

An Ethics Guide for Judges & Their Families



Cynthia Gray

American Judicature Society



This publication was developed under grant #SJI-99-N-006 from the State Justice Institute, "An Ethics Guide for Judges and Their Families." Points of view expressed herein do not necessarily represent the official positions or policies of the American Judicature Society or the State Justice Institute.

Allan D. Sobel

Executive Vice President and Director
American Judicature Society

Cynthia Gray

Project Director
Director, Center for Judicial Conduct Organizations

Jan Aikman Dickson

Judicial Family Institute
Consultant

PROJECT ADVISORY COMMITTEE

Seymour Abrahamson, Wisconsin

Shirley Taylor Frye, North Carolina

Hon. Lisa Davidson Kahn, Florida

Hon. Ben Logan, Michigan

Franny Maguire, Delaware

Kay S. Palmer, Arkansas

Hon. Ellen F. Rosenblum, Oregon

Arthur P. Strickland, Virginia

Hon. E. Norman Veasey, Delaware

Richard Wehmhoefer, Colorado

Library of Congress Catalog Card Number: 00-00000

ISBN 1-928919-06-5

Copyright: American Judicature Society, 2001

American Judicature Society

180 North Michigan Avenue, Suite 600

Chicago, Illinois 60601-7401

(312) 558-6900

(312) 558-9175 fax

www.ajs.org

Founded in 1913, the American Judicature Society is an independent, nonprofit organization supported by a national membership of judges, lawyers, and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, judicial independence, and public understanding of the justice system.

Table of Contents



Introduction	1
An Ethics Guide for Judges and Their Families	2
Defining Family	4
Misuse of Office	5
Presiding in a family member's case	5
Asking for favors from prosecutors, judges, and police officers	7
Presiding in a case involving a family member's complaint	9
Intervening in a family member's dispute	9
<i>Misuse of Office Q&A</i>	11
Hiring or Appointing Relatives	13
Whether a relative may be hired for a court position	13
Continued employment	15
Appointing a relative as counsel for indigent defendants	16
Appointing a relative to fiduciary or quasi-judicial positions	17
Appointing an attorney affiliated with relative	18
Hiring or appointing other judges' relatives	19
Giving a relative court business	20
<i>Hiring or Appointing Relatives Q&A</i>	23
Disqualification - Introduction	25
Introduction to disqualification	25
Remittal or waiver	26
A relative is a party or officer of a party	26
A relative is employed by a party	27
A relative is a witness	27
Disqualification - Economic Interest in a Case	29
Stock ownership	29
Other interests	30
Keeping informed	31

Disqualification - A Lawyer in the Family . . . . .	.33
When a relative is an attorney in a case . . . . .	.33
Possible exceptions . . . . .	.34
Uncontested matters . . . . .	.34
Judge-shopping . . . . .	.35
Emergencies . . . . .	.35
Wavier . . . . .	.35
Relatives appearing before other judges . . . . .	.35
When a relative is an attorney in a law firm that is appearing in a case . . . . .	.36
When the lawyer-relative is a partner . . . . .	.37
“Of-counsel” relationship . . . . .	.38
When the lawyer-relative is an associate in a law firm . . . . .	.38
When the lawyer-relative is a summer associate in a law firm . . . . .	.39
An attorney with whom a relative shares office space . . . . .	.40
When a relative practices law with a part-time with prosecutor or public defender . . . . .	.40
When a relative’s client appears before the judge . . . . .	.41
When a relative works as a government attorney . . . . .	.41
A relative is an attorney employed in the prosecutor’s office . . . . .	.42
Public defender . . . . .	.43
Legal aid . . . . .	.43
Exceptions . . . . .	.43
The relative participated in the case . . . . .	.43
The relative is involved in a related case . . . . .	.44
The relative has supervisory authority . . . . .	.44
Another judge in the family . . . . .	.46
Disqualification - Other Careers . . . . .	.49
When a relative is an elected public official . . . . .	.49
A law enforcement officer in the family . . . . .	.50
A teacher in the family . . . . .	.53
Government agency employee . . . . .	.53
Law firm employee . . . . .	.55
<i>Disqualification Q&A</i> . . . . .	.58

Acting as an Attorney for Family Members . . . . .	.63
Giving legal advice to family members . . . . .	.63
Drafting or reviewing documents . . . . .	.64
Appearing as an advocate for family members . . . . .	.64
Attending a hearing with a family member . . . . .	.65
<i>Legal Advice Q&A</i> . . . . .	.66
Gifts . . . . .	.67
Discouraged gifts . . . . .	.67
Permitted gifts . . . . .	.68
<i>Gifts Q&A</i> . . . . .	.72
Financial Activities . . . . .	.73
Investments . . . . .	.73
Real estate investments . . . . .	.73
Family members' financial dealings . . . . .	.74
When a family member is involved in the bail bond business . . . . .	.75
A judge participating in a family business . . . . .	.76
<i>Financial Activities Q&A</i> . . . . .	.79
When a Judge May Serve as a Fiduciary . . . . .	.81
Rule, rationale, and exception for family members . . . . .	.81
Serving as a fiduciary for someone with whom the judge has a close familial relationship . . . . .	.83
<i>Fiduciary Service Q&A</i> . . . . .	.85
Civic and Charitable Activities . . . . .	.87
Participation in civic and charitable organizations . . . . .	.87
Limitations on a judge's participation in fund-raising . . . . .	.88
A relative's fund-raising . . . . .	.89
Referrals to charitable organizations in which a family member is involved as a volunteer . . . . .	.90
<i>Civic and Charitable Activities Q&A</i> . . . . .	.91
Communications . . . . .	.93
Controversial issues . . . . .	.93
Public criticism . . . . .	.93
High profile cases . . . . .	.94

Ex Parte Communications . . . . .	.95
<i>Communications Q&A</i> . . . . .	.96
Political Activity by Members Of a Judge’s Family . . . . .	.97
The rule . . . . .	.97
Family members participating in a judge’s campaign . . . . .	.99
A judge participating in a family member’s campaign . . . . .	.99
The use of the judge’s home . . . . .	.101
Campaign literature . . . . .	.102
Accompanying spouse to campaign events . . . . .	.103
Campaign contributions . . . . .	.105
When a family member is involved in another candidate’s campaign . . . . .	.105
Use of the judge’s home . . . . .	.106
Campaign signs . . . . .	.107
Contributions . . . . .	.107
Other political conduct . . . . .	.109
Membership and holding office in a political organization . . . . .	.109
Escorting spouse to political events . . . . .	.109
<i>Political Activity Q&A</i> . . . . .	.112
Judicial Family Life . . . . .	.115
Understanding judicial stress . . . . .	.116
Judges considering their partners’ perspectives . . . . .	.117
Managing campaign stress . . . . .	.117
Benefits outweigh challenges for children . . . . .	.118
Being proponents of the judicial system . . . . .	.120
Security ideas for judges, spouses, and families . . . . .	.121
Additional Resources . . . . .	.129

Introduction



To avoid conflicts of interest and the misuse of the prestige of office, judges must give up many of their political, charitable, and business activities when they take the bench. Obviously, however, judges are not required to sever family ties, even though potential conflicts and actual temptations arising from family relationships may create difficult ethical dilemmas for judges. A judge is still a judge in the public's eyes when a he or she leaves the courthouse, and a judge is still part of a family when he or she departs from home in the morning. The role of judge and the role of spouse, domestic partner, parent, child, or sibling are both performed 24 hours a day, seven days a week.

The code of judicial conduct adopted in each state and for federal judges affects a judge both while sitting on the bench and while in the company of loved ones. As a judge, the code prevents a judge from making decisions in a relative's case, from improperly intervening on behalf of a relative with other public officials, and from giving a relative employment, appointments, or court business. When the judge is off the bench, the code limits a judge's participation in civic and charitable organizations and involvement in political activities that may have been customary before the judge took office and may be traditional for members of non-judicial

families. Whether a judge can accept a gift, engage in financial and fiduciary activities, and act as a lawyer are also affected by the code and may change family practices. The code also requires a judge to encourage relatives to refrain from certain behavior.

The code of judicial conduct does not expressly or directly restrict the behavior of members of a judge's family. The state supreme courts (which adopts the code) and the conduct commissions (which enforces it) have no authority over judges' relatives.

However, a judge's relatives need to know the requirements of the code to understand why a judge-relative seems to say "no, I can't do that" all the time, to avoid even asking the judge to do something he or she should not do, and to avoid attracting embarrassing public attention questioning the judge's ethics. Moreover, relatives presumably share a judge's commitment to the integrity and impartiality of the judiciary and would be willing to alter their plans voluntarily if they understood how their behavior could affect the public's confidence in the judiciary. The rules in the code do not so much restrict *what* family members can do as guide *how* they should do it. For example, a judge's spouse may run for political office but cannot expressly or impliedly maintain that the judge endorses the spouse's candidacy and the positions he or she advocates.

An Ethics Guide for Judges and Their Families

An Ethics Guide for Judges and Their Families explores the code of judicial conduct restrictions that affect a judge as a member of a family and the guidance the rules give to family members. The *Guide* outlines the law in each area, examining the rules in the code and considering the basis for the rules. The *Guide* also lists examples of permitted and prohibited conduct for each area. To summarize the information covered, each section of the *Guide* has a “Q&A” segment at the end that asks and answers typical ethical questions that arise under each topic. The *Guide* has sections on:

- ⊙ Misuse of office, including presiding in a relative’s case and asking for favors from prosecutors, judges, and police officers.
- ⊙ Hiring or appointing relatives and giving them court business.
- ⊙ Disqualification when a relative is a party, an officer of a party, or employed by a party.
- ⊙ Disqualification when a relative has an economic interest in a case.
- ⊙ Disqualification when there is a lawyer in the family.
- ⊙ Disqualification when a relative is an elected public official, a law enforcement officer, a teacher, or employed by a government agency or law firm.
- ⊙ A judge acting as an attorney for family members.
- ⊙ Gifts a judge is required to discourage family members from accepting.
- ⊙ Financial activities, including family members’ financial dealings and a judge’s participation in a family business.
- ⊙ When a judge may serve as a fiduciary.
- ⊙ Civic activities, including participation in charitable organizations, limitations on a judge’s participation in fund-raising, and a relative’s fund-raising.
- ⊙ Political activity by members of a judge’s family, including family members participating in a judge’s campaign, a judge participating in a family member’s campaign, a family member’s activity on behalf of a candidate for public office, and a family member joining and holding office in a political organization.
- ⊙ Public comment, including taking stands on controversial issues, responding to criticism of a decision, tips for high profile cases, and ex parte communications.

Unless otherwise indicated, references to canons in the code of judicial conduct in this *Guide* are to the 1990 American Bar Association model code. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantial changes and contains many differences in its details. The model code is not binding on judges unless it has been adopted in their jurisdiction. Forty-nine states, the U.S. Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for

judges, but they are not based on either model code.)

However, most states depart from the model in a few respects when adopting a code of judicial conduct. This *Guide* points out some of the differences between the model code and state codes. This *Guide* should be read with the applicable code at hand to enable an accurate comparison.

In addition to case law, the *Guide* relies on judicial ethics advisory opinions that address ethical questions involving family members. Over 40 states have a judicial ethics advisory committee to which a judge can submit an inquiry regarding the propriety of contemplated future action. Sometimes committees in different states have reached different conclusions about the best way to resolve the conflicts between being a judge and being a family member, and the *Guide* points out those areas of disagreement. The AJS web-site has links to the judicial ethics advisory committee web-sites in many states at www.ajs.org/ethics11.html.

Ethical issues are closely related to other family issues such as security, stress, being a family in the public eye, judicial impairment, and handling questions from the press. For judicial families, the usual challenges all families face can be complicated by feelings of isolation that may be created by some of the rules of judicial conduct, by concerns about publicity if professional help is sought, and by intense media scrutiny. In addition, judicial families face special challenges such as dealing with threats to the physical safety of the judge and the judge's family, children hearing criticism of their parent's decisions,

and people approaching spouses and children trying to influence the judge. Problems at home caused by such issues may interfere with a judge's performance of official duties and with the public's perception of the judge.

The last chapter of *An Ethics Guide for Judges and Their Families* is an essay on issues in judicial family life by Jan Aikman Dickson, founder of the Judicial Family Institute, Inc. and the wife of Brent Dickson, a justice of the Indiana Supreme Court. Based on her experiences with the Judicial Family Institute, the essay discusses and gives practical suggestions on issues such as stress, benefits and challenges for children, being proponents of the judicial system, and security ideas for judges, spouses, and families.

As the Judicial Family Institute points out, "Without formal training or materials, many judges' families have learned public family life skills strictly by trial-and-error." To encourage judges and their families to share their experiences with others, a discussion guide is available for *An Ethics Guide for Judges and Their Families*. The discussion guide contains all the materials necessary for a judge's spouse or other leader to plan a program on ethics and related topics for a meeting of judges and their spouses and other family members. The materials in the discussion guide present a variety of different techniques (for example, panel discussions, role plays, and small group discussions) that give the planner the flexibility to design a session that reflects the interests, needs, size, and composition of the specific audience and the time limits for the program.

Defining Family

The code of judicial conduct identifies four levels of family relationship in its terminology section.

1. The broadest definition is “third degree of relationship” and embraces great-grandparents, grandparents, parents, uncles, aunts, brothers, sisters, children, grandchildren, great-grandchildren, nephews, nieces, the spouse of those relatives, and anyone bearing the same relationship to the judge’s spouse. The term is used to describe the extent of a judge’s duty to disqualify based on a relationship to a party, officer of a party, lawyer, or witness to a proceeding or based on the effect of a proceeding on a de minimis financial interest owned by a relative.
2. The next gradation is “member of the judge’s family” and “denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.” The term is used to describe persons for whom a judge may act as a fiduciary and provide legal advice.
3. The next circle is “member of the judge’s family residing in the judge’s household” and “denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household.” The code uses the term to define which relatives a judge needs to discourage from accepting certain gifts and which relatives’

economic or other interests may require disqualification.

4. The fourth layer is “the judge’s spouse and minor children residing in the judge’s household.” The code uses the term to define which relatives’ economic interests a judge is required to keep informed about.

Note that “member of the family residing in the judge’s household” includes “a person treated by a judge as a member of the judge’s family.” Thus, even if a judge is not married to a person, the relevant code provisions apply if the relationship is comparable to that of a spouse. Where a lawyer and a judge are cohabiting, the rules regarding a married lawyer and judge “should be adhered to because the cohabitation relationship is akin in terms of intimacy, confidentiality, and shared interest to the marital relationship.” *Michigan Advisory Opinion R-3* (1989). In other words, the ethical duties of the code are not defined by legal labels.

Some states have made this more explicit in their codes. The Alaska code of conduct states, “Throughout the code, the term ‘spouse’ includes not only a husband or wife but also any person with whom the judge maintains a shared household and conjugal relations.” The Oregon code defines “member of the judge’s family” to include a domestic partner.

This *Guide* uses the term “spouse” and “family” to include any analogous relationships, including same-sex relationships, regardless whether they have a recognized, formalized legal status.

Misuse of Office



In this chapter:

- ➔ Presiding in a family member's case.
- ➔ Asking for favors from prosecutors, judges, and police officers.
- ➔ Presiding in a case involving a family member's complaint.
- ➔ Intervening in a family member's dispute.

If an individual with a judge in the family gets in trouble — a traffic ticket or a dispute with a neighbor, for example — it is natural for the relative to turn to the judge for help in dealing with the legal system. And it is natural for the judge to want to help.

However, if the judge assists by using power or influence the judge has only by virtue of holding a judicial office, the judge violates the code of judicial conduct. Canon 2B provides:

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

Judges as family members get in trouble by:

- ⊙ sitting as a judge in a family member's criminal case,
- ⊙ asking favors from police officers, prosecutors, and other judges on behalf of a family member, or
- ⊙ intervening in a family member's dispute with others.

Presiding in a family member's case

A judge may not sit as a judge in a family member's criminal case even if the judge does not treat the relative more favorably than other defendants facing similar charges.

The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential for abuse, and threatens to undermine the public's confidence in the impartiality of the judiciary. Any involvement by a judge in such cases or any similar suggestion of favoritism to family members has been and will continue to be viewed . . . as serious misconduct.

In the Matter of Wait, 490 N.E.2d 502 (New York 1986). There is no "situation more fraught with the threat of partiality as where a judge's child faces criminal charges subject to the authority of the judge's court." *In the Matter of Van Rider*, 715 N.E.2d 402 (Indiana 1999). The Indiana Supreme Court acknowledged that a judge whose child is

arrested may have concerns that the child's safety during incarceration would be threatened because his or her parent was a judge. However, the court concluded, such concerns do not excuse violations of the code.

In a case involving a family member, a judge may not issue warrants, conduct a bond hearing, take the guilty or not guilty plea, dismiss a case, issue an order of protection, conduct the trial, or sentence the family member. There are numerous cases in which judges have been disciplined for making rulings in a family member's criminal case.

Examples:

- ➔ After a petition was filed against the judge's grandson by the mother of the grandson's girlfriend, the judge heard the probable cause evidence, signed the arrest warrant, and conducted his bond hearing. The judge disclosed the family relationship to the girlfriend and the police officer involved, but did not get a waiver. The judge was reprimanded for this and other misconduct (*In the Matter of Johnson*, 532 S.E.2d 883 (South Carolina 2000)).
- ➔ A judge disposed of speeding tickets issued to his nephew and his wife's niece by reducing each charge to an equipment violation. The judge accepted guilty pleas by four different first cousins of his wife. In two of the cases, charging vehicle, traffic, or conservation law violations, the judge imposed an unconditional discharge. In a third case, a trespassing violation, the judge imposed no fine or sentence other than to require the relative to stay off the property of the complaining witness. In the fourth case, the relative was charged with criminal mischief, and the judge imposed a fine of \$50 but waived payment of it, sentencing the defendant instead to perform labor for the town. The judge was removed (*In the Matter of Wait*, 490 N.E.2d 502 (New York 1986)).
- ➔ A judge failed to disqualify from a criminal proceeding against his son and ordered his son's release from jail following his arrest for drug possession. The judge was reprimanded (*In the Matter of Van Rider*, 715 N.E.2d 402 (Indiana 1999)).
- ➔ A judge presided over a traffic case in which the defendant was his niece. The judge was admonished for this and other misconduct (*In the Matter of Bishop*, Determination (New York State Commission on Judicial Conduct January 10, 2000)).
- ➔ A judge arraigned his son after the son was arrested for assault. The judge was censured (*In the Matter of Poli*, Determination (New York Commission on Judicial Conduct October 7, 1994)).
- ➔ A judge reduced his son's and his son's friend's speeding tickets to parking violations. The judge was removed (*In the Matter of Reedy*, 475 N.E.2d 1262 (New York 1985)).
- ➔ A judge participated in cases in which her brother-in-law, his wife, and his daughter were parties or complaining witnesses and in cases involving an altercation between her brother-in-law and his wife of which the judge had personal knowledge. After witnessing an altercation between her husband's brother, Douglas, and his wife, the judge arraigned Douglas on a charge that he had violated an order of protection, released her brother-in-law on his own recognizance, and ordered him to appear in family court the following morning. The judge then dis-

qualified herself from the case. The judge issued a criminal summons to Brenda on a charge of assault stemming from the altercation with Douglas. The judge issued an order of protection against Brenda and in favor of Douglas. The judge arraigned Brenda on the assault charge and released her on her own recognizance. The judge then disqualified herself. The judge arraigned Douglas on a charge of third degree assault, based on the allegations of his daughter, the judge's niece by marriage, and released him on his own recognizance. The judge then disqualified herself from the case. The judge was admonished (*In the Matter of Remchuk* (New York Commission on Judicial Conduct March 29, 1999)).

- ➔ A judge presided over a traffic case in which the defendant was his niece. The judge was admonished for this and other misconduct (*In the Matter of Bishop*, Determination (New York State Commission on Judicial Conduct January 10, 2000)).
- ➔ A judge presided over five criminal cases in which his spouse's nephews were the defendants including one case in which the judge's stepson was a material witness. The judge was censured (*In Re Ross*, Determination (New York State Commission on Judicial Conduct, September 29, 1989)).

Asking for favors from prosecutors, judges, and police officers

If a family member receives a ticket or is charged with criminal conduct, a judge should not intervene and ask favors from police officers, prosecutors, or the judge presiding in the case. Thus, a judge should not convince or try to convince police officers to release a relative who has been arrested, should not reproach or threaten a police officer who ticketed a relative, should not ask an arresting officer and prosecutor if they could help the relative, should not ask prosecutors for special consideration, and should not ask another judge to give a particular sentence to the relative.

Moreover, a judge should be aware that a telephone call to police, for example, about a family member's ticket even if innocently undertaken, may be assumed to be an implied request for a favor and result in preferential treatment for the family member. Therefore, even if the judge does not expressly request a favor, a judge should not make inquiries into a criminal case in which the defendant is a relative.

Examples:

- ➔ A judge asked a magistrate to give her step-grandson a suspended sentence for a traffic ticket several times and engaged in several ex parte communications until the matter was resolved. The judge was suspended without pay for this and other misconduct (*In re Lorona*, 875 P.2d 795 (Arizona 1994)).

