

*Key Issues in
Judicial Ethics*

**DISQUALIFICATION ISSUES
WHEN A JUDGE
IS RELATED TO A LAWYER**

BY CYNTHIA GRAY



State
Justice
Institute

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INTRODUCTION

A judge who is neutral and appears to be neutral is a necessary element of justice and an essential prerequisite for public confidence in the decisions issued by the judiciary. Therefore, Canon 3E of the American Bar Association Model Code of Judicial Conduct creates a general requirement for disqualification whenever a judge's "impartiality might reasonably be questioned." All states (and the federal government) have adopted similar disqualification rules in their codes of judicial conduct, statutes, or procedural rules.

The code lists examples of circumstances in which a judge's impartiality might reasonably be questioned, and in some of the specific rules, a family member's involvement or interest as an attorney is the basis for the judge's disqualification. Thus, under Canon 3E(1)(d)(iii), disqualification is required if the judge knows that the judge's spouse, parent, or child wherever residing or any member of the judge's family residing in the judge's household is acting as a lawyer in the proceeding. Furthermore, even if the judge's attorney-relative is not acting as an attorney in the case, the judge is disqualified if the attorney-relative has a more than de minimus interest that could be substantially affected by the proceeding (Canon 3E(1)(d)(v)).

This paper will discuss the situations in which a judge may be required to be disqualified because a member of the judge's family is an attorney with some relationship to the case, the parties, or the attorneys. The paper will cover the rule requiring disqualification in cases in which a family member is acting as attorney, considering possible exceptions such as appearances in uncontested matters and emergencies. The paper will examine whether disqualification is required when a family member is not appearing in a case but is a partner or associate in a law firm in the case, is of-counsel to the law firm, or shares office space with an attorney appearing in the case. The possibility of disqualification if a family member's clients are parties in a case will also be considered. The paper discusses whether a judge is disqualified if a family member is a prosecutor, public defender, or an attorney for legal aid and other members of

that office appear before the judge. Finally, the paper discusses the repercussions of a judge's family members appearing before the judge's colleagues and of a judge's family member also being a judge.

WHEN A FAMILY MEMBER IS AN ATTORNEY IN A CASE

The model code provides that a judge is disqualified from a case if “the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is acting as a lawyer in the proceeding.” Thus, under the model code, a judge may not preside in a case in which one of the attorneys is the judge’s mother, father, mother-in-law, father-in-law, brother, brother-in-law, sister, sister-in-law, son, son-in-law, daughter, daughter-in-law, uncle, aunt, spouse’s uncle, spouse’s aunt, nephew, niece, spouse’s nephew, spouse’s niece, grandmother, grandfather, spouse’s grandmother, spouse’s grandfather, great grandfather, great grandmother, spouse’s great grandfather, spouse’s great grandmother, or the spouse of any of those relatives. The disqualification also applies if the lawyer is engaged to a member of the judge’s family within the specified degree. *Alabama Advisory Opinion 93-486*; *West Virginia Advisory Opinion* (January 20, 1995).

That rule applies to federal judges and most state judges, although in some states, disqualification extends to attorneys related to a judge or the judge’s spouse within the fourth degree, which includes first cousins and others.

The disqualification applies:

- regardless whether the relative’s fee was fixed or contingent (*Alabama Advisory Opinion 91-423*),
- if the judge’s relative has contributed toward the preparation of the case even though the relative is making no formal appearance (*Tennessee Advisory Opinion 95-4*),
- if the judge knows that a relative has given legal advice related to the matters in controversy (*Alabama Advisory Opinion 99-726*), or
- if the relative appeared in the original proceeding even though different attorneys are now appearing before the judge on a matter related to the original proceeding (*Alabama Advisory Opinion 95-549*; *Alabama Advisory Opinion 91-415*).

Absent additional factors, a judge is not disqual-

ified from a case when one of the attorneys is related to the judge outside the third degree of relationship. *Indiana Advisory Opinion 3-90*. For example, in states where the disqualifying relationship is the third degree, a judge is not disqualified when the judge’s cousin is acting as a lawyer unless they have a near-sibling relationship or close familial tie such that the judge’s impartiality might reasonably be questioned. *Florida Advisory Opinion 97-13*; *Kentucky Advisory Opinion JE-48* (1984).

Disqualification caused by the appearance of a relative as an attorney in a case may be waived or remitted by the parties following disclosure of the relationship. However, the Alabama judicial ethics committee “strongly discouraged” a judge from obtaining a waiver when the judge’s son represents a party (*Alabama Advisory Opinion 94-513*), and the South Carolina advisory committee advised a judge to be cautious about using waivers in non-adversarial matters in which the judge’s child appears (*South Carolina Advisory Opinion 1-1995*).

