SUPREME COURT OF LOUISIANA

No. 96-O-1447

IN RE: JUDGE SYLVIA R. COOKS

CALOGERO, C.J. dissenting.

The majority concludes that Judge Cooks' failure to recuse herself in the Abshire case violated both the Code of Judicial Conduct and the Constitution, as a consequence of which she warrants public censure. For the reasons that follow, I do not join the majority in this action.

The factual scenario, as I understand it, that gave rise to the Judiciary Commission's recommendation is as follows: In October 1992, Sylvia Cooks, a talented young lawyer with no prior judicial experience, was elected to the Court of Appeal, Third Circuit. Just seven months after taking office, never before having been a judge, she is confronted with the situation that developed and gave rise to the disciplinary proceedings involved here. At the time, Judge Cooks' experience with recusation is, of course, very limited, and she occasionally seeks guidance from her new peers on the Court of Appeal. The Canons of the Code of Judicial Conduct at the time simply tell her that "[t]he recusation of judges is governed by law."[1] That law consists of Article 151 of the Code of Civil Procedure and Article 671 of the Code of Criminal Procedure, which set forth the law regarding recusal in

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[1] Canon 3(C) has since been amended, effective July 8, 1996, to provide:

> C. Recusation. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.

civil and criminal cases, respectively. Article 671 of the C.Cr.P. tells her that in criminal cases she "shall" be recused in any one of six enumerated situations. Article 151 of the C.C.P. tells her that in civil cases like Abshire, she "shall" be recused if she is a witness in the case, but only "may" be recused in five other situations. The jurisprudence interpreting those articles tells her that the appearance of impropriety is not a ground for recusation in civil cases, because it is not enumerated as such in C.C.P. art. 151. E.g., State v. Pailet, 165 So. 2d 294, 297 (La. 1964) (holding that the statutory list of recusal grounds is exclusive, not illustrative, and there must be a statutory ground for recusing a judge); Christian v. Christian, 535 So. 2d 842, 845 (La. App. 2d Cir. 1988); Love v. Baden, 478 So. 2d 1008, 1011 (La. App. 3d Cir. 1985). Finally, no reported case has disciplined a judge for failing to recuse herself or himself in a civil case; rather, the reported recusal cases concern only the issue of whether a judge may sit on a case after he has been challenged by a litigant.[2] This was the state of the law as it existed when Judge Cooks came to the bench and when, within months, she authored an opinion and voted as one of five judges on the panel in the Abshire case.

The majority finds that Judge Cooks violated C.C.P. art. 151(B)(5) by not recusing herself in the case, one in which a friend was a litigant and in which her attorney and friend represented one of the parties. Article 151(B)(5) tells us that a judge "may" be recused if he is "biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent

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[2] Since the time of the Abshire case, in fact after the instant case was lodged here, this Court issued a decision addressing a judge's misconduct in failing or neglecting to recuse himself. In In re Lemoine, 96-2116 (La. 4/4/97) (on rehearing), this Court held that a judge's failure to recuse himself in 21 criminal cases and 11 civil cases, in which he was "associated with an attorney" in the respective causes under C.C.P. art. 151 and C.Cr.P. art. 671, subjected that judge to public censure under Article V, §25(C) of the Louisiana Constitution.

that he would be unable to conduct fair and impartial proceedings." The inherent problem with C.C.P. 151(B)(5) lies in proving bias and prejudice on the part of a judge, which is a subjective state of mind, without the benefit of objective evidence. The majority today puts forth an objective standard by which to measure bias or prejudice, holding that

> absent direct evidence that the judge is biased or prejudiced to such an extent that he would be unable to conduct fair and impartial proceedings, where the circumstantial evidence of bias or prejudice is so overwhelming that no reasonable judge would hear the case, failure of a judge to recuse herself is a violation of the Code of Judicial Conduct as well as the Louisiana Constitution. Slip op. at 17-18 (emphasis supplied).

I do not disagree with the standard dictated by the majority: If no reasonable judge would desist from recusing herself in a given case under similar circumstances, then perhaps a judge in those same circumstances who does not recuse herself can be shown to have been biased and prejudiced by circumstantial evidence alone.

In the instant case, however, I cannot agree that "no reasonable judge" under these circumstances could possibly have stayed in the case. I am not convinced that it is impossible to be fair because of a social relationship with a litigant, and/or a professional relationship with an attorney. Before I would condemn an elected judge with a public censure where the evidence is entirely circumstantial, I would have to be convinced with absolutely clear evidence of the existence of that state of mind. See In re Daniels, 340 So.2d 301, 306 (1976). I would not find such evidence in this case.