- ➔ A judge called the police department about the judge's brother's speeding ticket and expressed surprise that the officer did not recognize that the person he had given the ticket to was the judge's brother. After the call, the officer threw the ticket away. The judge was suspended (*In re Snow*, 674 A.2d 573 (New Hampshire 1996)).
- ➔ A judge sought special consideration from prosecutors in a case involving his stepson, proposed dispositions, persisted when they refused his suggestions, and exhibited impatience when they refused to yield. The judge was removed for this and other misconduct (*Matter of Seiffert*, Determination (New York State Commission on Judicial Conduct 1985)).
- ➔ A judge intervened with police officers and a judge on behalf of family members on three occasions, using profane, threatening, and menacing language. In the first incident, after the judge's daughter was arrested for DWI, the judge convinced police officers to release her instead of proceeding with an arraignment and asked the officers why they did not phone him directly when they knew she was his daughter. In a second instance, the judge was verbally abusive to police officers when his granddaughter ran away and demanded to know who she had been released to. In a third instance, the judge confronted and was verbally abusive to another judge who had presided over an order of protection hearing involving his daughter. The judge was removed (*In the Matter of Chase*, Determination (New York State Commission on Judicial Conduct June 10, 1997)).
- ➔ After a judge's son was removed by the sheriff from the courthouse for being intoxicated, the judge went to the sheriff's department and shouted loudly and angrily, "How can you do this to me? Why are you doing this to me? After all the support I've given you and your department, this is the way your deputies treat me." The judge was censured for this and other misconduct (*In the Matter of Purple*, Determination (New York Commission on Judicial Conduct September 29, 1997)).
- ➔ A judge (a) confronted a patrolman named J.R. Rodriguez after the patrolman had issued a traffic citation to the judge's grandson; (b) verbally attacked the patrolman in a confrontation with the police chief in which he used racial slurs and other derogatory language, (c) instructed his grandson to plead no contest and appeal to county court where the judge could "take care of it;" (d) while performing judicial duties, remarked to a jailer whose name is Joey Rodriguez, "Don't tell me you're related to J.R., or I'll have to shoot you too;" and (e) made racial slurs and used profanity in derogatory statements directed at Hispanics and African Americans in general and Rodriguez in particular while at a store where employees and customers overhead. The judge was publicly reprimanded (*Public Reprimand of Huegler*, No. 00-0162-JP (Texas State Commission on Judicial Conduct January 25, 2000)).
- ➔ After his son-in-law was arrested for public intoxication and possession of a controlled substance, a judge asked the arresting officer and prosecutor if they could help his son-in-law, and the charges were dismissed. The judge was admonished (*In the Matter of Rice*, 489 S.E.2d 783 (West Virginia 1997)).

Presiding in a case involving a family member's complaint

A judge misuses the power or prestige of the judicial office if he or she presides in a civil case in which a relative is the person asking for damages or presides in a criminal case in which a relative is the victim or complaining witness.

Examples:

- ➔ A judge issued several arrest warrants in which his daughter was the sole affiant; accepted payments in return for dismissal of charges and characterized the payments as bonds in a case in which his daughter had an interest; assisted his daughter's extortion efforts against her previous boyfriend; and misled probation officers to advance his daughter's interests. The judge was removed (*In the Matter of McKinney*, 478 S.E.2d 51 (South Carolina 1996)).
- ➔ After a judge's son-in-law was involved in an automobile accident, the judge sat at the state attorney's table throughout the trial of the other driver and counseled and advised the state attorney. After the trial, the judge, acting in his official capacity, signed a warrant to be served on the defendant for damages resulting from the automobile accident. The judge was admonished (*Judicial Inquiry and Review Commission of Virginia v. Jordan*, Record No. 730725 (Virginia Supreme Court 1973)).
- ➔ A judge issued an arrest warrant pertaining to a dishonored check given to her husband and then presided over the defendant's arraignment, committed the defendant to jail in lieu of \$5,000 bail, failed to appoint counsel for the defendant, and refused the advice of the district attorney and a county court judge that she disqualify herself. The judge was removed for this and other misconduct (*In the Matter of Tyler*, 553 N.E.2d 1316 (New York 1990)).
- ➔ A judge (1) signed a default judgment in favor of his wife for a claim for legal services performed and (2) sentenced two defendants who were charged with stealing property belonging to the estate of his father-in-law and of which estate his wife was administratrix. The judge was suspended as a member of the bar for two years for this and other misconduct (*In re Jenkins*, 419 P.2d 618 (Oregon 1966)).
- ➔ A judge presided in a case to recover damages stemming from an automobile accident involving the judge's son and the judge's car. The judge was removed (*In re Myers*, Determination (New York State Commission on Judicial Conduct, October 21, 1985)).

Intervening in a family member's dispute

A judge also abuses the prestige of the judicial office if he or she asks a police officer or other public official to take action to resolve a family member's dispute. A judge is placed in a particularly difficult situation when loved ones become involved with the police or in a legal dispute and the judge's judicial position is known. Regardless of any understandable concern for a family member in trouble, if a judge is known to

authorities as a judge, the judge must be circumspect in any advocacy, especially with anyone who is regularly in the judge's court, to avoid gaining an advantage for private interests.

Examples:

- ➔ After arriving at his son's home when a police officer was investigating the neighbor's complaint that someone had pulled up fence posts and survey stakes near the property line between his land and the judge's son's, a judge angrily shouted to the police officer that the neighbor was "crazy" and a "son of a bitch" in the presence of the neighbor. The judge twice urged the officer to arrest the neighbor for pulling up his own fence posts and survey stakes and accused the neighbor of cutting tree limbs that were on his son's property. Although he had no factual basis to support a charge against the neighbor, the judge advised the police officer to charge him with criminal mischief. When the police officer refused to make any arrest, the judge asked what evidence it would take to arrest someone under such circumstances. The judge was aware that the police officer appeared before him and knew he was a judge. The judge was admonished (*In the Matter of Stevens*, Determination (New York State Commission on Judicial Conduct December 23, 1998)).
- ➔ A judge issued an arrest warrant on petit larceny and simple assault charges filed by a friend and distant relative of the judge. The judge was reprimanded for this and other misconduct (*Mississippi Commission on Judicial performance v. Franklin*, 704 So. 2d 89 (Mississippi 1997)).
- ➔ A judge improperly intervened on behalf of a woman with whom he had an intimate relationship in an investigation of a child welfare matter involving the woman's children and their father. In conversations with a case worker and case manager, the judge stated that he was a family court judge with experience in child abuse cases, indicated that he knew the commissioner and deputy commissioner of the agency and might have to call their attention to the case. The judge related derogatory information about the father that he said he had learned from another judge's decision and from a newspaper report even though he knew that the prior complaints of abuse had been determined to have been unfounded. When police officers came to the mother's apartment concerning the children's visitation with their father, after the judge introduced himself as a family court judge, one of the officers concluded that the judge was the judge presiding over the visitation matter and sought the judge's opinion as to whether court-ordered visitation must be adhered to in all instances or whether a court order could be superseded in exigent circumstances. The judge was admonished (*In the Matter of Kaplan*, Determination (New York State Commission on Judicial Conduct May 6, 1996)).

Misuse of Office

Q & A

May a judge preside over preliminary matters in her son's criminal case if another judge conducts the trial?

No. A judge should not have any involvement in any part of a family member's case including issuing warrants or taking a plea.

May a judge conduct her son's trial or sentence him if she does not treat him more favorably than other defendants facing similar charges?

No.

May a judge call a prosecutor about a ticket issued to the judge's brother to ask how the prosecutor intends to proceed?

No. A judge should not ask favors from police officers, prosecutors, or the judge presiding in the case, and even absent an express request, a judge's inquiry may be perceived as an implied appeal for a favor.

May a judge hear a case in which her sister is suing a contractor for shoddy work rehabilitating property?

No. A judge may not preside in a civil case in which a relative is the person asking for damages.

May a judge preside over a case in which the defendant is charged with giving a bad check to a store owned by the judge's sister?

No. A judge may not preside in a criminal case in which a relative is the victim or complaining witness.

Hiring or Appointing Relatives



In this chapter:

- ➔ Whether a relative may be hired for a court position.
- ➔ Whether a court employee may continue to be employed if the employee becomes related to a judge.
- ➔ Appointing a family member as counsel for indigent defendants in criminal cases.
- ➔ Appointing a family member to fiduciary or quasi-judicial positions.
- ➔ Making appointments to an attorney who is affiliated with a family member.
- ➔ Hiring or appointing another judge's relative.
- ➔ Giving a family member court business.

Whether a relative may be hired for a court position

The code of judicial conduct requires a judge to “avoid nepotism and favoritism” (Canon 3C(4)). The code does not define nepotism, but, according to *Merriam-Webster's Collegiate Dictionary*, it means “favoritism (as in appointment to a job) based on kinship.” (“Nepotism” is derived from the Latin word *nepos*, which means

“nephew.”) Note that in addition to the code of judicial conduct, some states have anti-nepotism statutes that apply to all state employment, not just the judiciary, and a judge should consult these statutes before making a hiring decision.

The anti-nepotism provision in the code does not mean that an individual related to a judge, no matter how distantly, may never be employed in the judicial system, but that “the prospective employee's merit and concerns for the proper administration of justice must be paramount in the decision.” *Indiana Advisory Opinion 2-98*. Moreover, “the position for which the judge is considering hiring a friend or relative must be announced or advertised to the public in the same manner other vacancies within the court are announced or advertised, and other qualified applicants must be considered.” *Indiana Advisory Opinion 2-98*.

To determine whether hiring or appointing a relative would fall within the prohibition on nepotism, a judge should consider the following factors:

- ⊙ Whether the relative is objectively qualified for the position.
- ⊙ The degree, extent, or depth of the relationship of the prospective employee to the judge.

- ⊙ Whether the position is a deputy position.
- ⊙ Whether the appointment is on a volunteer and philanthropic basis for no perceived present or future, direct or indirect financial benefit to the relative or to the judge.
- ⊙ Whether the position is a relatively lucrative, full-time, or permanent position, or a temporary or part-time position.
- ⊙ The degree of day-to-day supervision and contact the judge would have with the relative.

Arkansas Advisory Opinion 91-4; Indiana Advisory Opinion 2-98.

With respect to the nature of the position for the prospective employee, the Indiana Judicial Qualifications Commission explained in an advisory opinion:

Employing a relative as a temporary filing clerk during another employee's leave of absence, a circumstance the Commission has approved, is unlikely to threaten the public's trust, whereas a judge who confers upon a sibling, child, parent, or member of the judge's household a key post in the judiciary likely will be scrutinized by the Commission.

. . . A judge who hires, for example, a niece or nephew as bailiff without the Commission's approval invites public criticism and a Commission inquiry, whereas the Commission may be inclined to approve the employment of the same relative as, for example, a secretary in the probation department.

The Commission urged judges to seek its approval before hiring or appointing a relative or close friend to any position.

Examples:

- ➔ A judge who manages the law library may not appoint the judge's niece or nephew to be law librarian (*Alabama Advisory Opinion 86-250*).
- ➔ A judge may appoint the judge's second cousin, who is highly competent and qualified, as the judge's secretary (*Alabama Advisory Opinion 86-256*).
- ➔ A judge may use the judge's first cousin as a court reporter on a temporary or case-by-case basis (*Alabama Advisory Opinion 94-513*).
- ➔ A judge may use the judge's daughter-in-law as a court reporter on a temporary or case-by-case basis (*Alabama Advisory Opinion 94-513*).
- ➔ A judge may appoint a second cousin once removed as the judge's bailiff. (*Alabama Advisory Opinion 87-291*).
- ➔ A judge should not appoint the judge's spouse as a deputy clerk even if the spouse is not compensated (*Arkansas Advisory Opinion 91-4*).
- ➔ A judge may consider the spouse of the judge's first cousin for appointment as court clerk (*Arkansas Advisory Opinion 99-5*).
- ➔ A judge may not appoint his or her spouse or other members of his or her immediate family to serve as a personal secretary (*Georgia Advisory Opinion 68 (1985)*).
- ➔ A judge may not employ the judge's step-parent in the court to which the judge is elected (*Louisiana Advisory Opinion 126 (1995)*).
- ➔ A judge may employ the judge's spouse's brother's daughter in the court in which the judge serves (*Louisiana Advisory Opinion 129 (1996)*).

- ➔ A judge may appoint the child of the judge’s spouse’s cousin as an unpaid volunteer summer intern (*New York Advisory Opinion 88-8*).
- ➔ A judge should not employ a relative within the sixth degree as a secretary or constable (*South Carolina Advisory Opinion 1-1980*).
- ➔ A judge may not appoint the spouse of a sibling as a magistrate assistant (*West Virginia Advisory Opinion* (January 5, 1993)).
- ➔ But see *Caudill v. Judicial Ethics Committee*, Nos. 97-SC-000856-OA, 97-SC-000870-OA, 97-SC-000893-OA (Kentucky Supreme Court May 21, 1998) (a judge may employ his or her spouse as secretary as long as the spouse “possesses the skills and competence requisite to performing the job duties”).

To provide a less subjective and more uniform and impartial standard to guide judicial hiring, some states have adopted a rule that prohibits the employment of a relative, regardless of merit, within a certain degree of relationship. For guidance on the degree of kinship that would constitute nepotism, these states often look to a state nepotism statute.

Examples:

- ➔ The code’s prohibition on nepotism read together with a statute prohibiting appointment of any person related within the fourth degree of affinity or consanguinity prohibits a judge from appointing the judge’s child as a bailiff or clerk (*Alabama Advisory Opinion 90-394*) and from appointing the judge’s uncle by marriage as bailiff (*Alabama Advisory Opinion 76-13*).
- ➔ Because Florida’s anti-nepotism law does not include a “niece-in-law” within the

definition of “relative,” a judge may employ his or her niece-in-law as a judicial assistant (*Florida Advisory Opinion 98-4*).

- ➔ Because, pursuant to a statute, a department head of state government cannot employ any person related or connected by consanguinity or affinity within the sixth degree, the same requirement will be applied to the judiciary (*South Carolina Advisory Opinion 1-1980*).

Continued employment

The prohibition on nepotism raises a question about a court employee’s continued employment in two situations:

- ⊙ if a court employee becomes related to a judge through marriage to the judge or a relative of the judge, or
- ⊙ if a court employee’s relative becomes a new judge.

Most advice suggests that continuation of a relative’s employment, as opposed to new employment, is permissible under those circumstances, particularly if the family member has been employed by the court for a significant time. The South Carolina advisory committee stated that anti-nepotism provisions “are directed toward the prohibition of future appointments” and “it would be unjust” to require the judge’s relative to leave his or her employment. *South Carolina Advisory Opinion 2-1981*

Examples:

- ➔ A judge's secretary may continue her employment after marrying the judge where she has been his secretary for 12 years, including his entire 3-year tenure as judge prior to the engagement (*Alabama Advisory Opinion 84-200*).
- ➔ The mother of a new magistrate may continue her employment as a clerk in the magistrate's court (*South Carolina Advisory Opinion 2-1981*).
- ➔ A court employee may continue to be employed when he or she marries a child of a judge of the court (*U.S. Compendium of Selected Opinions, § 2.8(h)* (1999)).
- ➔ If a judge's secretary and the judge marry, the secretary may continue in the employment (*U.S. Compendium of Selected Opinions, § 2.(h-1)* (1999)).
- ➔ *But see West Virginia Advisory Opinion* (December 11, 1997) (a court reporter may not continue in that employment after marrying a judge of the court because of "the close relationship between a circuit judge and the court reporter such as appointment, approving certain payments, and other direct work supervisory situations").

The advisory committee for federal judges did add several caveats to its permission to allow a judge's new relative to continue his or her court employee. The committee stated:

- ⊙ The employee-relative may not be supervised by the judge-relative.
- ⊙ The employee-relative's promotions should not be dependent upon the actions of the judge-relative.
- ⊙ The judge-relative should not directly or indirectly cause or contribute to any salary

increases (other than within-grade salary increases received in the normal course).

- ⊙ The judge-relative and his or her influence must be removed from any personnel decisions affecting the employment.

Appointing a relative as counsel for indigent defendants

The nepotism rule prohibits a judge from appointing a relative as counsel for indigent defendants in criminal cases. *Alabama Advisory Opinion 80-91*; *Alabama Advisory Opinion 87-316*; *Alabama Advisory Opinion 99-742*; *Missouri Advisory Opinion 38*; *Ohio Advisory Opinion 93-4*; *West Virginia Advisory Opinion* (February 25, 1994); *U.S. Compendium of Selected Advisory Opinions, § 2.8(i)* (1999). The prohibition applies even if:

- ⊙ the case is on the docket of another judge (*Alabama Advisory Opinion 99-742*),
- ⊙ assignments had been customarily rotated among all members of the bar (*Missouri Advisory Opinion 38*), and
- ⊙ the appointment is non-remunerative (*Missouri Advisory Opinion 38*).

Failure to follow that rule can lead to judicial discipline.

Examples:

- ➔ A judge should not have appointed his son to serve as an attorney in several cases and approved attorney fees in each case. The judge appointed his son to represent criminal defendants in nine cases, ordering \$1,675 in attorney fees to be paid from county funds; appointed his son to represent 16 persons before the court on mental commitments, ordering \$1,900 in attorneys fees to be paid from county funds; appointed his son as an attorney ad litem to represent a minor in a personal injury case and approved an agreed fee of \$750 from private funds; and approved a fee of \$750 from private funds to his son in a civil case. The judge was admonished (*Public Admonition of Jarvis* (Texas State Commission on Judicial Conduct October 22, 1999)).

Appointing a relative to fiduciary or quasi-judicial positions

A judge may not appoint a relative to serve as a guardian ad litem in a case.

Examples:

- ➔ A judge may not appoint the judge's son or daughter as a guardian ad litem (*Alabama Advisory Opinion 85-234*).
- ➔ A judge may not appoint the judge's relative within the 4th degree by blood or marriage as a guardian ad litem even if the minor nominates the relative and will remit disqualification (*Alabama Advisory Opinion 97-661*).
- ➔ A judge may not appoint the judge's relative as a guardian ad litem (*Florida Advisory Opinion 82-13*).

- ➔ A judge may not appoint the judge's son as a guardian ad litem even if assignments had been customarily rotated among all members of the bar and are non-remunerative (*Missouri Advisory Opinion 38*).

Similarly, a judge may not appoint a relative in a case to serve in positions such as receiver, trustee, administrator, referee, master, mediator, commissioner, or pro tem judge.

Examples:

- ➔ A judge may not appoint the judge's relative as a receiver or a master (*Florida Advisory Opinion 82-13*).
- ➔ A judge may not refer mediation cases to the judge's father, a certified mediator because mediators are compensated by the parties (*Florida Advisory Opinion 89-21*) unless the parties request the judge's father and are willing to waive the conflict in a writing signed by both the attorneys and the parties (*Florida Advisory Opinion 96-13*).
- ➔ A judge may not appoint the judge's close relative as a master commissioner even if no other attorneys in the county would be willing to serve (*Kentucky Advisory Opinion JE-26* (1981)).
- ➔ A judge may not appoint the judge's spouse to a position such as referee or magistrate where the judge must review or supervise the spouse's performance or preside over matters in which the spouse presents recommendations or makes decisions (*Michigan Advisory Opinion JI-31* (1990)).
- ➔ A judge may not appoint the judge's son as an appraiser, referee, or trustee even if assignments had been customarily rotated among all member of the bar and are non-remunerative (*Missouri Advisory Opinion 38*).

- ➔ A judge should not have appointed his wife as administrator of four estates, passing upon her accountings in the estates and setting and allowing fees, including fees for extraordinary services. The judge was suspended as a member of the bar for two years (*In re Jenkins*, 419 P.2d 618 (Oregon 1966)).
- ➔ A judge may not appoint the judge's child to serve as a pro tem judge as a substitute for the judge on an occasional basis (*Washington Advisory Opinion 92-11*).
- ➔ A bankruptcy judge's spouse may not be listed on a register of mediators for the court if any member of the court is involved in the selection for the register or of the mediator in a particular case and if the case is assigned to the judge (*U.S. Compendium of Selected Advisory Opinions*, § 2.8(k) (1999)).

Appointing an attorney affiliated with a relative

A judge may not appoint as defense counsel or fiduciary an attorney who is affiliated with a relative, for example, as a partner. The advisory committee for federal judges reasoned:

- ⊙ The propriety of appointing to compensable positions attorneys who are law partners of a judge's relative cannot turn upon "an individual assessment of the professional competence of the attorney to be appointed."
- ⊙ Even if the attorney is not obliged to share fees with the judge's relative, a judge should not have the opportunity to deter-

mine the compensation of a partner of the judge's relative.

U.S. Advisory Opinion 61 (1998). Moreover, even if the attorney waives compensation, appointment of an attorney affiliated with a judge's family member is not advised. The committee explained:

- ⊙ Because such an appointment generally carries with it entitlement to reasonable compensation, the community would likely regard the appointment as conferring a monetary benefit, even if, in fact, compensation was waived.
- ⊙ "Waiver of compensation would raise the additional issue of the propriety of a law firm's performing costly favors for the court."