Possible exceptions

Uncontested matters

Several advisory opinions state that a judge is disqualified if a relative appears as an attorney even if the matter is uncontested. *Alabama Advisory Opinion 94-512*; *South Carolina Advisory Opinion 3-1995*. Other opinions, however, appear to create an exception for routine or uncontested matters. For example, the Kansas advisory committee stated a judge may conduct a docket call in which the judge assigns cases to other judges and hears some preliminary matters before a case is assigned even if the judge’s child or a member of the child’s firm is of counsel in cases on the docket. *Kansas Advisory Opinion JE-42*. The South Dakota judicial ethics committee stated that a judge in a rural area may sign uncontested orders or judgements in probate matters presented by the judge’s uncle; however, the committee advised that, if the orders or judgement are ever challenged (for example, if a motion to set aside a default judgement is filed), the judge would have to disqualify. *South Dakota Advisory Opinion 90-1*. The West Virginia advisory committee stated that a judge may charge a grand jury and conduct a

general indoctrination of an entire jury panel in a proceeding in which the judge's child was representing a criminal defendant. *West Virginia Advisory Opinion* (December 15, 1995). The Nebraska judicial ethics committee stated that in cases in which a judge's brother-in-law appears as counsel, the judge may preside over routine matters such as the receipt and notation of a plea of not guilty and the scheduling of a case for trial unless there is a possibility of deferential treatment by the judge (for example, if a trial date is scheduled by the judge and not according to a pre-arranged established method). *Nebraska Advisory Opinion 89-5*.

Judge-shopping

Another possible exception to the requirement of disqualification arises if, after a judge has made decisions in a case, a dissatisfied party retains the judge's relative in an apparent strategy to force the judge to get off the case. Under those circumstances, disqualification is not required (*Alabama Advisory Opinion 95-548*; *Alabama Advisory Opinion 95-586*) or the judge may refuse to allow the attorney-relative to appear in the case (*Louisiana Advisory Opinion 110* (1993)).

Emergencies

Emergency circumstances may create an exception to the disqualification rule for cases involving attorney-relatives. The Alabama judicial ethics committee advised that a judge may preside in a case in which a party is represented by the brother of the adoptive father of the judge's spouse if immediate action is necessary to protect life or property or to preserve the status quo and no other judge is available. *Alabama Advisory Opinion 95-542*. However, the committee cautioned that the judge should turn the case over to another judge once the need for immediate action no longer exists.

WHEN A RELATIVE IS AN ATTORNEY IN A LAW FIRM APPEARING IN A CASE

When a relative is an attorney in a local law firm, a judge may be faced with the question whether to hear cases in which attorneys in the law firm other than the relative appear. The code in most states does not expressly require disqualification under those circumstances, and commentary to Canon 3E(1)(d) states the "fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." However, the code notes that under "appropriate circumstances," a relative's affiliation may require disqualification if additional factors suggest "the judge's impartiality might reasonably be questioned" or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding."

In deciding whether to disqualify, a judge should consider:

- whether the judge's relative is a partner, shareholder, associate, or of counsel in the firm,
- the size of the firm,
- whether the fee the firm will receive is based on an hourly fee or is contingent on the client winning the case,
- the nature of the case, in particular, its financial impact on the relative's law firm,
- prominence of the judge's relative's name in the firm name,
- the size of the court,
- the size of the community, and
- the frequency of the firm's appearance in the judge's court.

Illinois Advisory Opinion 98-12; *Illinois Advisory Opinion 94-18*; *Tennessee Advisory Opinion 95-4*; *Washington Advisory Opinion 88-12*. The Illinois judicial ethics committee explained:

Obviously, if the relative is a partner in a two-person law firm, and the case could generate substantial attorneys' fees, the relative's interest is more than de minimus. On the other hand, if the relative is a beginning associate in a 200-person law firm, and the case involves a fee of only a few thousand dollars, the relative's interest is de minimus. In most cases, the facts will fall somewhere between these extremes, and the judge will be required to make a reasoned assessment of the extent of the relative's interest.

Illinois Advisory Opinion 94-18. The Tennessee advisory committee stated "A judge does not commit any ethical impropriety by recusing himself/herself in all cases which involve a law firm in which the judge's relative practices as a partner or associate." *Tennessee Advisory Opinion 95-4.*

Some state codes have provisions specifically addressing disqualification when a family member's firm appears before the judge. The **Alaska** code states that a judge is disqualified if the judge knows that the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household "is employed by or is a partner in . . . a law firm involved in the proceeding." Similarly, the **New Jersey** code includes as a grounds of disqualification the fact that a judge's spouse, a person within the third degree of relationship to either the judge or the judge's spouse, or the spouse of such a person "is in the employ of or associated in the practice of law with, a lawyer in the proceeding." Commentary to the New Jersey code emphasizes, "The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated of itself disqualifies the judge." For appellate justices, the **California** code provides disqualification is required if "the justice or his or her spouse, or a person within the third degree of relationship to either of them, or the spouse thereof . . . is associated in the private practice of law with a lawyer in the proceeding."

