89-8 (October 30, 1989)); (NY Opinion 88-43 (April 11, 1988)); (NY Joint Opinion 88-120/88-125 (October 27, 1988)); (NY Opinion 88-1531/Issue 1 (January 12, 1989)); (NY Opinion 88-1531/Issue 2 (January 12, 1989)); (NY Opinion 89-13 (February 24, 1989)); (NY Opinion 89-27 (April 4, 1989)); (NY Bar Formal Opinion: 511 (April 23, 1979)); (NY Bar Formal Opinion: 574 (April 18, 1986)); (OH Opinion 89-34 (November 2, 1989)); (SC Opinion 3-1983); (Sc Opinion 2-1990 (January 17, 1990)); (TX Opinion 6 (1975)); (TX Opinion 7 (1975)); (WA Opinion 89-131/Issue 1 (June 15, 1989)); (1991). (See also: J. Shaman, S. Lubet, J. Alfani, Judicial Conduct and Ethics § 5.18 (1990)). This committee believes disqualification is the soundest approach and additionally will require it where the attorneys representing the judge's spouse appear before the judge. Most jurisdictions examining the latter question agree with this opinion. D. Solomon, supra.

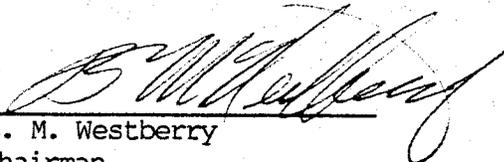
II. THE DISQUALIFICATION IS WAIVABLE.

The waiver question presents a difficult issue. The Code provides for disqualification in four (4) specific instances as well as in all other circumstances where a judge's impartiality might reasonably be questioned. Canon 3D then provides for a waiver of disqualification where the disqualification is based on family relationships or financial interest. Canon 3C(1)(c) and (d). It is silent as to waiver on all other matters. Most commentators agree that the intent of the drafters of the Code was to make all other matters non-waivable though they are unclear as to whether this includes the general category of all other matters in which a judge's impartiality might reasonably be questioned or only the two specific categories of bias and prior representation. Canon 3C (1)(a) and (b). E. Thode, Reporter's Notes to the Code of Judicial Conduct, 71-73 (1973); J. Shaman, S. Lubet, J. Alfani supra, § 5.26. At Common Law, almost everything was waivable. 46 Am. Jur.2d Judges § 224-231 (1969); 48A C.J.S. Judges § 158 (1981); J. Shaman, S. Lubet, J. Alfani, supra. 28 U.S.C. § 455, which was drafted to follow the Code, specifically provides that this general category that all matters in which a judge's impartiality might reasonably be questioned is waivable. The Committee believes this is the most reasonable approach.

Thus, the Committee believes that only those matters specifically set forth in Canon 3(C)(1)(a) and (b) are non-waivable. The only remaining question in issue here is to determine where this disqualification falls. A majority of the committee, in accordance with most ethics opinions from other jurisdictions, believes that the question falls under the general category of all matters in which a judge's impartiality might reasonably be questioned and is therefore waivable. D. Solomon, supra: (AL Opinion 80-78 (1980)); (NM Opinion 89-8 (October 30, 1989)); (NY Bar Formal Opinion: 574 (April 18, 1986)); (SC Opinion 3-1983). Bias is implied in all situations where disqualification is required. Where the bias involved in family relationships is waivable, relationships involving less bias should be waivable as well.

III. THE JUDGE MAY NOT TELL THE ATTORNEYS
THE DISQUALIFICATION IS WAIVABLE.

The Committee feels it is important at this time to modify Judicial Ethics Opinion JE-1 (Revised). In this instance, the judge must disclose his relationship to the attorneys before him on the record and disqualify. Contrary to what the Committee said in JE-1 (Revised), the judge may not tell the attorneys the disqualification is waivable. Since at Common Law most disqualifications were waivable, the attorneys know the option of waiver is available to them. If they independently agree to a waiver the judge may hear the case. Otherwise, the judge must step down. The Committee believes this new procedure is best as it avoids any undue pressure from the bench to compel the attorneys to agree to waive the disqualification. JE-1 (Revised) is hereby modified accordingly.


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