Examples:

- ➔ A judge should not appoint as guardians ad litem partners of a law firm where the judge's child is employed even if the child would not share in any fees (*New York Advisory Opinion 87-7*).
- ➔ A judge may not appoint an attorney who is in a law firm with the judge's uncle to represent indigents (*Texas Advisory Opinion 83*).
- ➔ A judge may not appoint an attorney who is partner in a firm in which the judge's nephew is also a partner as a special master to supervise discovery in a case (*U.S. Advisory Opinion 61* (1998)).
- ➔ *But see New York Advisory Opinion 88-21* (a judge may appoint partners and associates of the judge's first cousin to fiduciary positions provided the cousin does not share in fees).

Hiring or appointing other judges' relatives

In general, a judge may hire another judge's relative so long as the decision is based on merit.

Examples:

- ➔ An associate justice of the supreme court or a judge of the court of appeals may employ the second cousin of the chief justice as a law clerk (*Arkansas Advisory Opinion 96-8*).
 - ➔ A new judge's wife may continue to serve as the secretary to another judge in the same court facility (*Florida Advisory Opinion 76-24*).
 - ➔ An administrative judge may employ as an administrative assistant the son-in-law of a judge of a superior court in that district (*Georgia Advisory Opinion 14* (1977)).
 - ➔ A judge may hire another judge's child as a secretary (*Illinois Advisory Opinion 97-18*).
 - ➔ A judge may hire as clerk the child of a judge in the same circuit (*Missouri Advisory Opinion 55* (1981)).
 - ➔ A judge who serves on the appellate court may hire a trial judge's child as a law clerk as long as the appellate judge disqualifies from any matters involving the law clerk's parent (*New York Advisory Opinion 89-144*).
 - ➔ A judicial circuit may hire as a probation officer the grandchild of a judge in the circuit if the grandchild will not appear before the judge-grandparent or handle any cases in which the judge-grandparent presides (*West Virginia Advisory Opinion* (August 29, 1997)).
- ➔ A judge may hire as law clerk a person who is related to a judge of another federal court within the same circuit, including a court bearing a hierarchical relationship to the court on which the appointing judge sits, if appropriate safeguards are adopted (*U.S. Advisory Opinion 64* (1980, revised 1996)).
 - ➔ An appellate court judge may hire as a clerk a relative of a trial court judge whose work is reviewed by the appellate court if the clerk can be efficiently excluded from any participation in the cases decided by his or her judge-relative (*U.S. Advisory Opinion 64* (1980) (revised 1996)).
 - ➔ A trial court judge may hire as a clerk a relative of an appellate court judge who reviews the trial court's decisions "if disruption and undue disqualification can be minimized" in the chambers of both the hiring and the relative judges (*U.S. Advisory Opinion 64* (1980) (revised 1996)).
 - ➔ *But see Florida Advisory Opinion 99-10* (the members of a court may not hire as a program specialist the spouse of one of the judges of the court even if the judge recuses from the decision); *Louisiana Advisory Opinion 154* (1998) (a judge may not appoint as his or her law clerk the son-in-law of a judge on the same court); *Rules of the Chief Judge of New York*, 22 NYCRR 8.1 (prohibiting the appointment of relatives of any judge of the same court within the judicial district); *U.S. Advisory Opinion 64* (19) (a judge may not appoint as a law clerk a person who is related within the third degree of consanguinity to another judge of the same court).

To ensure that the hiring decision is based on merit both in fact and in appearance, there are several caveats to the rule

allowing judges to hire or appoint other judges' relatives.

- ⊙ The prospective employee's judge-relative must not participate in any way in the selection process (*Arkansas Advisory Opinion 96-8*; *West Virginia Advisory Opinion* (August 29, 1997)).
- ⊙ The hiring judge should interview other applicants and preserve a record that would demonstrate that the other judge's relative was in fact qualified for the position (*Illinois Advisory Opinion 97-18*).
- ⊙ The hiring judge should examine the personal and formal contacts he or she has with the judge-relative of the applicant (*U.S. Advisory Opinion 64* (1980) (revised 1996)).

Similarly, a judge may appoint another judge's relative to serve as an attorney for indigent defendants or to a position such as trustee so long as the decision is based on merit.

Examples:

- ➔ A judge may appoint the spouse of another judge to serve as a commissioner in a foreclosure action (*Hawaii Advisory Opinion 4-96*).
- ➔ A judge may appoint the spouse of another as a successor trustee (*New York Advisory Opinion 92-87*).
- ➔ A judge may appoint a relative of another judge as a law guardian provided the appointment is made from the current list of approved law guardians (*New York Advisory Opinion 95-166*).

- ➔ A judge's colleagues may appoint the judge's child to serve defense counsel (*U.S. Compendium of Selected Opinions*, § 2.8(I) (1999)).

“Cross nepotism” or even the appearance of cross nepotism is not permitted. The New York Court of Appeals admonished a judge who had engaged in two instances of cross nepotism. *Spector v. Commission on Judicial Conduct*, 392 N.E.2d 552 (New York 1979). Judge Spector had twice appointed the son of Judge Fine to serve as a guardian ad litem, receiver, or referee, while Judge Fine appointed Judge Spector's son eight times; Judge Spector had appointed the son of Judge Postel ten times, while Judge Postel appointed Judge Spector's son five times. The court stated: “Nepotism is to be condemned, and disguised nepotism imports an additional element of evil because the actor seeks to conceal what he is really accomplishing.”

Giving a relative court business

A judge should not order people appearing before the judge to obtain required services from a business owned or operated by a relative or recommend those businesses in connection with court cases.

Examples:

- ➔ A judge may not send defendants to a defensive driving school in which a member of the judge's immediate family has an ownership or other business interest (*Arizona Advisory Opinion 90-3*).

- ➔ A judge should not order supervised visitation in child custody cases through a social services agency administered by a member of the judge's family (*Arizona Advisory Opinion 92-1*).
- ➔ A juvenile court judge should not order children and/or parents to obtain counseling services from an organization for which the judge's spouse is executive director (*Georgia Advisory Opinion 219 (1997)*).
- ➔ A judge should not have (1) sentenced defendants to home incarceration under the administration of a company that employed the judge's spouse, and (2) placed defendants on probation under the supervision of a business owned by the judge's first cousin and the cousin's spouse. The judge was publicly reprimanded and suspended for 60 days (*In re Woods* (Kentucky Judicial Conduct Commission March 1, 1999)).
- ➔ A judge should not have recommended members of the judge's family to attorneys to be used as process servers in civil actions in the judge's court. The judge was censured (*In the Matter of Ellis*, Determination (New York State Commission on Judicial Conduct December 1, 1994)).
- ➔ A justice of the peace participated in a bail bond business his daughters owned by, among other activities, recommending the services of the company, offering to write bail bonds for criminal defendants who appeared before him, and serving as an intermediary between criminal defendants and his daughters. The judge was publicly reprimanded (*Public Reprimand of De La Paz* (Texas State Commission on Judicial Conduct December 22, 1998)).
- ➔ A juvenile court judge should discontinue ordering or allowing juvenile court personnel to require juveniles to obtain

services from a counseling center on whose board the judge's spouse serves (*Utah Advisory Opinion 99-1*).

- ➔ A judge may not place juveniles in a program provided by a corporation that employs the judge's spouse (*West Virginia Advisory Opinion* (December 12, 1994)).
- ➔ *See also Arizona Advisory Opinion 96-17* (it raises serious concerns for a court to contract with a not-for-profit corporation for which a judge's spouse serves on the board of directors or is employed). *But see New York Advisory Opinion 91-3* (a judge may refer cases to a county mediation service where the judge's spouse is employed if the judge has no association with the agency).

However, a program in which a family member is involved may be on a list of programs from which defendants must choose if the judge does not actively participate in the defendant's decision.

Examples:

- ➔ A judge may order domestic violence offenders to attend a domestic violence program owned and operated by another judge's spouse, when the actual selection of the program is made by the defendant or respondent from a list of approved programs provided by the probation office (*Florida Advisory Opinion 98-29*).
- ➔ A judge may give a defendant a list of bonding companies that includes the company where the judge's spouse is employed because it would be impossible for the judge to know which company a defendant selects (*Florida Advisory Opinion 87-8*).
- ➔ A defendant may elect to perform community service at the Red Cross office managed by the judge's spouse because

the judge does not participate in the selection of programs (*Florida Advisory Opinion 87-7*).

- ➔ A batterers' intervention program operated by a judge's spouse may remain on a list of certified programs from which batterers can choose if they are ordered to attend such a program (*Florida Advisory Opinion 98-30*).
- ➔ A counseling center for whom a judge's spouse is a board member may appear on a list of providers from which the juvenile or parents could choose (*Utah Advisory Opinion 99-1*).

Code Variations



- ✦ The **Arkansas** code provides “No judge shall employ a spouse or other relative unless it has been affirmatively demonstrated to the Arkansas Judicial Discipline and Disability Commission that it is impossible for the judge to hire any other qualified person to fill the position.”
- ✦ The **Louisiana** code provides, “No spouse or member of the immediate family of a judge shall be employed in the court to which the judge was elected. ‘Immediate family’ means a judge’s children, parents, brothers and sisters; the children and parents of a judge’s spouse; the spouses of a judge’s children; and all step relationships to the same degree.”
- ✦ The **New York** code provides:
A judge shall not appoint or vote for the appointment of any person as a member of the judge’s staff or that of the court of which the judge is a member, or as an

appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge’s spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the sixth degree of relationship of either the judge or the judge’s spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice’s household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Court, which may be given upon a showing of good cause.

- ✦ The **Ohio** code adds a definition of nepotism:
the bestowal of patronage by a judge in appointing any of the following to positions by reason of blood or marital relationship to the judge: spouse, parent, child, grandparent, grandchild, brother, sister, uncle, aunt nephew, niece, or great-grandparent.

Hiring or Appointing Relatives

Q & A

May a judge hire her husband as her law clerk?

No. The relationship between husband and wife and the relationship between judge and clerk are too close.

May a judge's nephew be hired as a secretary in the probation department?

Probably, if the nephew is qualified, the position is advertised, and other applicants are considered. The relationship between aunt and nephew and judge and probation department secretary are probably remote enough to permit the employment.

A new judge's father has been employed for years as the court clerk. May the clerk continue in that position?

Yes, as long as the clerk is not supervised by his daughter and she is not involved in any personnel decisions (such as promotions and salary increases) regarding her father.

The court clerk marries the daughter of a judge of the court. May the clerk continue his employment?

Yes, as long as the clerk is not supervised by his mother-in-law and she is not involved in any personnel decisions (such as promotions and salary increases) regarding her son-in-law.

May a judge appoint his daughter as counsel for indigent defendants in criminal cases?

No.

May a judge appoint his daughter's law partner to represent indigent defendants in criminal cases?

No.

May a judge appoint his father-in-law to serve as a guardian ad litem in a case?

No. A judge may not appoint a relative to positions such as guardian ad litem, receiver, trustee, administrator, referee, master, mediator, commissioner, or pro tem judge.

May a judge hire the son of another judge as a law clerk?

Yes, as long as the son is qualified. The other judge should not participate in any way in the selection process, and the hiring judge should interview other applicants and preserve a record that would demonstrate that the judge's son was qualified.

May a judge order domestic violence offenders to attend a counseling program owned and operated by the judge's wife?

No. A judge may not order people appearing before the judge to obtain required services from a business owned or operated by a family member. However, the wife's program may be on a list of programs from which defendants must choose if the judge does not actively participate in the defendant's decision.

Disqualification— Introduction



In this chapter:

- ➔ Introduction to disqualification.
- ➔ Remittal or waiver.
- ➔ When a relative is a party or officer of a party.
- ➔ When a relative is employed by a party.
- ➔ When a relative is a witness.

Introduction to disqualification

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 model code of judicial conduct creates 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 is taken off the case, and it is re-assigned to another judge.

The code lists specific examples of circum-

stances 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

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.

A relative is a party or officer of a party

The question of a judge presiding in a relative's cases is discussed in the chapter on misuse of office. Moreover, as noted above, a judge is disqualified if the one of those relatives is an officer, director, or trustee of a party (Canon 3E(1)(d)(ii)). However, if the relative is an officer in a subsidiary or branch of a party, the judge is not disqualified absent other factors.

Examples:

- ➔ A judge whose nephew is vice-president or chair of the board of a bank is disqualified from cases in which the bank is involved (*Alabama Advisory Opinion 86-276*).
- ➔ A judge may preside in cases involving a multi-state regional bank for which his or her spouse is branch manager and vice president (*Florida Advisory Opinion 93-15*).
- ➔ A magistrate may not hear civil suits filed by a loan company managed by her husband because her husband appears to be an officer, is clearly likely to be a material witness, and is likely to have an interest (*Georgia Advisory Opinion 168 (1992)*).
- ➔ A judge is not disqualified from a case involving a subsidiary of the corporation at which the judge's spouse is employed as vice president of a department (*Illinois Advisory Opinion 97-16*).
- ➔ A judge should disqualify from a proceeding involving a corporation for

which the judge's spouse serves as a member of the board of directors (*Texas Advisory Opinion 70* (1983)).

A relative is employed by a party

The fact that the judge's spouse, a person within the third degree of relationship to the judge or the judge's spouse, or the spouse of such a person is employed by a party to a suit does not disqualify the judge unless the judge knows the outcome might affect the relative's salary or employment status, the relative is likely to be a material witness in the proceeding, the judge has a personal bias or prejudice concerning a party, or the judge has personal knowledge of disputed evidentiary facts concerning the proceeding as a result of the relative's employment.

Examples:

- ➔ A judge is not disqualified from a proceeding involving a grocery chain that employs the judge's daughter unless the judge's daughter's salary will be affected by the outcome of the proceeding (*Alabama Advisory Opinion 82-133*).
- ➔ A judge is not disqualified from a case against a hospital and a physician for whom the judge's spouse, a registered dietitian, had provided services (*Alabama Advisory Opinion 95-540*).
- ➔ A judge is not disqualified from a case in which the defendant is a corporation that is a subsidiary of a corporation for which the judge's son-in-law works (*Alabama Advisory Opinion 95-564*).
- ➔ A judge may preside over proceedings involving the bank that employs the

judge's spouse as a secretary but should withdraw if requested (*New York Advisory Opinion 88-105*).

- ➔ A judge is not disqualified from cases involving the hospital that employs the judge's adult stepson but must disclose the relationship (*West Virginia Advisory Opinion* (December 12, 1994)).
- ➔ A judge need not disqualify where the spouse of the judge's child works as a middle manager for party but has no involvement in the case (*U.S. Compendium of Selected Opinions*, § 3.2-1(d) (1999)).

A relative is a witness

As noted above, a judge's disqualification is required 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 a person is, to the judge's knowledge, likely to be a material witness in the proceeding (Canon 3E(1)(d)(iv)).

Examples:

- ➔ A judge is disqualified from a proceeding in which an expert witness is a relative within the prohibited degree (*Alabama Advisory Opinion 86-258*).
- ➔ A judge may not preside in a juvenile case in which the judge's spouse, as a social worker and employee of the Cabinet for Human Resources, will be involved as a witness (*Kentucky Advisory Opinion JE-57*).
- ➔ A judge may not preside over a case in which the judge's child appears as a probation counselor with the department of youth services, but may hear other juvenile matters (*South Carolina Advisory Opinion 8-1988*).

- ➔ A judge should not have presided over a criminal proceeding in which he knew that his mother-in-law would likely be a material witness. The judge was publicly reprimanded (*Inquiry Concerning Herring*, No. 970502, 96-6JC-008 (Utah Supreme Court November 17, 1997)).
- ➔ A judge may not hear any cases in which the judge's sibling may testify as attendance director for a school (*West Virginia Advisory Opinion* (March 1, 1993)).

Disqualification— Economic Interest in a Case



In this chapter:

- ➔ Stock ownership.
- ➔ Other interests.
- ➔ Keeping informed.

Under Canon 3D(1)(c), a judge may not preside over a case if the judge knows that the judge's spouse, parent, child wherever residing, or any member of the judge's family residing in the judge's household has an economic interest:

- ⊙ in a party to the proceeding, or
- ⊙ in the subject matter in controversy (for example, in a piece of property in dispute).

An economic interest is defined by the model code as:

- ⊙ ownership of a significant legal or equitable interest that could raise reasonable question as to a judge's impartiality (in other words, a more than de minimis interest), or
- ⊙ a relationship as officer, director, advisor or other active participant in the affairs of a party.

Stock ownership

The most obvious economic interest is ownership of stock in a corporation that is a party to litigation. Under the 1972 ABA Model Code of Judicial Conduct, disqualification was triggered by ownership of a legal or equitable interest “*however small*” (Canon 3C(3)(c) (emphasis added)), in other words, by ownership of even just one piece of stock in a corporation resulted in disqualification if that corporation was a party. In one of the changes made to the model code in 1990, disqualification is not required by ownership of an interest “*however small*” but only by ownership of a “*more than de minimis*” interest, that is a significant legal or equitable interest that could raise reasonable question as to a judge's impartiality. However, federal judges and judges in some states are still governed by the “*however small*” standard.

Examples:

- ➔ Under the “*however small*” standard, a judge is disqualified from proceedings involving a local bank in which the judge's minor daughters own stock (*Alabama Advisory Opinion 84-205*).
- ➔ Under the *de minimis* standard, a judge is not disqualified from a case in which a subsidiary of AT&T is a party by the fact that the judge is the executor and

one of three beneficiaries of an estate that holds approximately 1,000 shares of an equity income fund about 18% of which is invested in AT&T (*Arkansas Advisory Opinion 94-8*).

- ➔ Under the de minimis standard, a judge should not preside in a case in which Wal-Mart is a party while the judge and the judge's spouse own approximately \$700,000 worth of Wal-Mart stock (*Letter to Donald Huffman* (Arkansas Judicial Discipline & Disability Commission July 24, 2000) (under appeal as of 3/01)).
- ➔ Under the de minimis standard, a judge who holds 1% or less of the outstanding stock in a publicly held corporation is not disqualified from cases in which the corporation is a party (*Virginia Advisory Opinion 00-5*).
- ➔ Under the "however small" standard, a judge whose spouse owns 150 shares of stock in a large corporation must disqualify from a case in which that corporation is a party (*U.S. Advisory Opinion 20* (1998)).

Other interests

Under the model code, a family member does not have a disqualifying economic interest in:

- ⊙ Securities held by a mutual or common investment fund in which the family member owns an interest (unless the family member participates in the management of the fund, or a proceeding pending or impending before the judge could substantially affect the value of the interest).
- ⊙ Securities held by an educational, religious, charitable, fraternal, or civic organization

in which the judge's spouse, parent, or child serves as an officer, director, advisor, or other active participant.

- ⊙ A financial institution in which the family member has a deposit (unless a proceeding pending or impending before the judge could substantially affect the value of the deposit).
- ⊙ A mutual insurance company in which the family member holds a policy (unless a proceeding pending or impending before the judge could substantially affect the value of the policy).
- ⊙ A mutual savings association in which the family member is a depositor (unless a proceeding pending or impending before the judge could substantially affect the value of the deposit).
- ⊙ A credit union in which the family member is a member (unless a proceeding pending or impending before the judge could substantially affect the value of the membership).
- ⊙ Government securities owned by the family member (unless a proceeding pending or impending before the judge could substantially affect the value of the securities).

Examples:

- ➔ A judge is not disqualified from a case that involves the bank with which the judge's spouse has a small unsecured loan unless, for example, the loan was granted as a special favor (*Alabama Advisory Opinion 89-369*).

- ➔ A judge may preside in cases involving a bank with which the judge’s daughter owns a college market money fund (*Alabama Advisory Opinion 89-370*).
- ➔ A judge is not disqualified from cases involving a bank with which judge’s spouse has an account or to which the spouse owes money unless, for example, the spouse has a “dubious loan application” pending, the loan was made to the spouse under unusually favorable terms, or the loan is in default (*U.S. Compendium of Selected Opinions*, § 3.1-7(e) (1999)).

Keeping informed

The model code requires that a judge “make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse and minor children residing in the judge’s household” (Canon 3E(2)). The Pennsylvania Supreme Court noted that a judge has a duty to know the extent of a spouse’s financial interests and that the judge was a part owner of the business that used the funds. *Pekarski v. Judicial Inquiry and Review Board*, 639 A.2d 759 (Pennsylvania 1994). The court rejected a judge’s argument that she had not violated disqualification rules because she had not known about a loan made by a party to her husband, the judge had presided in at least 33 cases involving close personal friends from whom the judge’s husband had borrowed \$15,000 to be used in a bar business owned jointly by the judge and her husband or the lender’s company. The judge was removed.

Examples:

- ➔ A judge is not required to investigate to determine if any relatives within the third degree fit within the class definition in a class action pending before the judge (*U.S. Advisory Opinion 90* (1994)).
- ➔ A judge’s duty to keep informed about a spouse’s personal financial interests does not require the judge to inquire about interests held only in a fiduciary capacity (*U.S. Compendium of Selected Opinions*, § 3.1-1(b-1) (1999)).
- ➔ A judge must make a reasonable effort to keep informed about personal and fiduciary financial interests of members of the judge’s household. With respect to other relatives, the judge has no duty (*U.S. Compendium of Selected Opinions* § 3.1-1(b) (1999)).
- ➔ Where friends establish a trust in memory of a judge’s deceased spouse for the benefit of the judge’s children, the judge should make reasonable efforts to keep informed of the trust’s financial interests and disqualify where necessary (*U.S. Compendium of Selected Opinions*, § 3.1-2(g) (1999)).