When the lawyer-relative is a partner

If a relative of a judge within the third degree is a partner with another lawyer or a partner in a law firm, many courts and advisory committees have adopted a per se rule that automatically prohibits the

judge from presiding over cases in which one of the judge's partners or an associate of the firm represents one of the parties. In *Regional Sales Agency v. Reichert*, 830 P.2d 252 (Utah 1992), the Utah Supreme Court addressed whether a judge must disqualify when a law firm appearing before the judge employed the judge's father-in-law and brother-in-law as partners, even though another attorney with the firm had exclusive responsibility for the case. The court noted that disqualification would be required if the firm's fee was contingent on the outcome of the case and if the relative's compensation, through profit sharing or other mechanisms, might ultimately be affected by the outcome. To avoid a detailed examination of the billing and compensation practices of the relative's firm in every case, the court adopted a "bright-line proscription:" a relative of the requisite degree of relationship has an interest that might be sufficiently affected by the outcome of a case to require disqualification in every situation in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case. Other jurisdictions have also adopted that "bright-line" rule. See Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 8.5.5 (Little Brown 1996); *Florida Advisory Opinion 84-24*; *Indiana Advisory Opinion 1-89*; *Nebraska Advisory Opinion 96-4*; *Nebraska Advisory Opinion 98-5* (the judge is disqualified even if the partners do not share profits or any equity interest); *New Mexico Advisory Opinion 89-7*; *New York Advisory Opinion 87-3*; *U.S. Advisory Opinion 58* (1998).

Opinions in other jurisdictions, however, have stated that the mere fact that a judge's relative is a partner in a law firm does not require automatic disqualification from cases in which the law firm appears, although ethics committees advise the judge to disclose the relationship and consider whether additional factors require disqualification. See, e.g., *Alabama Advisory Opinion 93-500*; *Michigan Advisory Opinion J-4* (1991); *Tennessee Advisory Opinion 95-4*; *Texas Advisory Opinion 29* (1978); *Washington Advisory Opinion 88-12*; *Washington Advisory Opinion 91-6*. The Alabama advisory committee stated, first, the judge should disclose the existence of the relationship to the parties and their attorneys. Second, the judge must determine on a

case-by-case basis whether there are any other factors that would cause the judge's impartiality to be reasonably questioned, including:

- Whether the lawyer-relative would receive a commission, contingency, or bonus from the case or all of the firm's cases for a period.
- Whether the relative would receive a salary increase when the firm reaches a certain dollar amount in a given time period.
- The degree of kinship between the judge and the relative.
- The number of cases the firm has before the judge.
- Any other connections, dealings, or relationships to other members of the firm.

Third, the judge should determine whether the lawyer-relative has an interest in the law firm that could be substantially affected by the outcome of the proceedings.

Noting that the judge's disclosure of the relationship gives the parties and their attorneys an opportunity to supply additional information, the committee stated that the judge need not initiate an investigation into additional factors that may require disqualification, although the judge is required to make a reasonable effort to be informed about the financial interests of the judge's spouse.

"Of-counsel" relationship

Whether a judge is disqualified from cases involving a law firm with which a relative has an "of counsel" relationship depends on the nature of the relationship. Disqualification is not required if:

- the relative only receives a fixed salary and fixed deferred compensation regardless of the firm's profits (*Utah Informal Advisory Opinion 92-3*), and
- the relative has only a retainer interest in "occasional, discrete, separate cases" (*New York Advisory Opinion 95-35*).

Disqualification is required if:

- a significant portion of the relative's salary or

deferred compensation is dependent on the firm's profits (*Utah Informal Advisory Opinion 92-3*), or

- there is a continuing counsel relationship "evidenced, for example, by a shared letterhead and other indicia" (*New York Advisory Opinion 95-35*).

When the lawyer-relative is an associate in a law firm

The states are split on whether, if a judge's relative is an associate in a law firm and, therefore, receives a fixed salary, the judge may preside over a case in which another attorney from the law firm appears.

- In some jurisdictions, absent additional factors, a judge may preside over proceedings in which a law firm representing one of the parties employs a relative as an associate. *Alabama Advisory Opinion 97-665; Illinois Advisory Opinion 96-18; Michigan Advisory Opinion J-4 (1991); New Mexico Advisory Opinion 87-2; New York Advisory Opinion 88-21; New York Advisory Opinion 94-1; South Carolina Advisory Opinion 4-1980; Wisconsin Advisory Opinion 00-1; U.S. Advisory Opinion 58* (reissued 1999).
- Some jurisdictions advise judges to disqualify when a relative is an associate in a law firm appearing in a case unless the parties waive the disqualification. *Florida Advisory Opinion 84-24; Indiana Advisory Opinion 1-89; Nebraska Advisory Opinion 89-3; New Mexico Advisory Opinion 86-10; Utah Advisory Opinion 97-2*.

