

Committee on Judicial Ethics
Special Meeting
Friday, June 25, 2021

Committee members present via teleconference: Judge James T. Graham (Chair), Judge Robert B. Shapiro, Professor Carolyn W. Kaas, and Judge Karen Goodrow (alternate). Staff present: Attorney Viviana L. Livesay and Attorney Adam Mauriello.

MINUTES

- I. Judge Graham called the meeting to order at 10:01 a.m. Although publicly noticed, no members of the public were present.

- II. The Committee continued its discussion of **Informal JE 2021-02**. The facts of the inquiry are as follows. A judge assigned to juvenile matters is a foster parent to two children and currently receives Department of Children and Families (DCF) subsidies for those two children and two adopted children. The judge is adopting the two foster children and expects the process to be completed in approximately two weeks. Once the adoption is completed, the judge will have no further foster children, but will receive adoption subsidies from DCF in an amount set pre-adoption. The judge inquires if he/she is disqualified from presiding over juvenile cases involving DCF because of the subsidies.

Relevant Code Provisions: Code of Judicial Conduct Rules 1.2 (Promoting Confidence in the Judiciary), 2.11 (Disqualification).

Rule 1.2 states that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Rule 2.11 (a) states, in relevant part, that “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:

(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 either of them, or the spouse or domestic partner of such a person is:... (C) a person who has more than a de minimis interest that could be substantially affected by the proceeding; ...

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding....

Rule 2.11 (c) states, in relevant part, that “[a] judge subject to disqualification under this Rule, other than for bias or prejudice under subsection (a) (1), may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification, provided that the judge shall disclose on the record the basis of such disqualification. If, following the disclosure, the parties and lawyers agree, either in writing or on the record before another judge, that the judge should not be disqualified, the judge may participate in the proceeding.

This inquiry is one of first impression for this Committee. Research has revealed a split of opinion among the several judicial ethics advisory committees that have addressed the issue of foster care and adoption. In reaching its decision, this Committee considered the following advisory opinions from New York, North Carolina, Kansas, Nebraska, and Alabama, as well as online judicial ethics information from Michigan.

[*New York Advisory Opinion 2020-167*](#)

There is no ethical incompatibility between foster parenthood and part-time judicial office.

[*New York Advisory Opinion 2017-120*](#)

A judge whose court clerk is sometimes appointed as a foster parent by the department of social services may preside in cases involving the potential removal of a child and need not insulate the clerk unless and until the judge becomes aware the clerk is personally involved or is likely to have an interest in a specific disposition. When insulation is required, the judge must also make full disclosure. If any party who has appeared and not defaulted is appearing without counsel at the time of such disclosure, the judge must disqualify herself; the judge otherwise retains full discretion to preside after full disclosure, even if there is an objection.

[*North Carolina Formal Advisory Opinion 2015-1*](#)

A judge who is applying to foster or adopt a child may disclose information about her employment and discuss her judicial office but should avoid statements or remarks that could be viewed as an attempt to use her judicial office to gain favorable treatment in the adoption process. If a department of social services is involved in the process, a judge should disqualify herself from any case or proceeding involving that specific department for as long as the application is pending. If an application to foster or adopt a child is denied, the judge is not disqualified and may resume hearing any cases or proceedings involving that department. If an application is successful, after the adoption is complete, the judge is not required to disclose further or disqualify when

hearing any cases or proceedings involving that specific department. If an application to foster a child is successful and the fostering has commenced, a judge is disqualified from any cases or proceedings involving the specific department with jurisdiction or influence over the continued foster-care arrangement for the duration of the fostering of that child, unless all counsel and parties waive the disqualification.

[Kansas Judicial Ethics Opinion JE 174 \(2012\)](#)

A district judge in a multi-judge district may provide licensed foster parent services to a child and may handle a portion of the “Child in Need of Care” docket, provided the case is pending in another judge’s division. The judge does not have to automatically recuse without a valid request.

[Nebraska Advisory Opinion 2002-4](#)

A clerk magistrate who exercises juvenile jurisdiction and hears cases involving the Department of Health and Human Services may not provide foster care for children, adopt a former foster child, or provide permanent placement for the sibling of the former foster child.

[Alabama Judicial Inquiry Commission Opinion 85-229](#)

A juvenile court judge may serve as a foster parent for children in the custody of the Department of Pensions and Security without violating the Canons of Judicial Ethics. Foster supervision will be provided by an independent private organization, AGAPE, in this case, rather than by the Department of Pensions and Security.

[Michigan Judicial Ethics FAQ](#)

May a judicial officer who oversees abuse and neglect matters be a foster parent?

Pursuant to MCJC 2, judicial officers must avoid the appearance of impropriety. Judges should keep in mind that DHHS staff, parents’ attorneys, and lawyer guardian ad litem involved in the foster care placement may also appear in unrelated abuse and neglect cases in the same county or in a different county. For respondent parents, the fact that the judicial officer presiding over their case is a foster parent could create the appearance that other participants have an unfair advantage in the proceeding, contrary to Canon 2(C). Such a perception would require disqualification of the judicial officer under Canon 3(C).

Further, Canon 4(E) provides that a judge should refrain from financial dealings that tend to reflect adversely on impartiality. While the foster care stipend paid to foster parents is minimal, it is a financial activity parties could perceive as an influence on the impartiality of the judicial officer.

Based upon the information provided, the participating members of the Committee unanimously concluded that during the adoption application process and while the children are still in foster care, the judge should disqualify him/herself (subject to remittal under Rule 2.11(c)) from any case involving DCF. Once the adoption is

completed, DCF supervision would end and the judge can go back to hearing cases and no further disclosure or disqualification of the matter is required when hearing any cases or proceedings involving DCF.

The Committee further found that the connection between proceedings involving DCF and the receipt of previously determined adoption subsidies is too attenuated to be an “interest that could be substantially affected by the proceeding” or an “economic interest” under Rule 2.11 (a)(2)(C) and Rule 2.11(a)(3) or to cause an appearance of impropriety.

III. The meeting adjourned at 10:19 a.m.