Code Variations



- ✦ The **Maine** code omits Canon 3E(2) because, according to the textual note, it was “superfluous in light of the extensive [financial] disclosure requirements” in the Maine code.
- ✦ The **Oregon** code requires a judge to “make reasonable efforts to be informed about the financial interests of the judge’s spouse, *domestic partner*, parents and children, *wherever residing*” (emphasis added).
- ✦ The **Wisconsin** code requires a judge to “make a reasonable effort to keep informed of the personal economic interests of the judge’s spouse and minor children residing in the judge’s household, *having due regard for the confidentiality of the spouse’s business*” (emphasis added).

Disqualification— A Lawyer in the Family



In this chapter:

- ➔ When a relative is an attorney in a case.
- ➔ Relatives appearing before other judges.
- ➔ When a relative is a partner in a law firm that is appearing in a case.
- ➔ When a relative is of-counsel to a law firm that is appearing in a case.
- ➔ When a relative shares office space with an attorney appearing in a case.
- ➔ When a relative is an associate in a law firm that is appearing in a case.
- ➔ When a relative is a summer associate in a law firm that is appearing in a case.
- ➔ When a relative practices law with a part-time prosecutor or public defender.
- ➔ When a relative's clients appear before the judge.
- ➔ When a relative is a prosecutor or public defender.
- ➔ When a relative is an attorney for legal aid.
- ➔ Another judge in the family.

When a relative 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).

Most states have adopted that rule, 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:

- ⊙ 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*),
- ⊙ regardless whether the relative's fee was fixed or contingent (*Alabama Advisory Opinion 91-423*),
- ⊙ 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 disqualified 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).

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 judgments 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 a possible 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.

Waiver

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, 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 represents a party (*South Carolina Advisory Opinion 1-1995*).

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 on the bench. *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) (1999).

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

When a relative is an attorney in a law firm that is 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 does not expressly require disqualification under those circumstances, and commentary 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 in the case 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 minimis. 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 minimis. 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*.

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. For example, 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 where a judge sits on a case 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.

Examples:

- ➔ 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*; *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.

Examples:

- ➔ 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 should disqualify from cases in which his 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(e) (1999) (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*).

However, 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. 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 in office of government attorneys are not greatly affected by the success or failure of other attorneys in the agency (*Nebraska Advisory Opinion 92-1*). 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.

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 minimis 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, the committee noted 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,'" but concluded "this interest is surely de minimis 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 workings of the U.S. Attorney's Office . . . is too frail a consideration on which to compel recusal." The committee relied on the good judgment 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, a county attorney, a corporation counsel, attorney general, or a 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)* (1999). 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 defense attorney, 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 in any other way currently involved in the case.

Examples:

- ➔ 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*).

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 relative is involved.

Examples:

- ➔ A judge whose spouse is an assistant United States Attorney is disqualified if the spouse, although having had no involvement in a case immediately

before the judge, 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's is disqualified from cases involving that office even if the relative does not actually make an appearance, absent disclosure and waiver.

Examples:

- ➔ 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 pro-

gram 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 for that county (*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*. 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 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.”

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.

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 case 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 hearing cases decided by the relative’s colleagues on the bench.

Examples:

- ➔ 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 should not review decisions of his or her spouse who is a district court judge or friend of court referee, but the other judges on the court may review the spouse’s decisions (*Michigan Advisory Opinion JI-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 involved).

Code Variations



- ✦ The **Alaska** code expressly requires disqualification 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."
- ✦ 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."
- ✦ The **New Jersey** code includes as a grounds of disqualification the fact that a judge or the judge's spouse or relative "is in the employ of or associated in the practice of law with, a lawyer in the proceeding."
- ✦ 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. . . ."

Disqualification— Other Careers



In this chapter:

- ➔ When a relative is an elected public official.
- ➔ A law enforcement officer in the family.
- ➔ A teacher in the family.
- ➔ When a relative is a government agency employee.
- ➔ When a relative is a law firm employee.

When a relative is an elected public official

If a judge's relative is a member of the governing body of a political subdivision, the judge is disqualified from proceedings in which that entity is a party. Similarly, if a judge's relative is the mayor of a city, the judge is disqualified from proceedings in which the city is a party. However, if the government entity involved in a case is separate from although connected to the government entity with which a relative is a public official, the judge is not disqualified.

Examples:

- ➔ A judge who has a family member on the county commission is disqualified from cases in which the county commissioners are named individually as parties, the county commission is a party, and the county is a party (*Alabama Advisory Opinion 83-186*).
- ➔ A judge whose brother-in-law is a member of the city council is disqualified from any proceeding in which the city is a party either as the prosecutor in a criminal case or a party to a civil case (*Alabama Advisory Opinion 88-342*).
- ➔ A judge is disqualified from cases brought by the municipality for which the judge's child is a council member (*Alabama Advisory Opinion 97-634*).
- ➔ A judge whose spouse is mayor of a city is disqualified from requests to set bail or issue search warrants made by a city police officer unless no other judge is available and immediate action is required to protect life or property (*Alabama Advisory Opinion 99-741*).
- ➔ A judge whose spouse is mayor of a city may preside in civil cases in which a separate entity connected to city government, for example, the city housing authority, is a party (*Alabama Advisory Opinion 99-741*).
- ➔ A judge is disqualified from cases in which the municipality that employs his spouse as mayor is a party or in which a fine might inure to the benefit of the municipality (*Florida Advisory Opinion 83-14*).
- ➔ A judge may not hear criminal or traffic cases for the city for which the judge's sibling is mayor even if it is the city manager who handles the day-to-day

operation of the city (*Washington Advisory Opinion 00-1*).

- ➔ A person may serve as a village justice even if his or her spouse is a member of the village board of trustees, but must disclose the relationship and disqualify absent waiver in matters involving the village (*New York Advisory Opinion 94-101*).
- ➔ A judge whose spouse is a member of a municipal board of park commissioners is disqualified from cases relating to the park board and its activities (*Washington Advisory Opinion 84-1*).
- ➔ A judge whose spouse is a member of a municipal board of park commissioners is not disqualified from cases involving the municipality (*Washington Advisory Opinion 84-1*).
- ➔ A judge whose spouse is a member of the city council is not disqualified from cases involving the city police department, but the relationship should be disclosed (*West Virginia Advisory Opinion* (June 23, 1997)).
- ➔ A judge whose spouse is a member of city council may not preside in any cases to which the city is a party (*U.S. Compendium of Selected Opinions*, § 3.2-2(a) (1999)).

The Michigan advisory committee addressed several situations that could arise for a judge whose spouse is the elected state secretary of state. *Michigan Advisory Opinion JI-122* (1999). Because the department of state issues driver's licenses, the committee noted that all court proceedings involving driver's license matters (such as sanctions and petitions to restore a license) name the secretary of state. However, the committee stated "[i]n no real sense could it

be said that the actual office holder, in this case the Secretary of State, has a personal interest in the outcome of the proceedings," and that it would elevate "form over substance" to conclude that the secretary of state is a party. The committee advised that the judge may preside in all routine driver's license proceedings even though the judge's spouse is a nominal or formal party. However, in other types of cases involving the department of state, the judge must disclose the relationship and disqualify if the spouse has more than a de minimus interest in the proceeding or is likely to be a material witness.

A law enforcement officer in the family

If a judge has a relative within the third degree who is a law enforcement officer, the judge is disqualified from any case in which that relative is the complaining officer, is likely to be a material witness, or was in any way involved. The disqualification may be waived following disclosure. *Alabama Advisory Opinion 86-286* (spouse is sergeant with county sheriff's department); *Alabama Advisory Opinion 99-735* (son is police officer); *Delaware Advisory Opinion 1994-2* (child is staff sergeant in a state police troop); *Florida Advisory Opinion 93-18* (spouse is officer in local sheriff's office); *Florida Advisory Opinion 96-15* (child is deputy sheriff); *Kansas Advisory Opinion JE-26* (son-in-law is law enforcement officer stationed in the judge's district); *Kansas*

Advisory Opinion JE-30 (sister-in-law is patrolwoman); *New Mexico Advisory Opinion 88-5* (spouse is law enforcement officer); *New York Advisory Opinion 88-57* (husband is forester); *New York Advisory Opinion 90-75* (brother is police chief); *New York Advisory Opinion 92-66* (relative is probation officer); *New York Advisory Opinion 92-71* (nephew is police officer); *New York Advisory Opinion 91-84* (father is town ordinance officer); *New York Advisory Opinion 94-55* (conservation officer is married to sibling of judge's spouse); *New York Advisory Opinion 97-59* (son is police officer); *South Carolina Advisory Opinion 3-1984* (step-son is prosecuting officer).

If the family member did not participate in the case, a judge is not disqualified from a case involving other members of the law enforcement department unless the family member has supervisory responsibilities.

Alabama Advisory Opinion 86-286; *Florida Advisory Opinion 93-18*; *Florida Advisory Opinion 96-15*; *New Mexico Advisory Opinion 88-5*; *New York Advisory Opinion 92-72*; *New York Advisory Opinion 93-104*.

If a member of the judge's family has supervisory responsibilities or a high rank in a law enforcement department, the judge is disqualified from any cases involving officers under the relative's command, absent disclosure and waiver. The disqualification applies not just to trials of cases but also to applications for warrants and setting bond.

Examples:

- ➔ A judge whose child is a staff sergeant in a state police troop that has 21 officers, one staff sergeant, two lieutenants, and one police chief may not hear any cases involving the troop's officers (*Delaware Advisory Opinion 1994-2*) (but a judge whose child is a staff sergeant in a state police troop that has 33 officers, five staff sergeants, two lieutenants, and one commander may preside in cases in which other officers from the troop are witnesses).
- ➔ A judge whose spouse is the commander of one district in the city police department should not preside in cases in which officers assigned to the district will testify or cases in which the defendant is charged with assaulting an officer or an officer is charged with violating a suspect's constitutional rights in conducting a search and seizure or obtaining a confession (*D.C. Advisory Opinion 2* (1992) (but the judge is not disqualified from cases involving officers from other districts)).
- ➔ A judge should not receive recommendations from probation and parole officers supervised by the judge's spouse (*New Mexico Advisory Opinion 98-3*).
- ➔ A judge whose husband is a forester in charge of state lands may not preside over proceedings initiated at his direction (*New York Advisory Opinion 88-57*).
- ➔ A judge whose father is town ordinance enforcement officer is disqualified from any matter involving the judge's father or any appearance ticket issued by or under the authority of the judge's father (*New York Advisory Opinion 91-84*).
- ➔ A judge whose spouse is a police lieutenant is disqualified from matters in which officers under the spouse's com-

mand or in the same precinct were in any way involved (*New York Advisory Opinion 94-52*).

- ➔ A city court judge whose spouse is a city deputy chief of police may not preside over criminal matters (*New York Advisory Opinion 98-27*).
- ➔ A judicial officer may not hear cases involving law enforcement officers who are supervised by the judicial officer's spouse (*Washington Advisory Opinion 94-1*).
- ➔ A judge who is married to the chief of police may not preside over cases involving the police department (*West Virginia Advisory Opinion* (December 5, 1989)).
- ➔ *But see New York Advisory Opinion 88-57* (a judge whose husband is a regional forester in charge of state lands may preside over proceedings involving violations initiated by the forester's office if he is not involved); *New York Advisory Opinion 90-75* (a judge whose brother is the police chief in a village within the jurisdiction of the judge's court should disclose the relationship in each case in which officers under the brother's command appear and inquire whether the brother participated); *South Carolina Advisory Opinion 1-1991* (a judge whose spouse is the sheriff may preside over cases prosecuted by the sheriff's department unless a defendant seeks the judge's disqualification).

The disqualification applies even if the spouse's duties are essentially administrative and do not involve investigations, prosecutions, or supervision of officers in arrests and prosecutions (*New York Advisory Opinion 98-27*) or the spouse rarely becomes personally involved in or familiar with individual cases (*D.C. Advisory Opinion 2* (1992)) because a title such as chief or commander

and a position in the higher echelons of a department suggests an interest in the outcome of the cases handled by the department. The D.C. advisory committee also suggested that a judge whose spouse is a police commander may be required to disqualify when police policies and practices and issues involving police training and supervision are directly at issue in a proceeding.

If a family member is employed in a law enforcement department in an administrative capacity, disqualification is not required in cases involving the department.

Examples:

- ➔ A judge whose spouse is employed part-time with the police department need not disclose the association in cases in which the spouse has absolutely no involvement (*Florida Advisory Opinion 2000-17*).
- ➔ A judge's spouse may hold a minor clerical position (for example, receptionist) with the local police department without the judge being disqualified in criminal cases where police officers of the department are witnesses (*New York Advisory Opinion 90-53*).
- ➔ A judge should disclose that the judge's spouse is employed as a secretary with the state police when the state police are involved in a case, but disqualification is not required (*West Virginia Advisory Opinion* (May 16, 1995)).

A teacher in the family

A judge whose relative is a teacher is not disqualified from a case in which the school board is a party unless:

- ⊙ the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding, as a result of the relative's employment;
- ⊙ the judge's relative is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding (e.g., the outcome might affect salary or employment status);
- ⊙ the judge's relative is to the judge's knowledge likely to be a material witness in the proceeding; or
- ⊙ the judge's relative has some other personal involvement in the matter in controversy that raises reasonable questions about the judge's impartiality.

Alabama Advisory Opinion 80-73; Alabama Advisory Opinion 88-322; Alabama Advisory Opinion 99-721; Florida Advisory Opinion 87-2; New Mexico Advisory Opinion 91-4. However, the judge should disclose the relationship. *Florida Advisory Opinion 87-2; New Mexico Advisory Opinion 91-4.*

An example of when a family member who is a teacher would have an interest that could be substantially affected by the outcome of the proceeding was presented to the Alabama advisory committee when a judge whose daughter was a teacher asked if he or

she could preside over a proceeding involving prorations of state appropriations for local education agencies. The committee stated the judge was disqualified from the case because the judge's daughter's salary would be affected by the outcome of the proceeding.

Alabama Advisory Opinion 81-103.

Government agency employee

If a non-lawyer relative of a judge is employed by a political subdivision (such as a county or city) or government agency, the judge is not automatically disqualified from a proceeding involving the subdivision or agency *unless* the relative is more directly involved or interested.

Examples:

- ➔ A judge whose spouse is employed by the state department of human resources is not disqualified from all cases in which the department is involved or is a party but only those in which the spouse is involved (*Alabama Advisory Opinion 88-345*).
- ➔ A judge is not disqualified from a case in which the city is named as a party merely because the judge's spouse is employed as the library director for the city-county public library and is paid as a city employee (*Alabama Advisory Opinion 92-462*).
- ➔ A judge whose spouse is employed by a government agency is not disqualified from cases the agency brings in a representative capacity on behalf of a city, county, state, or other body (*California Advisory Opinion 45 (1997)*).

- ➔ A judge whose spouse is employed by the county in a managerial capacity is disqualified from all cases involving the spouse's department but is not disqualified from other cases involving the county (*Florida Advisory Opinion 91-27*).
 - ➔ A judge whose spouse is employed as a chemist for the state's department of environmental regulation is not disqualified from cases involving the department unless the spouse's work is specifically involved (*Florida Advisory Opinion 94-3*).
 - ➔ A judge whose spouse is the deputy director of the state Wildlife Fish and Fisheries Department may not preside over matters, whether complex or routine, presented by the department (*Louisiana Advisory Opinion 100 (1992)*).
 - ➔ A judge whose spouse is employed by the community mental health department is not disqualified from cases in which the department makes recommendation if the spouse's work assignment does not involve participation in the preparation of the testimony or reports (*Michigan Advisory Opinion JI-62 (1992)*).
 - ➔ A judge whose spouse is employed by the county to work with programs relating to handicapped children need not disqualify from all cases involving the county (*New York Advisory Opinion 93-131*).
 - ➔ A judge whose spouse is a supervisor with the Department of Human Services may preside over cases where the department is a party or where department case workers are witnesses unless the spouse or an employee under the spouse's supervision is or was a participant in the case or a material witness (*Tennessee Advisory Opinion 96-1*).
 - ➔ A judge should not preside over proceedings in which the judge's spouse, who is employed by the court's probation department as a probation counselor, has prepared pre-sentence reports or other reports for the court (*Washington Advisory Opinion 95-2*).
 - ➔ A judge whose spouse is an adoption caseworker with the Department of Children and Family Services may hear dependency matters initiated by the department or in which department caseworkers appear as witnesses (*Washington Advisory Opinion 88-8*).
 - ➔ *But see California Advisory Opinion 45 (1997)* (a judge whose spouse is employed by a government agency is disqualified from cases in which the agency is a party).
- In most jurisdictions, this rule allows judges to preside over criminal cases even if the relative is an non-advocate employee of the prosecutor's office, the probation department, or the agency representing the defendant provided:
- ⊙ the relative's contact or interest in the case is minor (*Louisiana Advisory Opinion 145 (1998)*);
 - ⊙ the relative is bound by confidentiality (*New York Advisory Opinion 93-28*);
 - ⊙ there is no suggestion that the relative has or will attempt to influence the judge's decision, disclose disputed evidentiary facts to the judge, or ask the judge to favor the office (*Louisiana Advisory Opinion 145 (1998)*); and
 - ⊙ the relative and the judge will not discuss any cases with each other (*New York Advisory Opinion 93-28*).

Examples:

- ➔ A judge is disqualified from any motion to set aside a suspended sentence that is based on a deficiency report prepared by the judge's sister, the director of the county's work release program (*Alabama Advisory Opinion 99-730*).
- ➔ A judge whose spouse is employed by Legal Services Corporation in a non-advocate position is not disqualified from a case in which a party is represented by Legal Services Corporation (*Florida Advisory Opinion 83-10*).
- ➔ A judge whose spouse is a secretary in the state's attorney's office is not disqualified from criminal, juvenile, or traffic proceedings (*Illinois Advisory Opinion 95-9*).
- ➔ A judge whose spouse is a secretary at the office of the local district attorney may preside over a case prosecuted by the district attorney provided the spouse's contact or interest in the case is de minimis and there is no suggestion that the spouse has influenced or will attempt to influence the judge's decision, disclose disputed evidentiary facts to the judge, or ask the judge to favor the district attorney's office (*Louisiana Advisory Opinion 145 (1998)*).
- ➔ A judge whose spouse is secretary to the chief of the narcotics bureau in a district attorney's office may preside over narcotics cases assuming the spouse is bound by confidentiality and the judge and the spouse will not discuss any cases (*New York Advisory Opinion 93-28*).
- ➔ *But see Florida Advisory Opinion 84-2* (a judge whose spouse is employed as an assistant to the director of a pretrial intervention program may not handle criminal cases); *West Virginia Advisory Opinion* (November 3, 1995) (a judge whose child is a paralegal for the attorney

general's office must disclose the relationship on the record and inquire whether the child was involved in the case in any fashion); *West Virginia Advisory Opinion* (September 23, 1992) (a judge should not preside over criminal cases where the prosecutor employs the judge's spouse as a secretary, unless the judge discloses the relationship and the parties agree the relationship is immaterial).

Law firm employee

A judge is disqualified, at least from contested matters, if a law firm appearing before the judge employs the judge's spouse in a position other than attorney. Addressing whether a new judge may hear cases involving a firm at which his wife is employed as a bookkeeper and reception, the Nebraska judicial ethics committee explained, "As long as the new judge's spouse is employed by any law firm appearing before the new judge, the danger is inescapable that someone, especially the disgruntled, unsuccessful litigants, and even some of the opposing counsel, could latch onto either or both of at least two theories." It could be claimed that:

- ⊙ The "spouse learned something about the evidentiary issues at her firm and told the . . . judge what she learned."
- ⊙ The "judge's impartiality is compromised because his spouse's continued employment depends upon the satisfaction of the spouse's employer firm with the . . . judge's performance in matters affecting the firm and its clients."

Stating the judge “would be unable to disprove either claim to the satisfaction of the unhappy parties,” the committee concluded there would be “‘talk’ among the discontented and others who enjoy attacking the judicial and legal systems.” The committee noted that the firm was the local county attorney’s office, meaning “a large number of cases coming from the spouse’s employer firm involve a number of parties likely to complain about anything available to them in the event of dispositions they do not savor.” The committee also noted that the two judges in the county could easily develop a plan so that the other judge hears the matters from which the judge is disqualified. The committee did state that the judge could preside over “the most pro forma matters coming from the spouse’s employer firm.” *Nebraska Advisory Opinion 89-1*.

Examples:

- ➔ A judge is disqualified from a proceeding in which one of the parties was represented by a law firm that employed the judge’s wife as a part-time secretary (*Alabama Advisory Opinion 91-418*).
- ➔ A judge whose spouse is a temporary legal secretary is disqualified from all cases involving the law firm to which the spouse is currently assigned and is disqualified for six months from any cases involving law firms at which the spouse had a prior assignment (*Florida Advisory Opinion 97-8*).
- ➔ *But see Arkansas Advisory Opinion 98-5* (judge is not disqualified from a case involving an attorney for whom the judge’s spouse, who is self-employed, performs accounting services if the

spouse has no involvement with the firm’s clients or the case and has only limited contact with the firm in general).