The committees that require disqualification note that "a firm's ability to offer raises or pay Christmas or year-end associates bonuses, or, ultimately, to make payroll is directly related to its financial success." *Utah Advisory Opinion 97-2*. According to the Utah committee, adopting a bright-line rule for associates eliminates the necessity of expensive, time-consuming, awkward inquiries into an associate's compensation package, the internal financial arrangements of a law firm, and whether the relative has worked in the case.

When the lawyer-relative is a summer associate in a law firm

When a judge has a relative who is a law student and is working as a summer associate or clerk for a law firm, the states are split on whether the judge may preside over a case in which an attorney from the law firm appears. In some states, a judge is disqualified in cases involving a law firm with which the judge's relative is a summer associate/law student. *New York Advisory Opinions 90-127; New York 91-125; Utah Advisory Opinion 97-2.*

In other states, the judge is not automatically disqualified when a firm employs a relative as a summer associate absent additional factors. *Alabama Advisory Opinion 92-444; Tennessee Advisory Opinion 95-4; West Virginia Advisory Opinion* (August 15, 1995). In those states, the factors the judge should consider are:

- the extent of the relative's participation in the proceeding,
- whether the relative will assist the attorney at hearings or in the courtroom,
- whether the relative's name appears on any of the motions or pleadings,
- whether the relative has discussed the merits of the case with the judge, and
- the significance of the relative's contribution to the preparation or outcome of the proceeding.

Alabama Advisory Opinion 92-444.

- A judge may preside in a case in which a law clerk who is related to the judge attends a deposition to observe and discusses the substantive merits of the deposition with the attorney appearing before the judge, but the judge is disqualified if the relative prepared the questions for the deposition and actually assisted the attorney (*Alabama Advisory Opinion 92-444*).
- A judge whose child is employed by a law firm as a student law clerk should disqualify from those cases in which the child has contributed but not in other cases involving the law firm (*Tennessee Advisory Opinion 95-4*).

- A judge may preside in cases in which one of the firms employs the judge's child as a summer clerk, but should disclose information about the length of time the clerk has worked with the firm, the capacity in which the clerk works for the firm, and whether the clerk worked on the case (*West Virginia Advisory Opinion* (August 15, 1995)).

An attorney with whom a relative shares office space

If a judge's relative shares office space, expenses, and even a secretary with another attorney, but their practices are separate and they are not partners or members of a professional association, the judge is not disqualified from a proceeding involving the unrelated attorney. *Arkansas Advisory Opinion 95-2; Indiana Advisory Opinion 1-89; Kansas Advisory Opinion JE-55; Nebraska Advisory Opinion 89-5; Tennessee Advisory Opinion 89-12.* Disqualification is not required as long as:

- the attorneys do not share liabilities, profits, responsibilities, letterheads, and telephone listings (*Indiana Advisory Opinion 1-89*);
- the only connection between the attorneys is that their offices are physically connected (*Indiana Advisory Opinion 1-89*);
- their relationship does not in any way invite a reasonable conclusion of a deeper nexus (*Indiana Advisory Opinion 1-89*); and
- the relative has no interest in the outcome of cases handled by the other attorney or in fees earned by the other attorneys (*Kansas Advisory Opinion JE-55*).

When a relative practices law with a part-time prosecutor or public defender

If a judge's relative is not employed as a prosecutor or public defender but is associated in the practice of law with a part-time prosecutor or public defender, the judge is disqualified from cases involving the partner or associate but not from cases involving other prosecutors or public defenders.

- A judge whose brother is a member of a law firm in which the senior member is an appointed part-time assistant district attorney is disqualified in cases in which the member of the judge's brother's law firm actually participated in the trial or the preparation of the case but not in cases in which other assistant district attorneys appear (*Alabama Advisory Opinion 81-101*).
- A judge whose sibling is a partner in a law firm in which an assistant district attorney is an associate may preside in cases involving the assistant district attorney (*Louisiana Opinion 171* (2000)).
- A judge is disqualified from cases in which the assistant public defender is engaged in the practice of law with the judge's spouse (*Florida Advisory Opinion 87-11*).
- A judge whose sibling is a partner in a law firm in which an assistant district attorney is an associate may preside in cases involving the assistant district attorney (*Louisiana Advisory Opinion 171* (2000)).
- A judge should disqualify from cases in which the judge's lawyer-brother's partners or associates appear as part-time public defenders (*New York Advisory Opinion 87-3*).
- *But see New York Advisory Opinion 93-8* (in cases involving the county attorney's office, a judge need not disclose that the judge's spouse is employed part-time as an assistant county attorney and is a law partner of the county attorney).

