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**FORMAL
JUDICIAL ETHICS OPINION JE-127**

December 7, 2015

DISQUALIFICATION OF JUDGES AND REMITTAL OF DISQUALIFICATION

Public confidence in the judiciary is essential, and judges should make every effort to instill that confidence. Where a judge believes he or she cannot be objective and fair, recusal is mandatory. However, recent inquiries to the Committee indicate that there is some misunderstanding of the proper procedure to be employed where the possibility of bias might appear. This Formal Opinion will address the disqualification and remittal of disqualification rules set out in Canons 3E and 3F of the Kentucky Code of Judicial Conduct.¹

Canon 3E provides, in part:

Disqualification.

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
 - a. The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - b. The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it....

The Commentary to Canon 3E states:

¹ KRS 26A.015(2) also sets out grounds for disqualification, but this Committee does not interpret statutes.

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. * * * A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Thus, there are several courses of action by the judge when considering possible disqualification:

1. The judge discloses information the parties might consider relevant, considers responses the parties might make, and decides that recusal is not warranted. The parties may then take whatever action they deem appropriate under KRS 26A.015(2) and guidance for the court in such circumstances can be found in *Stopher vs Com.*, 57 SW3d 787 (KY 2001); or
2. The judge concludes that he or she has a personal bias or prejudice concerning a party or is otherwise unable to be impartial, and simply recuses; or
3. The judge concludes that he or she is disqualified under Canon 3E and informs the parties of the basis of that disqualification on the record, but draws the parties' attention to Canon 3F, allowing the parties to waive the disqualification.

It is important that the provisions of Canon 3F be strictly followed.

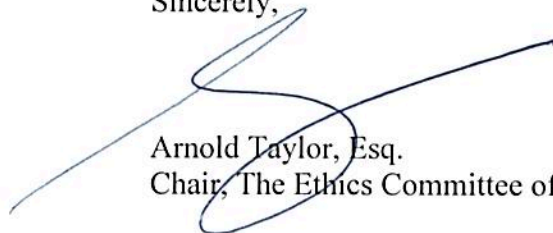
1. If the basis of the disqualification is personal bias or prejudice concerning a party, the judge should recuse and not mention Canon 3F.
2. If the disqualification is based on reasons other than personal bias or prejudice concerning a party, the judge must decide if he or she is willing to participate in the proceeding.
3. If still willing to participate, the judge may draw the attention of the parties and their lawyers to Canon 3F and ask them to consider whether to waive the disqualification.
4. The parties' and attorneys' consideration must be out of the presence of the judge. The judge may not participate in the discussion among the parties and their attorneys.
5. If all parties and attorneys agree to the waiver, an agreement to that effect, signed by all parties and all attorneys, is made of record and the judge may proceed. Obviously, if there is not universal agreement, the judge must recuse.

Implicit in Canon 3F is that the judge shall not attempt to persuade the parties or their attorneys to sign the agreement. No agreement of waiver should be presented to the parties or their attorneys in advance of their private consultation. The parties and their attorneys should be

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afforded sufficient time and privacy to consult on the matter. No party or attorney should be allowed to initiate or suggest waiver, lest other parties or attorneys feel they will be prejudiced by opposing waiver; it is the judge's responsibility to raise the issue.

Sincerely,

A handwritten signature in black ink, appearing to be "Arnold Taylor", written over a horizontal line.

Arnold Taylor, Esq.
Chair, The Ethics Committee of the Kentucky Judiciary

AT:psw

cc: Donald H. Combs, Esq. (*Via E-Mail*)
The Honorable Jean Chenault Logue, Judge (*Via E-Mail*)
The Honorable Jeffrey Scott Lawless, Judge (*Via E-Mail*)
Jean Collier, Esq. (*Via E-Mail*)