Disqualification is not required, absent additional factors, if a relative other than a spouse is employed by a law firm, although the judge should disclose the relationship.

Examples:

- ➔ A judge may preside in cases involving an attorney who employs as a legal secretary a child of the judge who does not reside in the judge’s household (*West Virginia Advisory Opinion* (March 5, 1993)).
- ➔ A judge may preside in cases involving a law firm that employs the judge’s child as a summer assistant, whose primary responsibilities include helping the law firm move into new offices and performing other chores not involving legal matters (*Florida Advisory Opinion 76-13*).
- ➔ A judge may preside over cases in which the law firm that employs the judge’s college-age daughter as a summer clerk appears as counsel of record if the judge’s daughter will be completely isolated from any and all matters over which her father may preside (*Georgia Advisory Opinion 232* (1999)).
- ➔ A judge whose college-age child is employed part-time as a legal assistant by a law firm is not disqualified when the employer-firm appears before the judge but should disclose the relationship (*New York Advisory Opinion 88-152*).
- ➔ A judge whose child is employed full-time by a local attorney as a secretary/paralegal may preside in uncontested cases brought by the firm but should disclose the relationship in contested cases and disqualify upon

receiving a reasonable request to do so (*South Carolina Advisory Opinion 6-1992*). *But see South Carolina Advisory Opinion 17-1996* (a judge whose child is employed as a part-time runner by a local law firm for the summer is disqualified from contested cases brought by the firm).

Disqualification

Q & A

May a judge preside in a case against a hospital at which his wife is a doctor?

Yes, unless he knows his wife's salary or employment status might be affected by the outcome of the case, his wife is likely to be a material witness, or the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts as a result of his wife's employment.

May a judge preside over a personal injury case where the judge knows her mother-in-law witnessed the car accident that is the subject of the suit and is likely to be a material witness?

No. The judge's mother-in-law is within the third degree of relationship to the judge's husband, and a judge may not preside in a case in which a person within the third degree of relationship to the judge's spouse is, to the judge's knowledge, likely to be a material witness.

May a judge hear cases in which the judge's brother will testify as attendance director for a school?

No. The judge's brother is within the third degree of relationship to the judge, and a judge may not preside in a case in which a person within the third degree of relationship to the judge is, to the judge's knowledge, likely to be a material witness.

May a judge preside in a case in which the judge's sister-in-law's husband appears as an attorney?

No. The judge's sister-in-law's husband is married to someone within the third degree of relationship to the judge, and a judge is disqualified from a case if a person within the third degree of relationship to the judge, the judge's spouse, or the spouse of such a person is acting as a lawyer in the proceeding.

May a judge preside in a case where one of the attorneys is the judge's cousin?

Because cousins are not within the third degree of relationship, *in most states*, the judge may preside unless the judge and the cousin have a near-sibling relationship or close familial tie.

May a judge's son represent a client before another judge of the same court?

Yes, but the judge in the case should disclose to all the parties of the attorney's relationship with the judge's colleague.

May a judge hear cases in which one of the attorneys is a partner of the judge's wife if the wife was not involved in any way in the case?

In some jurisdictions, no; in some jurisdictions, it depends on factors such as whether the firm's fee is contingent on the outcome of the case, the size of the firm, and if the spouse's compensation might be affected by the outcome of the case. At the least, in all jurisdictions, the judge should disclose the relationship to the parties and their attorneys.

May a judge preside in a case involving a law firm with which his brother has an "of counsel" relationship if the brother is not involved in the case before the judge?

Yes, if the brother receives fixed deferred compensation regardless of the firm's profits, has only a retainer interest in occasional, separate cases, and the firm and the brother do not share letterhead.

May a judge preside in a case in which one of the attorneys is from a law firm in which the judge's daughter is an associate?

In some jurisdictions, a judge may be able to preside over proceedings in which a law firm representing one of the parties employs a relative as an associate depending on factors such as an associate's compensation package, the firm's internal financial arrangements, and whether the relative has worked in the case. However, in other jurisdictions, a judge must disqualify when a relative is an associate in a law firm appearing in a case unless the parties waive the disqualification.

May a judge hear a case in which one of the attorneys shares office space, expenses, and a secretary with the judge's daughter, but they are not partners or members of a professional association?

Yes, if their practices are separate and they do not share liabilities, profits, responsibilities, letterheads, and telephone listings.

May a judge preside in a medical malpractice case in which the defendant is a hospital that the judge's husband represents in labor relations cases?

Yes, unless her husband regularly represents the hospital or the fees the hospital pays the husband contribute substantially to the family income.

<i>May a judge whose son is an assistant district attorney preside in a criminal case in which the prosecuting attorney is an attorney who is a member of the same office?</i>	Yes, unless his son participated in some way in an earlier part of the case, is involved in a related case, or serves in a supervisory capacity in the district attorney's office.
<i>May a judge whose son works as public defender preside in a criminal case in which the defendant is represented by a public defender from the same office?</i>	Yes, unless his son participated in some way in an earlier part of the case, is involved in a related case, or serves in a supervisory capacity in the public defender's office.
<i>May a judge whose son is an attorney for legal aid preside in a case in which the plaintiff is represented by an attorney who is a member of the same office?</i>	Yes, unless his son participated in some way in an earlier part of the case, is involved in a related case, or serves in a supervisory capacity in the legal aid office.
<i>May a judge on the court of appeals hear an appeal from a decision entered by her daughter, a trial court judge?</i>	No. 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.
<i>May a judge whose brother is a member of the city council preside in a case in which the city is a party either as the prosecutor in a criminal case or a party to a civil case?</i>	No. If a judge's relative is a member of the governing body of a political subdivision, the judge is disqualified from proceedings in which that entity is a party.
<i>May a judge whose husband is mayor of a city preside in a case in which the city is a party?</i>	No. If a judge's relative is the mayor of a city, the judge is disqualified from proceedings in which the city is a party.
<i>May a judge whose sister is a police officer preside over criminal cases in which officers from that police department are involved as the arresting officer or witness?</i>	Yes, unless the sister is the complaining officer, is likely to be a material witness, was in any way involved in the case, or has supervisory responsibilities or a high rank within the department.
<i>May a judge preside in a case in which parents are suing their child's school if the judge's brother is a teacher at the school?</i>	Yes, unless the outcome of the case might have a substantial effect on the brother's salary, employment status, or other interest; the brother is to the judge's knowledge likely to be a material witness; or the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts as a result of his brother's employment.

May a judge whose husband is a chemist for the state's department of environmental regulation preside in cases involving that department?

Yes, unless the husband's work is specifically involved. If a non-lawyer family member is employed by a political subdivision (such as a county or city) or government agency, the judge is not automatically disqualified from a proceeding involving the subdivision or agency unless the family member is directly involved or interested.

May a judge whose wife is a secretary in the state's attorney's office preside over cases brought by the state's attorney?

Yes, as long as his wife has no contact or interest in the case and is bound by confidentiality; there is no suggestion that his wife will ask the judge to favor the district attorney's office; and the judge and his wife will not discuss any cases with each other.

May a judge preside in cases in which one of the attorneys is from a law firm at which the judge's husband works as an accountant?

No. A judge is disqualified, at least from contested matters, if a law firm appearing before the judge employs the judge's spouse in a position other than attorney.

May a judge preside in cases in which one of the attorneys is from a law firm at which the judge's brother works as an accountant?

Yes, although the judge should disclose the relationship. Disqualification is not required, absent additional factors, if a family member other than a spouse is employed by a law firm.

May a judge preside over a case in which the defendant is a large corporation if the judge's daughter owns 1% or less of the company's outstanding stock, an amount that is worth less than \$1,000?

In jurisdictions that apply the "however small" standard, the judge may not preside because his daughter has a disqualifying financial interest in a party; in jurisdictions that apply a de minimis standard, the judge probably can preside.

May a judge preside in a case in which the defendant is a bank in which the judge's wife has an account or to which his wife owes money?

Yes, unless there is currently a dispute over the account or the loan is in default.

Acting as an Attorney for Family Members



In this chapter:

- ➔ Giving legal advice to family members.
- ➔ Drafting or reviewing documents.
- ➔ Appearing as an advocate for family members.
- ➔ Attending a hearing with a family member.

Giving legal advice to family members

Full-time judges are prohibited from practicing law (Canon 4G) because the “likelihood of conflicts of interest, the appearance of impropriety, and the appearance of a lack of impartiality all have their greatest potential in the practice of law by a full-time judge.” Thode, *Reporter’s Notes to [1972] Code of Judicial Conduct* at 91 (ABA 1973). The practice of law includes providing any services that are legal in character, call for the skill and expertise of a lawyer, and constitute part of a lawyer’s professional services. *Michigan Advisory Opinion J-2* (1989). A judge may represent himself or herself.

The rule against practicing law applies to prohibit a judge from acting “as an advocate or negotiator for a member of the judge’s family in a legal matter.” *Commentary, Canon 4G*. However, an exception allows a

judge to “give legal advice to and draft or review documents for a member of the judge’s family” if the judge does not receive compensation. This exception acknowledges that “judges are almost inevitably drawn to some degree into the legal affairs of their families” while still “prohibiting the evils of appearance of impropriety and neglect of judicial duties.” Milord, *The Development of the ABA Judicial Code*, at 43 (1992).

Judges may give uncompensated legal advice and counseling to family members.

Examples:

- ➔ A judge may represent the judge’s spouse in settlement negotiations against their insurance company for claims arising from an automobile accident (*Louisiana Advisory Opinion 81* (1990)).
- ➔ A judge may provide limited legal advice or counseling to a son-in-law concerning a real estate transaction (*Michigan Advisory Opinion J-2* (1989)).
- ➔ A judge may discuss a real estate arbitration proceeding with the judge’s spouse who is a real estate broker and with the spouse’s attorney (*Missouri Advisory Opinion 117* (1985)).
- ➔ A judge may offer informal legal advice to family members as long as there is no attorney-client relationship (*New York Advisory Opinion 91-5*).

- ➔ A judge may advise his brother's widow informally on the law and procedures regarding the administration of his brother's estate (*Pennsylvania Advisory Opinion 89-20*).
- ➔ A judge may give incidental counseling regarding the probate of a family member's will to immediate family members (*Texas Advisory Opinion 47 (1979)*).

Drafting or reviewing documents

A judge may draft or review documents for members of the judge's family as long the judge does so without compensation. However, noting that drafting wills for family members may raise conflicts of interest, the Michigan advisory committee stated that a "judge engaged in permitted legal work is governed by the same rules as a lawyer and should proceed accordingly." *Michigan Advisory Opinion J-2 (1986)*. Similarly, the Pennsylvania judicial ethics committee warned that a judge who advises family members would run the risk of violating the canon in the event that difficulties arose as a result of the advice. *Pennsylvania Advisory Opinion 89-20*.

Examples:

- ➔ A judge may draft wills for family members (*Michigan Advisory Opinion J-2 (1986)*).
- ➔ A judge may draft or review documents incidental to a real estate transaction in which the judge is advising the judge's son-in-law (*Michigan Advisory Opinion J-2 (1989)*).

Appearing as an advocate for family members

A judge may not make an appearance as counsel or function as an advocate or negotiator in a legal matter on behalf of a family member. That proscription applies even if the judge's representation requires no courtroom appearance, the representation takes place in a different state, and the judge receives no compensation (*Michigan Advisory Opinion J-2 (1989)*).

Examples:

- ➔ A judge may not act as a legal advisor for an adult son in negotiating with an insurance carrier (*Illinois Advisory Opinion 95-19*).
- ➔ A judge may not act as an attorney for the executors of a parent's estate (*Kansas Advisory Opinion JE-17 (1986)*).
- ➔ A judge may not file documents or appear as a legal representative for a daughter and her husband in connection with the adoption of a child (*Nebraska Advisory Opinion 92-2*).
- ➔ A judge should not have represented his son in a traffic violation by cross-examining witnesses, presenting legal arguments, and, after a verdict of guilty, filing an appeal. The judge was publicly censured (*Matter of DiSabato, 385 A.2d 234 (New Jersey 1978)*).
- ➔ A judge may not represent his or her daughter in a real estate purchase (*New York Advisory Opinion 92-118*).
- ➔ A judge may not act as counsel in the probate of the will of a family member (*Texas Advisory Opinion 47 (1979)*).

- ➔ A judge may not act as counsel for a spouse or a corporation owned by the judge and the judge's spouse in a suit even if the judge is representing himself/herself in the suit (*Texas Advisory Opinion 226* (1998)).
- ➔ A judge should not have represented his son at trial on charges he had committed traffic violations. The judge was censured for this and other misconduct (*Judicial Inquiry and Review Commission of Virginia v. Jordan*, Record No. 730725 (Virginia 1973)).
- ➔ A judge should not have appeared on behalf of his sister-in-law at a motion hearing before a family law commissioner during regular court hours and at the same courthouse in which the judge performs his judicial duties to personally address the court concerning disputed issues, contending, for example, that his sister-in-law was not properly served. The judge was publicly censured (*In re Chow*, No. 95-2066-F-59, Stipulation and Order of Admonishment (Washington Commission on Judicial Conduct February 2, 1996)).

Attending a hearing with a family member

Whether a judge may attend a deposition or hearing with a family member to offer moral support requires a balancing of two concerns. Because a judge is a public figure and member of the judicial branch, a judge's presence at a proceeding when not required will "inevitably be noticed" and observers might draw the inference that "the judge is attempting to influence the outcome of the hearing or the conduct of the deposition," creating at least an appearance of impropri-

ety. *Michigan Advisory Opinion JI-15* (1989). However, this inference "should be balanced by the concern of the judge when a party in the proceeding is a member of the judge's family . . . during occasions of stress or vulnerability, which are likely to be present if the family member is a party in a legal proceeding." The Michigan advisory committee concluded that "the correct balance" allows a judge to be at the side of a child or parent or other family member related within the third degree by blood or marriage during a legal proceeding. Similarly, a judge may attend a real estate arbitration proceeding with the judge's spouse who is a real estate broker (*Missouri Advisory Opinion 117* (1985)) or accompany his or her daughter to a small claims proceeding in which the daughter is a party and observe the proceeding as a member of the audience (*New York Advisory Opinion 99-24*). However, the judge may attend only if:

- ⊙ the judge does not directly or indirectly lend advice or assistance (*Missouri Advisory Opinion 117* (1985)),
- ⊙ the judge's role is limited to that of a spectator (*Missouri Advisory Opinion 117* (1985)),
- ⊙ the judge is likely to remain unknown (*New York Advisory Opinion 99-24*), and
- ⊙ the proceeding is being held in a county in which the judge does not sit (*New York Advisory Opinion 99-24*).

May a judge give legal advice to a sister regarding a will or real estate transaction?

Yes, as long as the judge is uncompensated. A judge may give informal legal advice and counseling to family members.

May a judge draft a will for his mother?

Yes, as long as the judge is uncompensated. A judge may draft or review documents for members of the judge's family.

May a judge represent the judge's son in a traffic violation?

No. A judge may not appear in court as counsel on behalf of a family member even if the case is in a different state and the judge receives no compensation. The judge cannot file legal pleadings, cross-examine witnesses, present arguments, or file an appeal.

May a judge represent the judge's daughter in a real estate purchase?

No. The prohibition on a full-time judge practicing law applies even if the judge's representation requires no courtroom appearance, and the exception for giving legal advice to family members does not include representing a family member at a transaction.

May a judge attend a hearing in a small claims case in which his son is the defendant to offer moral support?

Yes, if the case is not in the judge's court or courthouse and he is only a spectator and does not directly or indirectly lend advice or assistance.

Gifts



In this chapter:

- ➔ Gifts a judge is required to discourage family members from accepting.
- ➔ Permitted gifts.

The code notes that “a gift, bequest, favor or loan to a member of the judge’s family residing in the judge’s household might be viewed as intending to influence the judge.” *Commentary to Canon 4D(5)(a)*. The code acknowledges, however, that a judge cannot “reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge’s household.” The code requires a judge to:

- ⊙ inform family members residing in the judge’s household of the constraints upon the judge’s receipt of gifts, and
- ⊙ discourage those family members from violating them.

The Michigan advisory committee explained that a “judge has a duty to use best efforts to obtain the cooperation of family members” in complying with the code’s standards on accepting gifts. *Michigan Advisory Opinion CI-1201* (1988).

Discouraged gifts

Under Canon 4D(5), a judge must urge family members residing in the judge’s household not to accept any gift, bequest, favor, or loan from a party, attorney, or other person:

- ⊙ who has come or is likely to come before the judge, or
- ⊙ whose interests have come or are likely to come before the judge.

Examples:

- ➔ A judge and his or her spouse should not accept baby shower gifts from a person whose interests may come before the judge in the immediate future (*Florida Advisory Opinion 91-7*).
- ➔ A judge and the judge’s spouse may not, on behalf of their children, accept monetary gifts from a friend whom the judge previously appointed as a fiduciary (*New York Advisory Opinion 97-98*).
- ➔ A judge or a judge’s family that has suffered a catastrophic loss may not accept gifts of money from lawyers or parties who have come or might come before the court; a blind trust may not be used to prohibited accept gifts (*Texas Advisory Opinion 215* (1997)).

Permitted gifts

Canon 4D(5) permits a judge and, therefore, members of the judge's family to accept from anyone who has not come or is not likely to come before the judge:

- ⊙ An invitation to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice.
- ⊙ A gift incident to a public testimonial.
- ⊙ Books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use.
- ⊙ A gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.
- ⊙ Ordinary social hospitality, which has been defined as that type of social event or other gift that "is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage" (*California Advisory Opinion 43* (1994)).
- ⊙ A gift from a relative or friend for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship.
- ⊙ A gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would require the judge's disqualification.
- ⊙ A loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges or related to judges.
- ⊙ A scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

Examples:

- ➔ A judge and the judge's spouse may take advantage of free airline travel in accordance with a pass issued by the airline for which their son works as a benefit of the son's employment (*Florida Advisory Opinion 88-17*).
- ➔ A judge may accompany his wife to a trade association conference where the wife will be a featured speaker and all costs are paid by the sponsor (*Florida Advisory Opinion 89-9*).
- ➔ A judge and his or her spouse may accept baby shower gifts from relatives without disclosing them (*Florida Advisory Opinion 91-7*).
- ➔ A judge may request and accept a tuition waiver for the judge's children at a private school by virtue of the judge's position as a part-time instructor if it is granted on the same terms as would be applicable to persons who are not

judges (*Illinois Advisory Opinion 96-17*).

- ➔ A judge may accept an award that includes “a substantial monetary component” (a check and travel and hotel expenses for the judge and the judge’s spouse to the awards banquet) and recognizes the judge’s innovative case scheduling system from a national foundation whose purpose is improving local, state, and federal justice systems (*Massachusetts Advisory Opinion 98-17*).
- ➔ A judge may accept pro bono legal services from the judge’s sibling (*Michigan Advisory Opinion JI-106* (1996)).
- ➔ A judge may accept the proceeds of a fund-raising event held to help defray the medical expenses of a judge’s child only if the donors or persons purchasing tickets to the event were not parties or other persons who have come or whose interests have come before the judge or are likely to come before the judge (*Michigan Advisory Opinion CI-1201* (1988)).
- ➔ A judge and the judge’s spouse may attend an all-expense-paid, four-day semi-annual union meeting if the union is not a party whose interests have come or are likely to come before the judge and the judge is not currently presiding over any cases involving the union’s members, even if it is possible that a union member may come before the judge in the future (*Michigan Advisory Opinion CI-549* (1980)).
- ➔ A judge or a judge’s family member who has suffered a catastrophic loss may accept gifts of money from non-lawyer friends and acquaintances who work in the courthouse but have no interest that has or might come before the court (*Texas Advisory Opinion 215* (1997)).

- ➔ A judge and the judge’s spouse may attend cocktail parties hosted by law firms in connection with bar association gatherings and an infrequent dinner commemorating a firm’s significant anniversary but should not accept hotel and travel expense reimbursement (*U.S. Advisory Opinion 17* (revised 1998)).
- ➔ A judge’s children may accept scholarships awarded on the same terms and based on the same criteria applied to other applicants (*U.S. Compendium of Selected Opinions*, § 5.4-Z(b) (1999)).

When a judge’s spouse accompanies the judge on a trip to speak or participate in a meeting concerning the law, the legal system, the administration of justice, or non-legal subjects, if the judge can accept reimbursement for his or her expenses from the sponsoring organization, reimbursement of the spouse’s expenses is also allowed as long as the spouse’s attendance “is appropriate to the occasion.” (Canon 4B, Canon 4H, and commentary). Reimbursement of a judge’s expenses for participating in extra-judicial activities is only appropriate:

- ⊙ if the reimbursement is limited to the actual cost of travel, food, and lodging reasonably incurred by the judge, and
- ⊙ the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.