WHEN A RELATIVE'S CLIENT APPEARS BEFORE THE JUDGE

Where a party before the judge is, in other, unrelated matters, a client of the judge's relative or the relative's law firm, the judge is not usually disqualified. *Kentucky Advisory Opinion JE-82* (spouse); *New Mexico Advisory Opinion 87-7* (daughter); *West Virginia Advisory Opinion* (September 2, 1994) (daughter); *U.S. Compendium of Selected Opinions*, § 3.2-1(e) (2001) (spouse). However, disqualification may be required when a client of the judge's spouse appears in an unrelated case and:

- the spouse regularly represents the party (*U.S. Compendium of Selected Opinions* § 3.2-2(d-2) (1999)), or
- the fees from the party to the spouse contribute substantially to the family income (*Kentucky Advisory Opinion JE-82*).

Moreover, a judge is disqualified if the parent corporation of a corporate party in a case employs the judge's brother-in-law as an in-house attorney. *Alabama Advisory Opinion 97-662*.

WHEN A RELATIVE WORKS AS A GOVERNMENT ATTORNEY

If a judge's relative is an attorney for a government agency, the judge is disqualified from any case in which the relative appears. However, with some exceptions described below, a judge may preside in a proceeding involving other attorneys who are employed by the same government agency as the judge's relative. Government agencies include the offices of prosecuting attorneys at the local, county, and state levels, and the public defender. The same principles have also been held to apply to attorneys in legal aid offices.

Attorneys employed by government agencies are not assumed to be associated with one another in the same fashion as attorneys in the private sector because the clientele, compensation, and prestige of government attorneys are not greatly affected by the success or failure of other attorneys in the agency. *Nebraska Advisory Opinion 92-1*. The basis for allowing judges to sit on cases involving other attorneys from a government office in which the judge's relative is employed was explained by the D.C. advisory committee in response to a request from a superior court judge whose spouse was an assistant United States attorney in an office that prosecuted cases in the judge's court. *D.C. Advisory Committee 6* (1995). Examining whether the spouse had a more than de minimus interest that could be substantially affected by the outcome of criminal cases tried by the judge, the committee first pointed out that "the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings."

Second, although noting that "[a]s a member of the collective body of Assistants, it may enhance [the spouse's] pride and sense of group accomplishment to know that particular cases have been 'won,'" the committee concluded "this interest is surely de minimus and, moreover, should not be substantially affected by the verdicts in trials (individual or collective) conducted before this single Superior Court judge." Applying an appearance of impropriety standard, the committee stated that the possibility that "the judge and his spouse discuss together the day-to-day work-

ings of the U.S. Attorney's Office . . . is too frail a consideration on which to compel recusal." The committee relied on the good judgement of the spouse and the judge not to share confidences on individual cases that would require the judge's disqualification.

A relative is an attorney employed in the prosecutor's office

Under this rule, a judge's relative's employment as an attorney in the prosecutor's office does not disqualify the judge from criminal proceedings in which other attorneys from the same office appear, although most of the advisory opinions recommend that the judge disclose the relationship. Thus, with several exceptions discussed below, a judge is not disqualified from cases prosecuted by a city attorney, county attorney, corporation counsel, attorney general, or district attorney by the employment in that office of the judge's relative as an assistant or deputy attorney in that office. *Alabama Advisory Opinion 87-305; Alabama Advisory Opinions 80-89 and 80-90; Alabama Advisory Opinion 86-277; Alabama Advisory Opinion 83-171; Arizona Advisory Opinion 00-1; Arkansas Advisory Opinion 92-6; D.C. Advisory Opinion 6* (1995); *Florida Advisory Opinion 77-12; Georgia Advisory Opinion 182* (1993); *Indiana Advisory Opinion 1-89; Kentucky Advisory Opinion JE-8; Maine Advisory Opinion 93-3; New Mexico Advisory Opinion 87-6; New York Joint Advisory Opinions 88-101, 88-102; New York Advisory Opinion 89-127; New York Advisory Opinion 90-5; New York Advisory Opinion 90-91; New York Advisory Opinion 93-116; New York Advisory Opinion 96-42; New York Advisory Opinion 97-39; New York Advisory Opinion 97-130; Oregon Advisory Opinion 89-3; South Carolina Advisory Opinion 11-1999; Utah Informal Advisory Opinion 94-6; Washington Advisory Opinion 94-5; U.S. Compendium of Selected Opinions, § 3.2-1(a-1)* (2001). See also *Arizona Advisory Opinion 00-1* (a judge whose son regularly appears as a prosecutor in the judge's jurisdiction may serve as the presiding judge of the criminal division where the responsibilities of presiding judge are administrative and involve no supervisory authority over other judges or responsibility for the assignment or processing of cases).

Neither is disqualification necessary in cases involving a prosecuting attorney if a judge's family member is a private attorney who has a contract with a prosecuting attorney to handle certain types of

cases. *Georgia Advisory Opinion 182* (1993); *Washington Advisory Opinion 89-2*.

