



Judge C. Rene' Williams
Circuit Court

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**FORMAL
JUDICIAL ETHICS OPINION JE-129**

April 5, 2021

QUESTION 1: WHERE A CIRCUIT JUDGE IS MARRIED TO THE CHIEF OF THE CITY POLICE, MUST THAT JUDGE RECUSE IF A CITY POLICE OFFICER IS A MATERIAL WITNESS IN A CASE BEFORE HER?

ANSWER 1: YES.

QUESTION 2: IS THIS DISQUALIFICATION WAIVABLE?

ANSWER 2: YES.

A Kentucky Circuit Judge is requesting guidance because her husband has been appointed to the position of Chief of the City Police. Her question to the Committee is whether she is now required to recuse any time a city police officer is a material witness in a case before her. She also asks if this disqualification is waivable.

The **New Code** is clear that a judge must recuse if the judge's spouse is likely to be a material witness to the proceeding. **Canon 2, Rule 2.11(A)(2)(d)**. The Judge has explained to the Committee that because her

husband is now the supervisor, it is unlikely he will be called to testify. He will, however, be directing other police officers in the performance of their jobs and as Chief of Police will be making policy decisions that she will review. Therefore, the Judicial Ethics Committee believes the spouse's official responsibilities require the judge to recuse any time one of her spouse's subordinates is likely to be a material witness in the judge's courtroom. Whether the police officer is a material witness or not depends on the facts of the particular case and the relevance and probative value of the officer's testimony.

**I. THE NEW CODE AS WELL AS PRIOR ETHICS OPINIONS
IN KENTUCKY AND ELSEWHERE REQUIRE A JUDGE
TO DISQUALIFY WHENEVER THE JUDGE'S SPOUSE
SUPERVISES AN INDIVIDUAL LIKELY TO BE A
MATERIAL WITNESS IN THE PROCEEDING.**

The **New Code** is clear that when the judge is married to an individual who is likely to be a material witness in a proceeding the judge must recuse.

Canon 2.11(A)(2)(d) provides:

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

....

- (2) The judge knows that the judge, or the judge's spouse or domestic partner, or a person within the third degree of relationship of either of them, or the spouse or domestic partner of such a person:**

....

- (d) likely to be a material witness in the proceeding.**

Under the present facts, the spouse is not likely to be a witness, but he does direct the duties and make policy decisions that govern the responsibilities of the police officers who will be called to be material witnesses. This fact appears to bring these circumstances within the scope of subsection (A) in which a judge's impartiality might reasonably be questioned. Other Judicial Ethics Opinions support this conclusion.

In Kentucky, Judicial Ethics Opinion JE-80 held that where the judge was married to a person who was an attorney for and the deputy commissioner of the Natural Resources and Environmental Protection Cabinet, the spouse was an officer of the party and the judge was disqualified from hearing any cases involving the Cabinet. The opinion did not specifically say that the judge's spouse was a supervisor, but by finding that the spouse was an officer and a policy maker, to a certain extent, that position was implied. The Committee went on to hold that recusal was mandatory because the situation presented an appearance of impropriety. The Committee also held that disqualification could be waived.

Judicial Ethics Opinions from outside Kentucky have reached a similar result with regard to the obligation to recuse. An opinion from the Advisory Committee on Standards of Judicial Conduct of the State of South Carolina held that a county magistrate could not preside over proceedings involving employees of the county sheriff where the magistrate was dating the sheriff. Under those circumstances the public would believe that the magistrate was biased in favor of witnesses who were employees of the sheriff even though the sheriff was not a witness in the case. Here, again, the problem was the appearance of impropriety. SC Adv. Comm, Std. Cond., OPINION NO, 2-2018 (January 9, 2018), 2018 WL 505939.

A 2013 ethics opinion from the State of New York reached a similar result. The ethics opinion held that a part-time judge who was married to a person who worked for the county probation department and who supervised some of the probation officers must recuse himself when the material witness is one his wife has supervised. Because she was the supervisor, she was directly involved in those proceedings even though she was not a witness.

The judge's decision to sit would create an appearance of impropriety. The Ethics Committee held, however, that the decision of the judge to recuse was waivable. NY Jud. Adv. Op. 13-108 (September 12, 2013), 2013 WL 8477977.

Whether a witness is material depends on the facts of the case. The Court should consider the relevance and probative value of the witness's anticipated testimony in determining whether the witness is material. *See Sinnott v. Commonwealth*, 364 S.W.3d 70, 85 (Ky. 2011).

II. THE KENTUCKY SUPREME COURT HAS MADE IT CLEAR THAT WHERE THE NEW CODE AND THE STATUTE SAY "SHALL," RECUSAL IS MANDATORY; HOWEVER, ABSENT EVIDENCE OF ACTUAL BIAS OR PREJUDICE, THE RECUSAL MAY BE WAIVED.

Recently, the Kentucky Supreme Court decided the case of *Abbott v. Guirguis*, --- S.W.3d ---, 2021 WL 728860 (Ky. 2021). The case applied the **New Code** and held that where an objective, reasonable person knowing all the relevant facts and circumstances might reasonably question the judge's impartiality, the appearance of impropriety exists and recusal is mandatory. The Court in *Abbott* also changed the applicable standard of appellate review from abuse of discretion to *de novo*. The pertinent statutory provision is essentially the same as the language of the Code. *See* KRS 26A.015(2)(e). ("Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding. . . [w]here he has knowledge of any other circumstances where his impartiality might reasonably be questioned."). The Committee believes that a situation in which the judge is married to the supervisor of a material witness satisfies the test of the *Abbott* case since an objective, reasonable person knowing all the surrounding facts and circumstances would believe the judge's impartiality might reasonably be questioned, and thus the judge must recuse.

The Committee notes that *Abbott* does not address whether an otherwise mandatory recusal "in a proceeding where the judge's impartiality might

reasonably be questioned” is waivable. Waiver was not an issue in *Abbott* due to the fact an objection had been made and the Court found evidence of prior animosity (though not necessarily current actual bias) on the part of the judge toward the objecting party. Bias and prejudice are the only reasons for judicial recusal that cannot be waived. The other authority cited herein would appear to support the conclusion that a personal relationship between a judge and the supervisor of a material witness giving rise to an appearance of impropriety does not rise to the level of actual bias because they held that the conflict could be waived. Based on the weight of the foregoing authority, and assuming additional facts do not indicate a contrary result, the Judicial Ethics Committee believes the obligation to recuse is waivable where a judge is married to a supervisor of a material witness.

In conclusion, the Committee believes that where a material witness is supervised by the judge’s spouse and a party objects, i.e., there is no waiver, the judge must recuse from the case.

Sincerely,

/S/ Irv Maze

Judge, Court of Appeals and
Chair
The Ethics Committee of the
Kentucky Judiciary

cc: The Honorable C. Rene’ Williams, Judge, Circuit Court
The Honorable Jeffrey Scott Lawless, Judge, District Court
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