The source of the payment gives the appearance of impropriety if the organization or its interests have come or are likely to come before the judge or if the members of the

organization or their interests have come or are likely to come before the judge.

Reimbursement of expenses to participate in general interest bar association programs is generally appropriate, however, because its membership reflects all segments of the bar and all sides of the issues and “no individual lawyer could be seeking to achieve any special favor or position with the judge” (*Maryland Advisory Opinion 91* (1981)).

bursement is limited to the actual costs of travel, food, and lodging reasonably incurred (*U.S. Advisory Opinion 7* (revised 1998)).

Examples:

- ➔ A judge who is presenting a paper and giving a speech at a symposium in a foreign country on the American judicial system may accept reasonable travel and accommodation expenses for the judge and the judge’s spouse from the sponsoring institute (*New York Advisory Opinion 91-7*).
- ➔ A judge and the judge’s spouse or guest may attend as guests a bar association dinner, provided the association is not one whose members usually represent the same side in litigation (*Wisconsin Advisory Opinion 98-10R*).
- ➔ A judge and the judge’s spouse may be reimbursed for hotel and travel expenses reasonably required for their attendance at dinners and similar social events sponsored by lawyer organizations such as bar associations unless the lawyer organization were identified with a particular point of view regularly advanced in litigation (*U.S. Advisory Opinion 17* (revised 1998)).
- ➔ A judge who is serving as a member of the faculty for the National College of State Trial Judges may be reimbursed for travel and subsistence for the judge and the judge’s spouse, but the reim-

Code Variations



- ✦ The **California** code provides: “Under no circumstance shall a judge accept a gift, bequest, or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge.” Commentary states that application of that provision “requires recognition that a judge cannot reasonably be expected to anticipate all persons or interests that may come before the court.” The California code notes in commentary that: “In addition to the prohibitions set forth in Canon 4D(b) regarding gifts, other laws may be applicable to judges, including for example, Code of Civil Procedure section 170.0 and the Fair Political Practices Act . . .” and “[j]udges should be aware of the statutory limitations on accepting gifts, including honoraria.” The California code adds that a judge may accept “advances or reimbursement for the reasonable cost of travel, transportation, lodging, and subsistence which is directly related to participation in any judicial, educational, civic, or governmental program, bar-related function or activity, devoted to the improvement of the law, the legal system, or the administration of justice.”
- ✦ The **Delaware** and **U.S.** codes also limit gifts from a donor who has sought and is seeking to do business with the court or other entity served by the judge. The commentary to the Delaware and U.S. codes also adds:

Reimbursement or direct payment of travel expenses may be a gift and, if so, its acceptance is governed by Canon 5C(4) and (5). A judge or employee may

receive as a gift travel expense reimbursement including the cost of transportation, lodging, and meals, for the judge and a relative incident to the judge’s attendance at a bar-related function or at an activity devoted to the improvement of the law, the legal system, or the administration of justice.

- ✦ **Kentucky** adds to the model code’s list of permitted gifts “customary expressions of sympathy.”
- ✦ The **Louisiana** code states: “A judge, a judge’s spouse, or a member of the judge’s immediate family residing in the judge’s household shall not accept any gifts or favors which might reasonably appear as designed to affect the judgment of the judge or influence the judge’s official conduct.”
- ✦ The **North Dakota** code allows a judge to accept testimonials “only if the donor organization is a professional legal organization interested in the promotion of justice.”
- ✦ The **Wisconsin** code defines gift as “the payment or receipt of anything of value without valuable consideration.” The Wisconsin code expressly permits a judge to accept:

Anything of value if the activity or occasion for which it is given is unrelated to the judge’s use of the state’s time, facilities, services or supplies not generally available to all citizens of this state and the judge can show by clear and convincing evidence that it was unrelated to and did not arise from the judge’s holding or having held a public office.

May a judge's wife accept a baby shower gift from an attorney who frequently appears before the judge?

The judge should encourage his wife to decline the gift.

May a judge accept free tickets from a county bar association for the judge and her husband to attend a bar association dinner?

Yes.

May a judge who is teaching at a judicial conference accept reimbursement for her husband's expenses to accompany her?

Yes, if the reimbursement is limited to the actual costs of travel, food, and lodging reasonably incurred and the organization making the payment does not give the appearance of influencing the judge's judicial performance.

May a judge's wife, a doctor, accept reimbursement of costs for traveling to a conference sponsored by a medical association at which she will be a featured speaker?

Yes. This is a benefit incident to the wife's business, profession, or other separate activity, and the payment could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

May a judge accept free legal services from the judge's sister?

Yes, because the judge cannot hear cases in which his sister appears.

May a judge's daughter accept a college scholarship?

Yes, as long as the scholarship is awarded to her on the same terms and based on the same criteria applied to others.

May friends of a judge hold a fund-raising event to help defray the medical expenses incurred by the judge in treating her infant child following an accident?

Yes, but only if persons purchasing tickets to the event are not parties or attorneys who have or whose interests have come before the judge or are likely to come before her.

Financial Activities



In this chapter:

- ➔ Judges holding and managing family investments.
- ➔ Judges holding and managing family real estate investments.
- ➔ Family members' financial dealings.
- ➔ When a family member is involved in the bail bond business.
- ➔ Judges participating in a family business.

Investments

Canon 4D(2) provides:

A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

The commentary clarifies that judges are permitted to hold and manage investments:

- ⊙ owned solely by the judge,
- ⊙ owned solely by a member or members of the judge's family, or
- ⊙ owned jointly by the judge and members of the judge's family.

Examples:

- ➔ A judge may own stock in a travel agency that is being purchased by the judge's spouse (*Florida Advisory Opinion 80-7*).
- ➔ A judge may hold shares of stock in a family business (*Illinois Advisory Opinion 97-7*).
- ➔ A judge may become a general partner in a co-partnership with immediate family members (*Michigan Advisory Opinion CI-826 (1982)*).
- ➔ A judge may handle family business interests, some of which are held in trust and in partnerships with an aunt and several cousins (*Texas Advisory Opinion 151 (1993)*).
- ➔ A judge may hold shares of stock in an independent family-owned insurance agency and continue to receive corporation distributions without establishing a trust (*Washington Advisory Opinion 97-2*).

Real estate investments

The rule specifically allows a judge to hold and manage real estate investments of the judge and members of his or her family.

Examples:

- ➔ A judge may participate in a limited family partnership formed for the pur-

pose of holding family-owned real property even if one of the buildings on the property is leased by the state (*Alabama Advisory Opinion 80-65*).

- ➔ A judge and the judge's spouse may, with several business associates, own and manage a warehouse and industrial park even if title to the property is in their names if daily management responsibility is handed by their associates (*Florida Advisory Opinion 76-1*).
- ➔ A judge may continue to own with his or her spouse a small rental property inherited from family (*New York Advisory Opinion 96-11*).
- ➔ A judge who co-owns a farm with his or her spouse may raise beef cattle and sell hay, grain, and seed (*Ohio Advisory Opinion 95-10*).

Family members' financial dealings

A judge's ability to hold real estate and other investments is subject to the prohibitions in Canon 4D against a judge engaging in financial and business dealings that:

- ⊙ "may reasonably be perceived to exploit the judge's judicial position,"
- ⊙ "involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves," or
- ⊙ require frequent disqualification.

A judge must divest investments and other financial interests that might require frequent disqualification as soon as the judge can do so without serious financial detriment. *See,*

e.g., South Carolina Advisory Opinion 18-1994 (a judge may not hold stock in the judge's family's law practice).

Moreover, the commentary to the 1990 model code adds that a judge "should discourage family members from engaging in dealings that would reasonably appear to exploit the judge's judicial position." The commentary explains that the "rule is necessary to avoid creating an appearance of exploitation or favoritism of the judicial office and to minimize the potential for disqualification." However, the code acknowledges the "possibility that a judge may lack control over such dealings by family members" by using "the hortatory 'should discourage' formulation." Milord, *The Development of the [1990] ABA Model Code*, at 38 (ABA 1992). (According to the preamble to the model code, "[w]hen 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.")

Examples:

- ➔ Members of the judge's immediate family may not receive financial benefit either directly or in trust from property rented to the judge's former firm (*Alabama Advisory Opinion 81-115*).
- ➔ A judge's wife may take a job that would require her to solicit various local businesses for business for her employer, which provides accounting and bookkeeping services and advice about workers compensation insurance, employer-employee relations, taxes, and

other business-related matters (*Arkansas Advisory Opinion 2000-13*).

- ➔ A judge's spouse may not lease space in an office building the spouse owns to a lawyer who appears before the judge (*South Dakota Advisory Opinion 95-2*).
- ➔ A trust created to benefit a judge's minor children should not rent space in a building to lawyers who practice in the judge's court (*Texas Advisory Opinion 179 (1995)*).
- ➔ A judge's spouse may serve as director on the board of a publicly owned corporation but should serve under his or her own name (*Texas Advisory Opinion 70 (1983)*).
- ➔ A judge's parents should not convey an office building in which the prosecuting attorney has offices to the judge, the judge's spouse, or children living in the judge's household. (*West Virginia Advisory Opinion (December 22, 1993)* (the property could be conveyed to the judge's emancipated child who is not living in the judge's household)).
- ➔ A judge's spouse should not participate in the management of a family-owned business that does business with attorneys (*U.S. Compendium of Selected Opinions, § 3.2-2(b) (1999)*).
- ➔ *But see Louisiana Advisory Opinion 155 (1999)* (a judge may transfer his or her interest in an office building jointly owned with others who are likely to appear before the judge to the judge's child so long as the transfer divests the judge of full ownership and control over the property).

When a family member is involved in the bail bond business

If a judge has a family member who is a bondsman or works for a bonding company a defendant may choose in a case, the judge:

- ⊙ may set bonds at first appearance hearing because which company the defendant will choose is not known,
- ⊙ may not refer a defendant to a particular bonding company,
- ⊙ may not preside over the increase, decrease, or modification of bail if the defendant has secured surety from the relative's company, and
- ⊙ may not preside over a bond forfeiture hearing if the defendant has secured surety from the company.

Examples:

- ➔ A judge whose spouse works for a bonding company located in the counties that the judge serves may set bond at a first appearance hearing but may not refer a defendant to a particular bonding company and must disqualify from any case in which the judge's spouse's bonding company has an interest in the outcome and involving a defendant who has been bonded by the spouse's company (*Florida Advisory Opinion 87-8*).
- ➔ A judge whose child is one of many salaried employees of a bail bond company that provides surety in approximately 95% of the cases in the judge's jurisdiction (1) may preside over the initial fixing of bail of a defendant who

may secure surety from the company; (2) may preside over the increase, decrease, or modification of bail when the defendant has secured surety from a different bail bond company; (3) may not preside over the increase, decrease, or modification of bail if the defendant has secured surety from the relative's company; and (4) may not preside over a bond forfeiture hearing if the defendant has secured surety from the company (*Louisiana Advisory Opinion 164* (2000)).

- ➔ A magistrate must disqualify from bond matters in which the magistrate's spouse and the spouse's parent are participating through a bail bond business (*South Carolina Advisory Opinion 31-1995*).

A judge participating in a family business

In general, a judge is not allowed to participate in a business. Under Canon 4D(3), a judge is prohibited from serving “as an officer, director, manager, general partner, advisor or employee of any business entity” The same provision in the 1972 model code had been interpreted to restrict a judge's participation in family businesses.

Examples:

- ➔ A judge may not serve as president of a family-owned corporation (*Florida Advisory Opinion 77-1*).
- ➔ A judge may not serve on the board of a private corporation restricted to members of the judge's family (*Florida Advisory Opinion 83-6*).
- ➔ A judge may not assume an active role in the management or serve as an offi-

cer, director, or employee of a family hardware business (*Illinois Advisory Opinion 97-7*).

- ➔ A judge may not serve as a director of the judges' parents' insurance brokerage firm (*Maryland Advisory Opinion 4* (1971)).
- ➔ A judge may not actively participate in the management or day-to-day operation of a restaurant/bar owned by the judge's spouse (*Michigan Advisory Opinion CI-999* (1984)).

Recognizing “the considerable extent to which, particularly in rural areas, judges are involved in family businesses” (Milord, *The Development of the [1990] ABA Model Code* at 39 (ABA 1992)), the 1990 model code created an exception to Canon 4D(3) that allows a judge, subject to the requirements of the code, to manage and participate in:

- ⊙ “a business closely held by the judge or members of the judge's family,” or
- ⊙ “a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.”

The commentary clarifies that a judge may participate in a business that is “closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.” The commentary to the family business exception advises that a judge may be prohibited from participating in a closely-held family business if:

- ⊙ the business entity frequently appears before the judge's court,
- ⊙ the participation requires significant time away from judicial duties, or

- ⊙ the judge's participation would involve misuse of the prestige of judicial office.

Examples:

- ➔ A judge may participate in a limited family partnership formed for the purpose of holding certain family-owned property including a building that is leased by the State of Alabama (*Alabama Advisory Opinion 80-65*).
- ➔ A judge may form a closely-held family business corporation to take orders and distribute a software program written and published by the judge if there is no identification of the judge with the product (*Alabama Advisory Opinion 96-604*).
- ➔ A judge may serve as chair of the board of a closely-held family corporation, which is a wholesale distributor of dry goods and floor coverings, where the corporation does not conduct any business with any individuals, firms, or corporations in the judge's state (*Florida Advisory Opinion 86-11*) (even before adoption of the 1990 model code, the Florida code of judicial conduct provided that a judge could participate in a "closely held" family business).
- ➔ A judge may attend a promotional event for a family business so long as the judge is not introduced or identified as a judge (*Illinois Advisory Opinion 97-7*).
- ➔ A judge may participate in a family-run business of selling Christmas trees (*Maine Advisory Opinion 01-2*).
- ➔ A judge may not participate in a multi-level marketing business that the judge and the judge's spouse currently operate by making sales, presenting the marketing concept, recruiting sponsors, and assisting sponsors to recruit others (*Maryland Advisory Opinion 119* (1989)).
- ➔ A judge may serve as an officer or director of a corporation that is in fact the judge's alter ego and the stock of which is owned exclusively by the judge, or the judge and his immediate family (*Michigan Advisory Opinion CI-470* (1980); *Michigan Advisory Opinion CI-502* (1980)).
- ➔ A judge may serve as director and secretary of the judge's family's closely held business (*South Carolina Advisory Opinion 35-1995*).
- ➔ A judge may be an uncompensated officer or director of a business wholly owned by members of the judge's family (*U.S. Compendium of Selected Opinions*, § 5.2-3(c) (1999)).
- ➔ A judge may not participate in the management of a family-owned business that does business with attorneys (*U.S. Compendium of Selected Opinions*, § 3.2-2(b) (1999)).

The code does not define a closely held family business, although a business wholly owned by members of the judge's family would obviously fall within any definition. The advisory committee for federal judges has stated that a judge may not serve as a director or officer of a corporation in which any non-family member owns any substantial interest because such a business is not a family business. *U.S. Compendium of Selected Opinions*, § 5.2-1(d-2) (1999). In contrast, the Florida advisory committee characterized a business as a closely held family business even though the corporation's 35 stockholders included descendants of the judge's great-grandfather's partner as well as descendants

of the judge's great-grandfather. *Florida Advisory Opinion 86-11*.

If the structure of a corporation changes so that it no longer qualifies as a closely held family corporation, a judge would be required to resign from the board of directors. *Florida Advisory Opinion 86-11*.

Code Variations



- ✦ The **Michigan** code of judicial conduct states that a judge's participation in a family business "must be of a passive, personal nature, and may not consist of waiting on customers, collecting accounts, marketing, and the like."
- ✦ **Texas** has adopted a provision that states: "A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a 'publicly owned business' is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship."
- ✦ Commentary to the **Virginia** code cautions judges against participating in a closely held family business if such participation would "subject the judge to public criticism or give the appearance of impropriety."

May a judge's husband lease office space in a building he owns to a lawyer who appears before the judge?

The judge should discourage her husband from doing so because the lease would reasonably appear to exploit the judge's judicial position.

May a judge set bond in a case if his brother works at one of the bonding companies the defendant may choose to use?

Yes, because which company the defendant will choose is not known. However, if the defendant chooses the judge's brother's company, the judge may not preside over the increase, decrease, or modification of bail and may not preside over a bond forfeiture hearing.

May a judge serve as chair of the board of a closely-held family corporation that is a wholesale distributor of dry goods and floor coverings?

Yes, if participation would not require significant time away from judicial duties and there is no identification of the judge with the product.

May a judge serve as an officer of a local bail bond company that is owned by the judge and other members of her family?

No. A judge may not participate in even a family business if the business frequently appears before the judge's court.

When a Judge May Serve as a Fiduciary



In this chapter:

- ➔ Rule, rationale, and exception for family members.
- ➔ Involvement in legal proceedings.
- ➔ Serving as a fiduciary for someone with whom the judge has a close familial relationship.

Rule, rationale, and exception for family members

In general, a judge is prohibited from serving as a fiduciary (Canon 4D). “Fiduciary” means relationships such as executor of a will, administrator of an estate, trustee, or guardian of a child or incompetent person. The prohibition is designed to address “a real danger of the appearance that the party for whom the judge acted as a fiduciary would have an advantage due to the judge’s status as a judge.” E. Wayne Thode, *Reporter’s Notes to the [1972] Code of Judicial Conduct*, at 87 (1973).

However, there is an exception that allows a judge to serve as a fiduciary for a member of the judge’s family — in other words, a spouse, child, grandchild, parent, or grandparent — or other relative or person with

whom the judge maintains a close familial relationship. Even that exception, however, is subject to limitations:

- ⊙ If the trust has holdings that would require the judge to disqualify frequently from cases, the judge should not serve if divestiture of those holdings would harm the trust.
- ⊙ It must be unlikely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge.
- ⊙ The estate, trust, or ward must not become involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- ⊙ The service must not take so much time it interferes with the proper performance of judicial duties.

Moreover, as a fiduciary:

- ⊙ The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.
- ⊙ The judge must keep informed about the judge’s fiduciary economic interests.
- ⊙ The judge must disqualify from cases if the judge knows that he or she as a fiduciary:

- has an economic interest in the subject matter in controversy or in a party to the proceeding, or
- has more than a de minimis interest that could be substantially affected by the proceeding.

If a judge may serve as a fiduciary, he or she may be paid a reasonable fee for those services that does not exceed what anyone else would be paid. *Florida Advisory Opinion 90-11*; *Florida Advisory Opinion 95-7*; *New York Advisory Opinion 93-81*.

Examples:

- ➔ A judge may not serve as a fiduciary for the estate of a family member that was extremely complicated with various business ventures and liabilities that might result in proceedings in the judge's court (*Florida Advisory Opinion 74-10*).
- ➔ A judge may serve as a co-personal representative and co-trustee of an estate arising from the judge's father's death (*Florida Advisory Opinion 90-11*).
- ➔ A judge may serve as a co-trustee of the estate of the judge's spouse's recently deceased grandmother (*Florida Advisory Opinion 95-7*).
- ➔ A judge may serve as trustee of property devised to the judge and the judge's spouse as a life estate (*Florida Advisory Opinion 2000-1*).
- ➔ A judge may serve as a co-executor of the judge's father's estate (*Kansas Advisory Opinion JE-17*).
- ➔ A judge may serve as personal representative of the judge's father's estate or as trustee of the trust created by the father's will (*Maryland Advisory Opinion 4 (1971)*).
- ➔ A judge may not serve as trustee for a trust created for an incapacitated cousin if the cousin resides in the same county as the judge's court even if the judge is not the only judge on the court where state statutes require trusts to be registered and trustees to periodically account for the trustee's actions and handling of funds to a court (*Nebraska Advisory Opinion 97-7*).
- ➔ A judge should not serve as a guardian or conservator for a cousin who lives in the same county, where guardians and conservators must account to the court annually (*Nebraska Advisory Opinion 97-7*).
- ➔ A judge may act as an executor or executrix of the joint will for the estate of a family member (*New York Advisory Opinion 93-81*).
- ➔ A judge may serve as co-executor of the judge's father's estate (*New York Advisory Opinion 94-27*).
- ➔ A judge may act as executor of his grandfather's estate (*Pennsylvania Informal Advisory Opinion 99-1-22b*).
- ➔ If an adversary action involving a trust is brought in the Court of Common Pleas on which the judge serves, even though the judge does not sit in the division in which the action is brought, the judge may not serve as trustee (*Pennsylvania Informal Advisory Opinion 99-1-28*).
- ➔ A judge may serve as the co-executrix of a parent's estate and as co-trustee under the testamentary trust created by that parent (*South Carolina Advisory Opinion 35-1995*).
- ➔ *But see New York Advisory Opinion 94-27* (because a surrogate court judge would be disqualified from any case

involving the judge's father's will, the judge may serve as co-executor even though it will be probated in the surrogate court on which the judge serves).

Serving as a fiduciary for someone with whom the judge has a close familial relationship

When an individual is a relative of the judge but is not the judge's spouse, child, grandchild, parent, or grandparent, the judge must have "a close familial relationship" with the relative to be able to serve as a fiduciary. Whether a relationship is a "close familial relationship" depends on such factors as:

- ⊙ intimacy of address,
- ⊙ recognition by others of a close relationship,
- ⊙ shared meals,
- ⊙ frequent contact either by phone or in person,
- ⊙ shared holidays,
- ⊙ shared family events,
- ⊙ assistance with physical, medical, legal or emotional needs, and
- ⊙ longevity of the relationship.