Public defender

Moreover, a judge may preside over proceedings in which the defendant is represented by an attorney who is employed by the same public defender's office as the judge's relative. *Arizona Advisory Opinion 85-1*; *Florida Advisory Opinion 76-12*; *Florida Advisory Opinion 77-12*; *Florida Advisory Opinion 91-17*; *New Mexico Advisory Opinion 91-1*; *Nebraska Advisory Opinion 92-1*; *New York Advisory Opinion 97-130*; *South Carolina Advisory Opinion 2-1991*; *Washington Advisory Opinion 95-10*.

Legal aid

Similarly, a judge may preside over proceedings in which attorneys appear who are employed in the same legal office as the judge's relative. *Florida Advisory Opinion 97-25*; *Georgia Advisory Opinion 72* (1985); *Nebraska Advisory Opinion 89-9* (a judge whose law school daughter is working for a legal aid agency may preside when attorneys from that agency appear before the judge); *New York Advisory Opinion 97-82*.

Exceptions

There are three exceptions to the general rule. Under these exceptions, if a judge's relative is a prosecutor or public defender, the judge may not preside in cases in which other attorneys in the same government agency appear if:

- the relative participated in some way in the case before the judge,
- the relative is involved in a related case, or
- the relative serves in a supervisory capacity at the government agency.

The relative participated in the case

A judge may not preside over a case in which a relative participated in any manner at any point in the proceedings even if the relative is not appearing before the judge or currently involved in any other way in the case.

- A judge is disqualified from a child support proceeding in which his wife, an assistant district attorney, had previously represented the state (*Alabama Advisory Opinion 91-414*).
- An appellate judge whose son is employed by the public defender's office is disqualified from those appeals in which the son participated in the trial (*Florida Advisory Opinion 76-12*).
- An appellate court judge is disqualified from an appeal and any post conviction proceedings in a case that originated with a grand jury indictment handed down following a presentation before the grand jury by the judge's child, an assistant district attorney, even if the judge's child had not participated in the actual trial of the defendant (*Louisiana Advisory Opinion 149* (1998)).
- A judge cannot hear retrials of cases originally tried by the judge's father, a senior attorney in the district attorney's office, even if another attorney is re-trying the case (*Massachusetts Advisory Opinion 92-1*).
- A judge should disqualify from cases on which the judge's law school daughter conducted research for a legal aid agency (*Nebraska Advisory Opinion 89-9*).
- A judge whose spouse serves as a district attorney must disqualify from a case if the spouse screened the case (in other words, decided whether to send the case to a superior criminal court) or took statements from witnesses (*New York Advisory Opinion 93-116*).
- A family law master whose spouse is a prosecutor or assistant prosecutor should hold a hearing to determine if the spouse had any involvement in the case and what efforts were made to insulate the spouse from the case, file, witnesses, etc. (*West Virginia Advisory Opinion* (February 16, 2002)).

The relative is involved in a related case

A judge may not preside in a case that is related to a case in which a family member is involved as an attorney.

- A judge whose spouse is an assistant United States Attorney is disqualified if the spouse, although having no involvement in the case, took part in a related prosecution (*D.C. Advisory Opinion 6* (1995)).
- A judge whose child is a public defender representing a defendant before another judge is disqualified from hearing the companion case of another defendant charged with the same crime (*South Carolina Advisory Opinion 2-1991*).

The relative has supervisory authority

If a judge's relative has substantial supervisory or policy responsibilities in a government office, the judge is disqualified from cases involving that office even if the relative does not actually make an appearance, absent disclosure and waiver.

- A judge whose spouse is district program administrator of the department of health and rehabilitative services and responsible for all aspects of child support enforcement, including approval of monies paid to the court under a federal program and compensation of contract attorneys, may not preside in any case over which the spouse has supervisory authority (*Florida Advisory Opinion 90-23*).
- A judge should not take an assignment in the dependency side of the juvenile court if the judge's spouse is employed as the managing attorney for dependency by the department of health and rehabilitative services, and several attorneys that appear in the dependency court fall under the spouse's chain of command, even though the spouse's duties are almost completely administrative (*Florida Advisory Opinion 93-51*).
- A judge whose spouse is a legal advisor to the general counsel for a state program department and participates in policy decisions should disqualify from cases involving the department (*Kentucky Advisory Opinion JE-80* (1991)).
- A judge whose spouse is the sibling of a district attorney is disqualified from criminal cases prosecuted by the district attorney's office even though the district attorney does

not personally prosecute all criminal cases because the cases are prosecuted under the district attorney's ultimate direction and control and it may be assumed the district attorney is personally involved in prosecutorial decisions in most if not all of the cases (*Maine Advisory Opinion 93-3*).

