

WHEN DO JUDGES DISQUALIFY THEMSELVES FROM CASES TIED TO FAMILY?

Family relationships are one of many reasons why judges may disqualify themselves from legal cases coming before them. In *An Ethics Guide for Judges and Their Families*, Cynthia Gray explained the ethical restraints under which judges operate. This article should be read alongside one's own state Code of Judicial Conduct, many of which are recently revised and posted on state court websites. See "**Questions and Answers about Judicial Disqualification Tied to Family**" in a separate JFI website article.

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 1990] model code of judicial conduct created a general requirement for disqualification whenever a judge's "impartiality might reasonably be questioned." All states have adopted similar disqualification rules in their codes of judicial conduct, or in statutes or rules.

Although there can be some technical differences between the two terms, "recuse" can usually be used interchangeably with "disqualify." When a judge is disqualified or recused from a case, he or she does not participate. In trial courts and some appellate courts, another judge hears it in place of the one who recused. In instances of recusal some appellate courts do not use substitute judges, but evaluate and vote on cases with fewer members.

The code lists specific examples of circumstances in which a judge's impartiality might reasonably be questioned. In some of the specific rules, the interest or involvement of a member of the judge's family as a party or attorney is the basis for the judge's disqualification from a case. Thus, under the specific rules of the 1990 model code, 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 has an economic interest (Canon 3E(1)(c)):
 - in the subject matter in controversy, or
 - in a party to the proceeding.
- If the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such as person:
 - is a party to the proceeding (Canon 3E(1)(d)(i)),
 - is an officer, director, or trustee of a party (Canon 3E(1)(d)(ii)),
 - is acting as a lawyer in the proceeding (Canon 3E(1)(d)(iii)),

- is likely to be a material witness in the proceeding (Canon 3E(1)(d)(iv)), or
- has a more than de minimis interest that could be substantially affected by the proceeding (Canon 3E(1)(d)(v)).

Persons within the third degree of relationship are great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

Commentary to Canon 3E states: 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.

Remittal or Waiver

[In many states] disqualification based on a family relationship or interest can usually be remitted, in other words, waived by the parties. Under Canon 3F of the 1990 model code, remittal is allowed if:

- the judge discloses on the record the basis of the judge's disqualification,
- the judge asks the parties and their lawyers to consider whether to waive disqualification,
- the parties and their lawyers consider waiver out of the presence of the judge,
- the parties and the lawyers, without participation by the judge, agree that the judge should not be disqualified,
- the judge is willing to participate, and
- the waiver agreement is incorporated in the record of the proceeding.

If a judge is disqualified because of a personal bias or prejudice concerning a party, remittal or waiver is not allowed.

Judicial Educators are encouraged to copy this and other JFI articles for judicial conference literature tables. See other online Judicial Family Institute (JFI) articles on ethics, avoiding family conflicts of interest, parenting in a high visibility situation, stress management, impairment assistance, security, finances, and other topics.