In re Horgos, 682 A.2d 447 (Pennsylvania Court of Judicial Discipline 1996).

Examples:

- ➔ A judge may serve as executor of the estate of a deceased uncle if the uncle stood more or less in loco parentis during the judge's childhood or adolescence; there was a close bond of friendship between them; and the uncle was regarded as a member of the judge's extended family (*Kentucky Advisory Opinion JE-11*).
- ➔ A judge may serve as a trustee, guardian, or conservator for an incapacitated cousin where the judge had a close familial relationship with the cousin; the judge was the designed payee to receive Social Security payments, cared for the cousin's actual living needs, and provided her with a home and all of her living expenses due to her inability to provide for herself (*Nebraska Advisory Opinion 97-7*).

Code Variations



- ✦ The **Maryland** code provides that: “A judge may serve as a personal representative (executor or administrator) or special administrator of the estate of a decedent, as a trustee of a trust, as a custodian, as a guardian, or as an attorney in fact but only where the judge is spouse, the surviving spouse or is related within the third degree according to the civil law system to the decedent, grantor, minor or disabled person.”
- ✦ **Michigan’s** code of judicial conduct only permits judges to serve as fiduciaries for “immediate family members,” which the advisory committee has defined to include only a parent, child, husband, wife, brother, or sister. *Michigan Advisory Opinion JI-98 (1995)*.
- ✦ In **Missouri**, a judge may serve as a fiduciary only for the estate, trust, or person of the judge’s spouse or a person within the third degree of relationship to the judge or the judge’s spouse.
- ✦ The **Code of Conduct for U.S. Judges** defines member of the judge’s family as “any relative of a judge by blood, adoption, or marriage or any other person treated by a judge as a member of the judge’s family.”

May a judge serve as the executor of her father's estate?

Yes. The code of judicial conduct allows a judge to serve as a fiduciary — an executor, administrator, trustee, or guardian — for a member of the judge's family — in other words, a spouse, child, grandchild, parent, or grandparent — subject to certain limitations.

May a judge serve as the executor of her father's estate if it appears that the judge's brother will contest the will or if the estate is being sued regarding property it owns?

No, if the will contest or property dispute litigation would ordinarily come before the judge or will be filed in the court on which the judge serves or one under its appellate jurisdiction.

May a judge serve as his niece's guardian?

No, unless the judge maintains a close familial relationship with the niece as demonstrated by signs such as intimacy of address; recognition by others; shared meals, holidays, and events; frequent contact by phone or in person; assistance with physical, medical, legal or emotional needs; and longevity of the relationship.

Civic and Charitable Activities



In this chapter:

- ➔ Participation in civic and charitable organizations.
- ➔ Limitations on a judge's participation in fund-raising.
- ➔ A relative's fund-raising.
- ➔ Referrals to charitable organizations in which a relative is involved.

Participation in civic and charitable organizations

Under Canon 4C, a judge may be a member of a not-for-profit civic or charitable organization as long as the membership does not cast reasonable doubt on the judge's capacity to act impartially as a judge; demean the judicial office; or interfere with the proper performance of judicial duties.

Furthermore, a judge may serve as an officer, director, trustee, or non-legal advisor of a civic or charitable organization unless the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court. The judge's

involvement in an organization as a member or leader is more likely to cause problems if the organization:

- ⊙ advocates positions on disputed issues,
- ⊙ is regularly engaged in adversarial proceedings in court, including filing amicus briefs,
- ⊙ engages in political activity beyond improving the law, the legal system, or the administration of justice,
- ⊙ endorses non-judicial political candidates, or
- ⊙ subscribes to a particular legal philosophy or position that would give the appearance of partiality, i.e., imply commitment to causes that may come before the court for adjudication.

Within those limitations, a judge can be involved in organizations such as the parent/teachers association at the school attended by the judge's children.

Examples:

- ➔ A judge may serve as president of an elementary school parent-teacher association (*Florida Advisory Opinion 94-41*).
- ➔ A judge may join the PTA or attend board of education meetings (*New York Advisory Opinion 91-15*).

- ➔ A judge may serve on a school district committee in the district in which the judge's child is enrolled in the third grade the purpose of which is the participation of parents and teachers in school-based planning to improve the educational performance of all students and to get input from parents, similar to a parent-teacher association (*New York Advisory Opinion 93-27*).
- ➔ A judge may serve on the governance council of a private school (*South Carolina Advisory Opinion 3-1999*).
- ➔ A judge whose children attend public school and are active in their school's sports program may serve on a school district's committee to analyze the district's school athletics program (*Washington Advisory Opinion 95-9*).

However, although a judge may discuss any non-judicial questions relating to these activities with his or her spouse, the judge should avoid taking public positions on controversial issues or commenting on pending cases even if they involve the judge's child's school (*New York Advisory Opinion 91-15*). This limitation, plus the restrictions on fund-raising (*see* discussion below), may render the judge an ineffective board member or officer, leading the judge to defer involvement to others.

Although there are no limitations on family members being involved in civic and charitable organizations, family members should take care to be perceived as independent actors from the judge and not to give any basis for others to believe they are acting as the judge's surrogate or speaking on behalf of the judge.

Limitations on a judge's participation in fund-raising

Although a judge may engage in civic and charitable activities, there are limits to that participation. The limitations ensure that the prestige of the judge's office is not used to raise funds for a charity, to ensure that no one feels pressured to donate money because they fear offending the judge with a refusal, and to ensure that no one donates money in hopes of currying the judge's favor. No matter how commendable a charity's work, the code prohibits a judge from personally soliciting funds for charitable organizations.

Obviously, these restrictions prevent a judge from participating in some of the fund-raising activities traditional for parents or members of a religious organization. However, not all participation in fund-raising is prohibited. A judge may donate money, attend most fund-raising events, and assist in planning fund-raising activities. Moreover, a judge may participate in fund-raising activities, for example, singing in a choir at a fund-raising concert, as long as the judge's participation is not advertised to entice people to attend and the judge's title is not used. However, the judge may not sell tickets beforehand, collect money at the door, or work at a concessions stand. The Indiana code of judicial conduct explains that the restriction on personally soliciting funds "is not intended to prohibit judges, as parents, from participating in their children's educa-

tional and organizational fund-raising activities if the procedures employed are not coercive and the sums nominal.”

Examples:

- ➔ A judge may not work in a concession stand in his or her child’s school fund-raising activities if it involves active solicitation of funds or selling goods (*Florida Advisory Opinion 2000-17*).
- ➔ A judge may not act as a cashier at a used book sale held to benefit a non-profit library or at a food stand operated by a charitable organization (*Maine Advisory Opinion 97-3*).
- ➔ A judge may serve as a bartender at a library-sponsored cocktail party and may cook at the library fair, but may not serve as a cashier at either event (*New York Advisory Opinion 96-59*).
- ➔ A judge may pass the collection basket during services at church, may ask friends and neighbors to buy tickets to a pancake breakfast for a local neighborhood center and may cook the pancakes at the event, but may not personally ask attorneys and others who are likely to appear before the judge to buy tickets to it (*Commentary to Canon 4, Rhode Island and Wisconsin Codes of Judicial Conduct*).
- ➔ A judge may not solicit funds for a church youth group but may serve in a generic capacity such as collecting tickets at a football game (*West Virginia Advisory Opinion* (November 3, 1995)).
- ➔ A judge may not sell fruit door-to-door to raise funds for a charitable organization (*Wisconsin Advisory Opinion 98-12*).

A relative’s fund-raising

The code does not prohibit a judge’s spouse or other relative from participating in charitable fund-raising. However, a judge should refrain from all participation in the relative’s fund-raising activities and should not in any way be identified with the fund-raising. *Washington Advisory Opinion 88-15*. Although a judge’s spouse is “an independent person with the right to pursue personal interests,” a judge “has an obligation to take steps to ensure the appearance as well as the reality of [the spouse’s] independence and of the judge’s impartiality.” *In the Matter of Castellano*, 889 P.2d 175 (New Mexico 1995).

Examples:

- ➔ A judge should not have allowed his wife to solicit contributions from lawyers who regularly appeared before the judge, to use the judge’s chambers and telephone to solicit funds, and to include the judge’s name, title, photograph, and official telephone numbers in materials used to solicit funds. The judge was removed (*In the Matter of Castellano*, 889 P.2d 175 (New Mexico 1995)).
- ➔ A judge should not have assisted his wife by distributing and collecting advertising contracts previously solicited by his wife to raise funds for a charity from lawyers with matters pending before the judge or regularly appearing in the judge’s court. (*In the Matter of Kaplan*, Determination (New York State Commission on Judicial Conduct May 17, 1983) (the judge was admonished)).

- ➔ A judge's spouse may utilize a jointly-owned cooperative apartment for fund-raising events for charitable organizations, but the judge may not attend or participate (*New York Advisory Opinion 96-77*).

Referrals to charitable organizations in which a family member is involved as a volunteer

A judge should not refer parties in a case to a charitable organization at which a family member is a volunteer leader. The Utah judicial ethics committee explained that if the spouse of a juvenile court judge served on the board of trustees of a counseling center that received referrals from the juvenile court:

- ⊙ An impression could be created that the center was receiving more referrals than it would otherwise.
- ⊙ Juveniles or parents would perceive that the judge would give undue credence to the arguments, testimony, or evidence of the center.

Therefore, the committee concluded that a judge could not refer cases to the center if the judge's spouse was a board member. *Utah Informal Advisory Opinion 99-1*. However, the committee stated that the counseling center could appear on a list of providers from which the juvenile or parents could choose. However, the committee stated that it could only advise the judge and could not "provide instruction to a judge's spouse as to whether he or she may sit on a board of trustees."

The West Virginia judicial ethics committee did advise a judge that his "wife should not accept the position as a member of the Advisory Committee of CASA," an organization that serves as a court-appointed advocate for children who are abused, neglected, or delinquent. *West Virginia Advisory Opinion* (December 11, 1997). The judge presided over all abuse and neglect cases filed in the county. The committee was concerned that, although the judge's spouse would not directly be involved in an advocacy role in the judge's court, "her close affiliation with that organization would create in the minds of the public the perception that she is engaging in those activities," creating at least the appearance of impropriety.

Civic and Charitable Activities

Q & A

May a judge participate in a car wash intended to raise funds for the school marching band in which his daughter plays?

A judge may not personally solicit funds for civic or charitable organizations. Therefore, the judge should not ask a hardware store (in writing or in person) to contribute buckets, sponges, and detergent for the car wash or invite attorneys and others at the courthouse or other people he meets to the event. He should not stand by the entrance to the car wash and encourage drivers to enter or act as the cashier for the event. However, the judge may help plan the car wash (set the date, find a location, set up committees, etc.), make signs, buy supplies, and wash cars. And the judge can have his car washed.

May a judge's husband use their home to hold a fund-raising reception for a charity?

Yes, but the judge's name should not be included on the invitation to the event, and the judge should not attend the event. Moreover, attorneys or others who regularly appear before the judge should not be invited.

May a judge's wife sign a letter soliciting contributions to a literacy program?

Yes, but the judge's name should not be included or referred to. Moreover, the letter should not be sent to attorneys or others who regularly appear before the judge and court staff or equipment should not be used to mail the letter.

May a judge be an officer of the local parent/teacher's association for the school where her children attend?

Probably, although the judge may not personally solicit funds for the organization and if the PTA becomes involved in any public controversies, she may not take a public position or comment on any pending court case. These restrictions may render the judge an ineffective officer for the organization.

May a judge's husband be an officer of the local parent/teacher's association for the school where their children attend?

Yes.

Communications



In this chapter:

- ➔ Controversial issues.
- ➔ Public criticism.
- ➔ High profile cases.
- ➔ Ex parte communications.

Controversial issues

Because most of the controversial issues that arise in a community eventually become lawsuits, a judge is not allowed to get involved or speak out on any political or social issues other than measures to improve the law, the legal system, or the administration of justice. To avoid making the public think he or she has pre-judged a case, a judge may not publicly advocate or oppose, for example, handgun control, the death penalty, abortion, “three times and you’re out” sentencing, bond issues for schools, or similar proposed or enacted legislation or local government issues.

Family members can become involved in such public issues. However, as in all political and community activities, a judge’s relative should avoid any implication that the judge agrees with the relative’s stance on an issue and should think about how to distance the judge from the relative’s activism.

Public criticism

Judges are allowed, even encouraged, under the code of judicial conduct to educate the public about how the justice system works and the role of judges in the American government system. However, judges are prohibited from commenting on pending cases even in response to criticism of a decision. Cases are considered still “pending” even after a decision as long as there are any undecided issues and even if the case is on appeal because the appellate court may send the case back to the trial judge.

It is probably difficult for a family member to understand why a judge-relative remains silent in the face of what can sometimes be unfair and disparaging criticism of a judge’s decision in the media. Whatever the temptation to respond, a judge does not defend decisions outside the courtroom so they can preserve the integrity of the judicial process and maintain the ideal of impartiality. A judge’s debate with critics in the press suggests that the case is being tried outside the courtroom and decided on the basis of evidence and argument in the press. Moreover, the debate is likely to become cantankerous and detract from the dignity of the judiciary.

For the same reasons, a member of a judge's family is also well-advised to resist the temptation to wrangle with the judge's critics. A relative's comments about a case in which the judge is presiding will inevitably be attributed to the judge and prompt further criticism about the judge's ability to fairly decide the case. A judge faced with cases that have created a lot of interest is well-advised to explain to family members both why the judge is refusing to join the trial by media and why it is a good idea for family members to remain silent as well.

High profile cases

The Judicial Family Institute notes that the stresses, media attention, and time demands of handling a high profile case can shake judges, their households, and even extended family members. Judges should take care to avoid referring to family members in the courtroom and with reporters. Judges should draw on their relationships with reporters to explain the importance of leaving names and pictures of family and home out of news stories and consider issuing a press release to reinforce privacy of family and home.

Advance preparation and family discussion can minimize the impact of a high profile case. The Institute suggests that judges and their families consider the following ideas:

- ⊙ Finding a “buddy judge” and “partner mentor” who have been through a similar high profile case.
- ⊙ Obtaining information and assistance about dealing with the media from the public information staff of the state supreme court or local court.
- ⊙ Paying special attention to exercise, recreation, good nutrition, spirituality, and relaxation during, before, and after trial. Vacations before and/or after a difficult case serve well. Counsel from a personal physician is also helpful.
- ⊙ Taking decompression time — judges and partners take at least 10-minute relaxation break between work activities and home.
- ⊙ Remembering the “bigger picture”— realizing the inconvenience to you and your family is a small price to pay for living in a country ruled by law.
- ⊙ Obtaining extra security for home and family.
- ⊙ Having conversations at meals about the headlines to prepare family for responses to peers and teachers.
- ⊙ Relying on the support of family, friends, and other judicial families.
- ⊙ Receiving practical assistance from family and friends such as: lawn mowing, house repairs, hot meals, car-pooling, babysitting.
- ⊙ Conversation and encouragement from family and friends.
- ⊙ Age appropriate attention to children missing a judicial parent.
- ⊙ Temporary housing during time of some trials.

Ex parte communications

The code of judicial conduct requires a judge to “accord to every person who is legally interested in a proceeding, or that person’s lawyer, full right to be heard according to law.” Therefore, the code prohibits a judge from initiating or considering “ex parte or other communications concerning a pending or impending proceeding.”

An ex parte communication is any communication:

- ⊙ outside the presence of or without the knowledge or participation of every person who has a legal interest in a proceeding or that person’s lawyer,
- ⊙ about a pending or impending case,
- ⊙ by or to the judge presiding in the case.

In addition to communications with only one of the parties or lawyers in a case, prohibited ex parte communications include:

- ⊙ communications with lawyers, law teachers, and other persons who are not participants in the proceeding, and
- ⊙ independent investigations of the facts.

Ex parte communications are prohibited because they undermine a judge’s impartiality.

- ⊙ During an ex parte communication, a judge may receive inaccurate or incomplete information that might easily be corrected if all parties to a case had been present.
- ⊙ Seemingly innocuous ex parte contacts can have a subtle influence that even the most conscientious judge does not recognize.

- ⊙ If the excluded party suspects or learns of the communication, he or she will inevitably feel that his or her opponent gained an advantage regardless whether the judge was swayed.

It is possible that a person not aware of the rules or someone intentionally hoping to gain an unfair advantage in a case will try to use a member of a judge’s family as a channel to the judge and will communicate with the family member evidence or arguments they hope or ask will be conveyed to the judge. To protect the integrity of the process and the reputation of the judge, a family member should make clear to such an individual that the judge is not open to influence or information about a case even from a member of the judge’s family and that the family member will not be having a conversation about the case with the judge.

May a judge join a group of citizens to encourage the passage of a school levy that will result in more funding for the district in which the judge's children attend school?

No. A judge may only engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice.

May a judge's husband join a group of citizens to encourage the passage of a school levy that will result in more funding for the district in which the judge's children attend school?

Yes, but he should ensure that he is not considered to be speaking for his wife when he takes public positions on the issue.

May a judge speak at Career Day at her daughter's school about how to become a judge?

Yes. Judges are encouraged to educate the public about the justice system.

May a judge speak at her daughter's law school class about a jury trial in which the judge presided that is pending on appeal?

No. Judges are prohibited from commenting on pending cases.

Should a judge's husband respond when a reporter asks for his comment on his wife's sentencing decision in a criminal case, which has been the subject of several public demonstrations?

Not a good idea. No rules prohibit such comment, but common sense suggests that the comment will not help but hurt the judge by adding fuel to the controversy.

At a grocery store, an acquaintance tells a judge's wife that his daughter-in-law is making up the domestic violence allegations she has made in a case to get revenge for his son's infidelity and the judge should let the son out of jail without bail. Should the judge's wife tell the judge about the conversation?

No. Judges are not allowed to receive or consider information that is not conveyed inside the courtroom and before all the parties or in written documents submitted to all sides in the dispute.

Political Activity by Members of a Judge's Family



In this chapter:

- ➔ The general rule about political activity by members of a judge's family.
- ➔ Family members participating in a judge's campaign.
- ➔ When a judge's family member is a candidate – working for the campaign, use of the judge's home, campaign literature, accompanying spouse to campaign events, and contributions.
- ➔ A family member's activity on behalf of a candidate for public office — use of the judge's home, campaign signs, contributions, and a judge escorting the judge's spouse to campaign events.
- ➔ Other political activity — a family member joining and holding office in a political organization and a judge escorting the judge's spouse to political events.

The rule

It has been suggested that there is “an inevitable public belief” that the publicly stated views of a judge's politically active spouse “would or must implicate the fundamental thinking of the judge and the court represented by that judge.” *Application of Gaulkin*, 351 A.2d 740 (1976). Consistent with the

right to free speech contained in the First Amendment, however, the code of judicial conduct does not and probably could not prohibit members of a judge's family from engaging in independent political activity. Therefore, judges have never been required to *compel* family members to shun political activity. However, they have been required to *encourage* family members to do so. The 1972 American Bar Association Model Code of Judicial Conduct provided, in Canon 7B(1)(a):

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election should encourage members of his family to adhere to the same standards of political conduct that apply to him.

The “standards of political conduct” that applied to judges under the 1972 model code included prohibitions on acting as a leader or holding an office in a political organization, making speeches for a political organization or candidate, publicly endorsing a candidate for political office, attending political gatherings, and running for non-judicial office. The reporter for the ABA committee that drafted the 1972 model code noted that the committee had “considered setting mandatory political conduct standards for members of the candidate's family but rejected the idea

because of lack of a means of enforcement.” Thode, *Reporter’s Notes to Code of Judicial Conduct*, at 98 (ABA 1973).

Examples:

- ➔ A judge should not have given a check to the campaign manager for the Democratic candidate for Secretary of State and stated, “I want to give you \$100, but, I want you to put it in my wife’s name because I’m a sitting judge and I’m not supposed to be doing this.” The judge was publicly reprimanded (*In the Matter of Sallee*, 579 N.E.2d 75 (Indiana 1991)).
- ➔ “Although a candidate’s spouse as a matter of legal right can hold an office in a political organization and can make speeches for other candidates for political office, the candidate has the duty to try to dissuade his spouse from doing so” (Thode, *Reporter’s Notes to [1972] Code of Judicial Conduct*, at 98 (ABA 1973)).

The revised model code, adopted by the ABA in 1990, eliminates the duty to dissuade, except with respect to a judicial candidate’s own campaign. Canon 5A(3)(a) provides:

A candidate for judicial office shall encourage members of the candidate’s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.

The change reflects “awareness that the families of judges and judicial candidates are composed of individuals with independent lives, interests and rights, and that any requirement that a judge or judicial candidate seek to influence or control the behavior of those individuals must be narrowly tailored.”

Milord, *The Development of the [1990] ABA*

Judicial Code, at 49 (1992). The “autonomy of the judge’s spouse should simply be accepted as an understood premise of modern life,” and the public can accept the political neutrality of a judge despite the political involvement of the judge’s spouse. *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976). However, “an implicit burden” always rests on the judge “to be vigilant in detecting possible impropriety or the likelihood of public appearance thereof.” *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976).