- A judge is disqualified from all cases in which the judge's parent, as senior attorney in the district attorney's office, had any involvement or responsibility (*Massachusetts Advisory Opinion 92-1*).
- A judge whose spouse serves as chief trial attorney for the county prosecutor is disqualified whenever the prosecutor's office appears before the judge (*Michigan Advisory Opinion JI-101* (1995)).
- A justice of the appellate division should recuse from appeals in tort cases brought against a municipality that originate in a county where the judge's spouse serves as deputy chief of the corporation counsel's tort division (*New York Advisory Opinion 98-29*).
- A judge whose wife is the elected prosecuting attorney is disqualified from handling all criminal cases, even those handled solely by one of the assistant prosecuting attorneys (*West Virginia Advisory Opinion* (February 25, 1994)).
- A judge whose child is the elected prosecuting attorney is disqualified from all proceedings involving cases represented by any assistant prosecuting attorney (*West Virginia Advisory Opinion* (March 10, 2000)).

The Arizona advisory committee stated that a judge who is married to a supervising deputy county attorney is not required to disqualify from criminal cases in which attorneys from the spouse's section appear if the spouse's role is limited to scheduling attorneys. *Arizona Advisory Opinion 95-19*. The committee stated that the risk that the judge may obtain personal knowledge of the facts of a case from the spouse was limited and did not require automatic disqualification, noting "the judge and her spouse can reasonably be expected to avoid discussion of

cases in the spouse's trial group [that] may be assigned to the judge."

However, the committee advised that the judge is required to disqualify from criminal cases in which attorneys from the spouse's section appear:

- if the spouse is required to evaluate the attorneys in their performance before the judge,
- if the spouse's position or compensation in the prosecutor's office depends on the performance of those he or she supervises in their appearances before the judge,
- if the spouse reviews the judge's minute entry orders for errors, or
- if the spouse advises and consults with those he or she supervises regarding trial technique and strategy, evidentiary questions, sentencing, and similar matters not of an administrative nature.

The committee advised the judge either to communicate to the attorneys supervised by the judge's spouse that it is important that they inform the judge every time the judge's spouse has been consulted in a case, or to disclose the spousal relationship in each case and make a specific inquiry.

The Massachusetts advisory committee stated that a judge is disqualified from any case in which the state is represented by the district attorney's office in which the judge's spouse serves as the first assistant district attorney even if the assistant district attorneys appearing in the judge's court operate independently from the judge's spouse. *Massachusetts Advisory Opinion 96-3*. The committee explained:

[T]he functional division may be less important than the perception of litigants and the general public concerning [the] spouse's responsibilities as First Assistant District Attorney for the operations of, and interest in the success of the office. The First Assistant District Attorney is understandably perceived by litigants and by the community to have responsibility, second only to the district attorney, for all the work of the office.

The committee also stated that "the universality of the problem, and the strong public interest in the appearance of strict impartiality in criminal cases" made waiver of the disqualification inappropriate.

RELATIVES APPEARING BEFORE OTHER JUDGES

A judge's spouse, child, or other close relative may appear as a lawyer before another judge of the same court, but the presiding judge should notify all the parties of the attorney's relationship with the judge's colleague. *Delaware Advisory Opinion 1992-2*; *Indiana Advisory Opinion 1-89*; *Indiana Advisory Opinion 4-93*; *New York Advisory Opinion 88-68*; *New York Advisory Opinion 89-100*; *New York Advisory Opinion 89-105*; *Oregon Advisory Opinion 84-1*; *Washington Advisory Opinion 84-3*; *Washington Advisory Opinion 91-18*; *U.S. Compendium of Selected Opinions*, § 3.6-8(c) (2001).

That rule applies even in a two-judge district. *Kansas Advisory Opinion JE-9I*; *New York Advisory Opinion 92-23*.

ANOTHER JUDGE IN THE FAMILY

If a judge sits on a court that reviews the decisions of another court and a relative of the judge sits on the other court, the judge is disqualified from hearing any appeal in which the relative rendered the decision. The Alabama advisory committee noted that a judge's "reputation is an interest which could be substantially affected by the decisions on appeal in matters which he heard." *Alabama Advisory Opinion 91-421*. However, the reviewing judge is not disqualified from reviewing cases decided by the relative's colleagues on the bench.

- A judge was disqualified from appeals of cases in which the judge's father, a municipal court judge, sat as trier of fact (*Alabama Advisory Opinion 91-421*).
- A circuit judge whose spouse is a municipal judge may hear any appeal from the municipal court, as long as the judge's spouse did not participate in any aspect of the proceeding below (*Alabama Advisory Opinion 97-632*).
- A circuit court judge whose spouse is a district court judge or friend of court referee should not review decisions of his or her spouse, but the other judges on the court may review the spouse's decisions (*Michigan Advisory Opinion II-31* (1990)).
- *But see West Virginia Advisory Opinion* (November 5, 1990) (a judge whose spouse is a family law master for the county may hear uncontested divorces where there is a settlement agreement between the parties and no children are involved).

The **Ohio** code adds a disqualification requirement where: "The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [h]as acted as a judge in the proceeding. . . ."

SUMMARY

The model code of judicial conduct provides that a judge is disqualified from a case if "the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is acting as a lawyer in the proceeding." Relatives within the third degree are the judge's mother, father, mother-in-law, father-in-law, brother, brother-in-law, sister, sister-in-law, son, son-in-law, daughter, daughter-in-law, uncle, aunt, spouse's uncle, spouse's aunt, nephew, niece, spouse's nephew, spouse's niece, grandmother, grandfather, spouse's grandmother, spouse's grandfather, great grandfather, great grandmother, spouse's great grandfather, or spouse's great grandmother. That rule applies to federal judges and most state judges, although in some states, disqualification extends to attorneys related to a judge or the judge's spouse within the fourth degree, which includes first cousins.

The disqualification applies regardless whether the relative's fee is fixed or contingent. Moreover, even if the relative makes no formal appearance in the case, disqualification is required if the relative has contributed toward the preparation of the case, if the judge knows that a relative has given legal advice related to the matters in controversy, or if the relative appeared in a related proceeding.

Disqualification caused by the appearance of a relative as an attorney in a case may be waived or remitted by the parties following disclosure of the disqualifying relationship. However, such a waiver is discouraged, particularly in non-adversarial matters.

Several advisory opinions state that a judge is disqualified if a relative appears as an attorney even if the matter is uncontested, but other opinions appear to create an exception for routine or uncontested matters. Another possible exception to the requirement of disqualification arises if, after a judge has made decisions in a case, a dissatisfied party retains the judge's relative in an apparent strategy to force the judge to get off the case. Finally, a judge may be able to preside in a case in which a party is represented by a relative if immediate action is necessary to protect life or property or to preserve the status quo and no other judge is available, but the

judge should turn the case over to another judge once the emergency no longer exists.

A judge is not disqualified from a case when one of the attorneys is related to the judge outside the third degree of relationship unless they have a near-sibling relationship or close familial tie such that the judge's impartiality might reasonably be questioned.

One of the questions that is frequently raised for a judge if a family member is an attorney in a local law firm is whether the judge may hear cases in which the law firm's attorneys other than the relative appear. In some states, if a relative of a judge within the third degree is a partner, associate, or summer associate with a lawyer or law firm, the judge is automatically prohibited, absent waiver, from presiding over cases in which one of the attorneys is affiliated with the family member. In other states, the mere fact that a judge's relative is affiliated with a lawyer or law firm does not require automatic disqualification from cases in which the lawyer or law firm appears.

In states where there is no rule automatically requiring disqualification, a judge should consider:

- whether the judge's relative is a partner, shareholder, associate, or of counsel in the firm.
- the size of the firm.
- whether the fee the firm will receive in the case is based on an hourly rate or is contingent on the client winning the case.
- the nature of the case, in particular, its financial impact on the relative's law firm.
- prominence of the judge's relative's name in the firm name.
- the size of the court.
- the size of the community.
- the frequency of the firm's appearance in the judge's court.

The smaller the firm, the smaller the court and community, the more often a firm appears before the judge, the more likely the judge will be disqualified when a family member's firm appears, particularly in contingent fee cases and particularly if the family member is a partner.

Where parties before the judge are, in other, unrelated matters, clients of the judge's spouse or the spouse's law firm, the judge is not usually disqualified. However, disqualification may be required if the family member regularly represents the party and the fees from the party to the spouse contribute substantially to the family income.

If a judge's relative is an attorney for a government agency, the judge is disqualified from any case in which the relative appears. However, with some exceptions, a judge's relative's employment as an attorney in the prosecutor's office does not disqualify the judge from criminal proceedings in which other attorneys from the same office appear, although most of the advisory opinions recommend that the judge disclose the relationship. Similarly, a judge may preside over proceedings in which the defendant is represented by an attorney who is employed by the same public defender's office as the judge's relative. The same principles have also been held to apply to attorneys in legal aid offices. Under the exceptions to the general rule, if a judge's relative is a prosecutor or defense attorney, the judge may not preside if the relative participated in some way in the case before the judge; the relative is involved in a related case; or the relative serves in a supervisory capacity at the government agency.

A judge's spouse, child, or other close relative may appear as a lawyer before another judge of the same court, but the presiding judge should notify all the parties of the attorney's relationship with the judge's colleague. If a judge sits on a court that reviews the decisions of another court and a relative of the judge sits on the other court, the judge is disqualified from hearing any case in which the relative rendered the decision. However, the reviewing judge is not disqualified from hearing cases decided by the relative's colleagues on the bench.