A family which chooses to combine a judicial career with political endeavors takes on a particularly heavy burden to protect the judge and the judicial office from appearances of political bias, and it is possible that the judge will be answerable if there exists anything less than a clear division between the political activities of the spouse and the judicial office (*Indiana Advisory Opinion 2-93*).

As discussed below, nothing in the code of judicial conduct in any state prevents members of a judge’s family from running for political office, supporting others’ candidacy for political office, or being involved publicly in other political activities as long as they are careful not to suggest their activities reflect the judge’s convictions as well. Many judicial family members do refrain from such activities and other community involvement out of concern that their activities may hurt a judge’s re-election chances. Those restrictions, however, are self-imposed and are not required by the code of judicial conduct.

Family members participating in a judge's campaign

A judge who runs for office or retention in office is required to encourage members of the judge's family "to adhere to the same standards of political conduct in support of the candidate as apply to the candidate."

Therefore, a judge is required to encourage members or his or her family, in general, to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary" (Canon 5A(3)(a)) and to refrain from:

- ⊙ making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" (Canon 5A(3)(d)(i)).
- ⊙ making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" (Canon 5A(3)(d)(ii)).
- ⊙ "knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent" (Canon 5A(3)(d)(iii)).
- ⊙ "personally solicit[ing] or accept[ing] campaign contributions" (Canon 5C(2)).
- ⊙ "personally soliciting publicly stated support" (Canon 5C(2)).

Examples:

- ➔ A judicial candidate's campaign committee may not be composed solely of the judicial candidate's spouse (*Georgia Advisory Opinion 163* (1992)).
- ➔ A judicial candidate may not appoint the candidate's father-in-law as campaign treasurer (*Michigan Advisory Opinion JI-90* (1994)).
- ➔ The spouse of a judge who is a candidate for retention in office may serve as the judge's campaign committee treasurer, but may not solicit campaign contributions (*Pennsylvania Informal Advisory Opinion 99-2-16*).
- ➔ A judge's spouse may not send out letters to solicit funds for the judge's campaign and may not serve on the candidate's campaign committee (*South Carolina Advisory Opinion 26-1998*).

A judge participating in a family member's campaign

Most state codes of judicial conduct, like the model code, prohibit a judge from publicly endorsing another candidate for public office. A judge's kinship to another candidate is not "a sufficient reason for removing the undesirability of such campaign activity" (*Alabama Advisory Opinion 82-142*). The restriction applies whether the family member is running for a judicial or a non-judicial office. (Some states, like the model code, have a limited exception that allows a judge only while a candidate to publicly endorse "other candidates for the same judicial office.")

Thus, a judge is prohibited from soliciting

votes, funds, and other support for a family member through speeches, handing out campaign literature, or personal contacts.

Examples:

- ➔ A judge may not give speeches on behalf of a relative who is a candidate for non-judicial office (*Alabama Advisory Opinion 82-142*; *Michigan Advisory Opinion JI-30* (1990); *Ohio Advisory Opinion 2001-1*).
- ➔ A judge may not solicit funds or support for a spouse's campaign for judicial office through personal political appearances or personal contacts by telephone or through the media (*Louisiana Advisory Opinion 52* (1981)).
- ➔ A judge may not hand out a family member's campaign literature (*Alabama Advisory Opinion 82-142*; *Michigan Advisory Opinion JI-30* (1990)).
- ➔ A judge should not have contacted attorneys to seek help for his son's candidacy for county court judge or asked an individual why he was backing the son's opponent. The judge was reprimanded for this and other misconduct (*Inquiry Concerning Turner*, 573 So. 2d 1 (Florida 1990)).
- ➔ A judge may not inform friends of a spouse's candidacy even if the judge does not solicit votes or support. (*Florida Advisory Opinion 87-22*).
- ➔ A judge may not solicit votes for a non-judicial candidate to whom the judge is related (*Michigan Advisory Opinion JI-30* (1990)).
- ➔ A judge may not solicit persons to display campaign signs in their yards, erect those signs, or hand out campaign signs or posters (*Michigan Advisory Opinion JI-30* (1990); *West Virginia Advisory Opinion* (February 25, 1994)).

➔ A judge whose wife was campaigning for judicial office should not have encouraged several people to vote for his wife. The judge was publicly censured for this and other misconduct (*In the Matter of Codispoti*, 438 S.E.2d 549 (West Virginia 1993)).

➔ *But see New Mexico Advisory Opinion 96-2* (a judge may assist the judge's spouse in a door-to-door campaign as long as the judge does so as a private person and does not do so during the judge's normal business hours or while acting in an official capacity; the judge may solicit signatures for the spouse's nominating petition).

A judge is also prohibited from displaying support for a relative's candidacy by, for example, displaying campaign signs or driving a car with the candidate's bumper sticker and from engaging in behind-the-scenes activities in support of a relative's campaign.

Examples:

- ➔ A judge may not do "leg work" for the judge's spouse's campaign (*Florida Advisory Opinion 87-22*).
- ➔ A judge whose wife is running for clerk of the county court should not have delivered campaign signs, erected signs along a highway, and attached political disclaimers to signs. The judge was publicly reprimanded (*In re McGregor*, 614 So. 2d 1089 (Florida 1993)).
- ➔ A judge may not drive a car that displays a spouse's campaign sticker even if the car is normally driven by the spouse and even if the title for the car is in the spouse's name (*Florida Advisory Opinion 87-22*; *Maine Advisory Opinion 94-3*; *Michigan Advisory Opinion JI-30* (1990); *West Virginia Advisory Opinion* (February 25, 1994)).

- ➔ A judge may not wear the judge's spouse campaign button in public or in chambers (*Ohio Advisory Opinion 2001-1*).
- ➔ A judge may not compile voter or contribution lists (*Maine Advisory Opinion 94-3*).
- ➔ A judge may not stuff envelopes (*Maine Advisory Opinion 94-3*).
- ➔ A judge may not drive the judge's spouse to events (*Maine Advisory Opinion 94-3*).
- ➔ A judge may not sign letters (*Michigan Advisory Opinion JI-30* (1990)).
- ➔ A judge may not act or appear to act as a political advisor for a family member's campaign (*New Hampshire Advisory Opinion 78-3*; *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976); *New York Advisory Opinion 92-129*).
- ➔ A judge may not maintain a relative's campaign sign in chambers, in plain view (*Ohio Advisory Opinion 2001-1*; *Oregon Advisory Opinion 82-2*).
- ➔ A judge may not perform volunteer manual labor for the judge's spouse's campaign (*West Virginia Advisory Opinion* (February 25, 1994)).
- ➔ A judge may not deliver or pick up campaign materials from printers or commercial advertisers (*West Virginia Advisory Opinion* (February 25, 1994)).
- ➔ *But see Michigan Advisory Opinion JI-30* (1990) (a judge may perform behind-the-scenes campaign activities for relatives, as well as non-relatives, including stuffing envelopes, participating in voter registration drives, placing ads, writing speeches, and building yard signs).

The use of the judge's home

As long as the judge does not attend or participate, a judge's spouse may use the home they jointly own as headquarters for the spouse's campaign and to hold a fundraiser, campaign strategy meeting, or constituent event. *Florida Advisory Opinion 87-22*; *Maine Advisory Opinion 94-3*; *Washington Advisory Opinion 86-8*; *U.S. Advisory Opinion 53* (1998). *But see Michigan Advisory Opinion JI-30* (1990) (campaign events for a candidate-spouse may not be held at a judge's home or at other property owned by a judge even when it is also the property of the candidate); *New Hampshire Advisory Opinion 78-3* (consideration should always be given to not using the marital home for political or fund-raising meetings).

To disassociate himself or herself from any political activity held in the judge's home, the judge:

- ⊙ should not be identified on invitations to the event (*Washington Advisory Opinion 86-8*),
- ⊙ should not assist in any preparations for a fund-raiser (*Washington Advisory Opinion 86-8*),
- ⊙ should not serve as host by greeting guests, mingling with the visitors, pouring coffee, or serving cake (*Florida Advisory Opinion 87-22*; *Maine Advisory Opinion 94-3*), and
- ⊙ should be in another part of the house separated from the political gathering or leave

the house when such events are scheduled (*Maine Advisory Opinion 94-3*).

The Ohio advisory committee stated that a judge whose spouse is a candidate for elected public or judicial office may allow campaign signs promoting the spouse's candidacy to be placed on real estate jointly owned by the judge and judge's spouse. *Ohio Advisory Opinion 2000-1*. The committee explained: "Placement of a spouse's campaign sign on property co-owned by a judge and spouse does not constitute a 'public endorsement' by the judge"

Campaign literature

In general, factual information about a relative-candidate's "background or family should not tie the candidacy to the prestige of the judge's office" (*Michigan Advisory Opinion JI-30* (1990)). However, there is a divergence of advice on whether a judge may be referred to in a family member's campaign literature.

- ⊙ In some states, a family member's campaign materials cannot use the relative-judge's picture (*Alabama Advisory Opinion 82-143*) or name and title (*Texas Advisory Opinion 180* (1995)).
- ⊙ In some states, a candidate's judge-relative may be included in a family picture reproduced in campaign literature if the spouse is not identified or referred to by name or office (*New York Advisory Opinion 96-7*).
- ⊙ In some states, a family member's campaign materials may use the judge's name

or include the judge in a family photograph but may not identify the judge as a judge (*Kansas Advisory Opinion JE-3*; *Florida Advisory Opinion 90-7*; *Maine Advisory Opinion 94-3*; *New Mexico Advisory Opinion 96-2*; *West Virginia Advisory Opinion* (June 19, 1991)). See also *Florida Advisory Opinion 92-40* (a photograph of a judge, in robes, administering the oath of office to a candidate taking local government office may not be used in campaign literature even if the judge is related to the candidate).

- ⊙ In some states, a family member's campaign literature may identify the candidate's relative as a judge as long as the judge's office or title are not used or his or her judicial duties discussed, the occupations of other family members are also identified, and the judge is not pictured in robes (*Massachusetts Advisory Opinion 99-16*; *New Mexico Advisory Opinion 89-2*; *Ohio Advisory Opinion 2001-1*).

The Massachusetts advisory committee stated that, if a judge participates in an interview related to a relative's campaign, the judge should keep the interview brief, limit his or her remarks to personal matters about marriage and family, not allow the interview to focus on judicial duties, and avoid weighing in on issues being raised in the campaign or why the voters should vote for the judge's spouse. *Massachusetts Advisory Opinion 99-16*. If the interviewer asks a question that the judge should not answer, the judge should change the subject or cease participation no matter

how awkward. In the interview, the judge may be identified as a judge, but should not allow the interviewer to use the judge's title as a manner of address, should not appear in judicial robes, and should not permit interviews to be conducted at the courthouse.

Accompanying spouse to campaign events

Whether a judge can escort his or her spouse to political gatherings when the spouse is a candidate varies from state to state, depending, at least in part, on whether the judge is prohibited by the code from attending political events.

- ⊙ In some states, a judge may accompany a candidate-spouse to political events, including fund-raisers (*Illinois Advisory Opinion 96-12*; *Kansas Advisory Opinion JE-62* (1996); *Michigan Advisory Opinion II-30* (1990)).
- ⊙ In some states, a judge may accompany a candidate-spouse to political events other than fund-raisers (*Louisiana Advisory Opinion 52* (1981) (may attend public events or civic or political gatherings); *New Mexico Advisory Opinion 89-2* (may attend non-fund-raising political functions); *Texas Advisory Opinion 180* (1995) (may attend campaign functions); *West Virginia Advisory Opinion* (February 25, 1994) (may attend campaign rallies and social functions)). See *In the Matter of Rath*, Determination (New York Commission on Judicial Conduct February 21, 1989) (admonition for, among other

misconduct, attending two fund-raisers for his wife's campaign).

- ⊙ In some jurisdictions, a judge may not accompany a candidate-spouse to any political event (*Florida Advisory Opinion 90-7*; *Maine Advisory Opinion 94-3*; *Maryland Advisory Opinion 69* (1979); *Massachusetts Advisory Opinion 99-16*; *New Hampshire Advisory Opinion 78-3*; *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976); *New York Advisory Opinion 89-48*; *New York Advisory Opinion 92-129*; *Oregon Advisory Opinion 82-2*; *Utah Informal Advisory Opinion 89-15*; *U.S. Compendium of Selected Opinions*, §§ 7.1(a); 7.1(b); 7.2(b); 7.3(b) (1995)).

Even those advisory committees that allow a judge to escort his or her spouse to campaign events note that a judge should take certain precautions when attending such gatherings:

- ⊙ the judge's appearance must be discreet and low-profile (*West Virginia Advisory Opinion* (June 19, 1991)),
- ⊙ the judge may not be introduced by title (*Kansas Advisory Opinion JE-62* (1996); *Louisiana Advisory Opinion 52* (1981); *New Mexico Advisory Opinion 89-2*),
- ⊙ the judge may not make comments that concern the candidate's position relating to the judiciary (*New Mexico Advisory Opinion 89-2*),

- ⊙ the judge may not solicit votes or financial support for the spouse (*Louisiana Advisory Opinion 52* (1981)),
- ⊙ the judge may not speak on behalf of or endorse the spouse's candidacy (*Louisiana Advisory Opinion 52* (1981); *Texas Advisory Opinion 180* (1995)), and
- ⊙ any views expressed by the judge must comport with the code of judicial conduct (*New Mexico Advisory Opinion 89-2*).

For those states that prohibit a judge from escorting his or her spouse to a political event, a political event is defined as any event “the public fairly would perceive as political in nature.” *New York Advisory Opinion 89-48*. The Massachusetts committee stated that prohibited events are those “that are partisan in nature, that is, designed to enhance the electability of, pay homage to, to rally support behind, or to raise funds for, a particular candidate,” or to show solidarity against the opposing party. *Massachusetts Advisory Opinion 99-16*. The Florida committee cautioned that a candidate-spouse should not explain the judge-spouse's absence from campaign functions by referring to the restrictions in the code of judicial conduct because such an explanation would reveal the judge-spouse's status and “thus indirectly achiev[e] that which cannot be done directly.” *Florida Advisory Opinion 90-7*.

Even those advisory committees that prohibit a judge from escorting his or her candidate-spouse to any political event allow a judge to escort a candidate-spouse to events that are essentially civic, social, religious,

community, cultural, or recreational even if the spouse engages in some personal campaigning during the events if the judge would have attended the event even if the spouse were not a candidate. *Maine Advisory Opinion 94-3*; *Massachusetts Advisory Opinion 99-16*; *New York Advisory Opinion 89-48*. The Massachusetts judicial ethics committee stated that a judge whose spouse was running for office could, for example, attend a forum sponsored by Common Cause at which four of the candidates would speak because the event was not designed to garner support for one candidate but to inform the electorate of the positions of all the candidates. *Massachusetts Advisory Opinion 99-16*.

However, when attending a non-partisan event, the judge should be careful not to be introduced by title or to participate in any activity that could be seen as campaigning on behalf of the spouse such as speaking, carrying a sign, passing out literature, or encouraging people to vote for the candidate. For example, while a judge may attend a local parade or community fair, the judge should not march beside the judge's spouse under a campaign banner or work the crowd with the spouse *Maine Advisory Opinion 94-3*. If the line is difficult to draw, the judge should err on the side of caution and avoid any activity that could be construed as campaigning on behalf of the spouse. *Maine Advisory Opinion 94-3*.

Campaign contributions

Whether a judge can make a financial contribution to the campaign of a spouse or other family member varies depending on each state's rule regarding political contributions by judges. In Michigan, for example, where a judge is permitted to make contributions to a political party at any time, the Michigan advisory committee stated that a judge may personally contribute to a spouse's campaign. *Michigan Advisory Opinion JI-30* (1990). Canon 7A(1)(d) of the North Carolina code expressly creates an exception to the prohibition on a judge making financial contributions to any candidate for public office that allows a judge to contribute to a candidate who is a member of the judge's family.

In contrast, in Maine and New York, where a judge is prohibited from all political activity except while a candidate for office, a judge whose spouse is campaigning for political office cannot contribute to the spouse's campaign. *Maine Advisory Opinion 94-3*; *New York Advisory Opinion 92-129*. The Maine advisory committee stated that a judge's spouse should not pay for expenses of his or her campaign out of a joint bank account that includes funds contributed by the judge and over which the judge shares control. *Maine Advisory Opinion 94-3*. *But see Florida Advisory Opinion 87-22* (a candidate-spouse may withdraw funds from a joint account and place it into a campaign account).

According to several authorities, a judge's spouse may not accept campaign contribu-

tions from attorneys or litigants who are appearing or may appear before the judge.

Examples:

- ➔ A judge's spouse may not accept political contributions from attorneys or litigants whose cases are, or are likely to be, before the judge (*New Hampshire Advisory Opinion 78-3*).
- ➔ Contributions to a judge's spouse's campaign from attorneys or litigants who are appearing or may appear before the judge "would be particularly offensive from an ethical standpoint" (*Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976)).
- ➔ A judge whose family member is a candidate for elected office must disqualify from cases in which parties or counsel are known by the judge to be contributors to the family member's campaign (*U.S. Compendium of Selected Opinions*, §7.3(b) (1995)).

When a family member is involved in another candidate's campaign

Members of a judge's family may publicly and actively support another individual's campaign for public office.

Examples:

- ➔ A member of a judge's family may display election signs for a political candidate and have a campaign party at his or her law office (*Florida Advisory Opinion 94-21*).
- ➔ A member of a judge's family may serve as campaign manager or on a campaign committee for a political candidate

(*Kansas Advisory Opinion JE-37*; *Kansas Advisory Opinion JE-61* (1996); *New York Advisory Opinion 91-85*; *New York Advisory Opinion 95-22*).

- ➔ A judge's spouse or a member of the judge's immediate family may actively work in political campaigns (*Louisiana Advisory Opinion 134* (1996)).
- ➔ A member of the judge's family may work in a campaign for a political candidate (*Louisiana Advisory Opinion 154* (1996); *Maryland Advisory Opinion 108* (1986)).
- ➔ A member of the judge's family may endorse a candidate for political office (*Louisiana Advisory Opinion 154* (1996); *Maryland Advisory Opinion 108* (1986)).
- ➔ A member of the judge's family may solicit funds for a political candidate (*Louisiana Advisory Opinion 154* (1996); *Maryland Advisory Opinion 108* (1986)).
- ➔ A member of a judge's family may hand out campaign materials for a political candidate (*Texas Advisory Opinion 170* (1994)).
- ➔ A member of a judge's family may recommend to people that they vote for a political candidate (*Texas Advisory Opinion 170* (1994)).

However, the family member's participation in political campaigns must be conducted without reference to the judge or the judge's office and may not be undertaken to do indirectly for the judge that which is prohibited. *Louisiana Advisory Opinion 134* (1996). Family members should take "every precaution to insulate the judge from direct or indirect involvement in such activity" (*Kansas Advisory Opinion JE-37*) and to ensure that

the family member's participation in the campaign is not misunderstood as "surrogate judicial participation" (*Maryland Advisory Opinion 108* (1986)).

Use of the judge's home

In 1934, the ABA Committee on Professional Ethics advised that, "[i]n principle, a judge should not approve a practice on the part of his wife in giving political teas at their home to advance the candidacy of partisan nominees for political office." *ABA Advisory Opinion 113* (1934). Similarly, in an advisory opinion, the New Hampshire Supreme Court stated that, when a judge's spouse participates in the political campaigns of others, consideration should always be given to not using the marital home for political or fund-raising meetings. *New Hampshire Advisory Opinion 78-3*. The Kansas committee stated that a judge may not permit a spouse to host a "Come over and meet the Governor" party in their home, owned by them in joint tenancy, in an election year where the governor was an announced candidate for re-election even if there would be no fund-raising and the judge would take no part in the event. *Kansas Advisory Opinion JE-33* (1990).

However, the West Virginia judicial advisory committee stated that the spouse of a judge could have political fund-raisers in the home in which the judge and the spouse reside as long as the judge was not involved in raising funds or endorsing any candidate. *West Virginia Advisory Opinion* (August 28,

1995). Moreover, the Massachusetts Supreme Judicial Court found no misconduct when a judge attended meetings held by his wife in their home with a gubernatorial candidate and supporters. *In the Matter of Troy*, 306 N.E.2d 203 (1973). Even though the impression was created that the judge supported the campaign, the court found no misconduct where it was not proved that he took any active part in the campaign or fund-raising.

Although not prohibiting the use of a judge's home for political events hosted by the judge's spouse, the advisory committee for federal judges has stated that a "judge must not in any manner encourage, assist or concur" in the events. *U.S. Compendium of Selected Opinions*, §7.3(d) (1995). The committee stated that a judge "must take all reasonable measures to dissociate himself or herself from [the events], including steps to avoid being seen by those in attendance during the events, which if necessary would include leaving the premises for the duration of the events." Similarly, the Wisconsin judicial ethics committee stated that if a judge's spouse hosts political fund-raising activities in their home, the judge should be careful not to be seen by those attending the event.

Wisconsin Advisory Opinion 97-2. However, the committee stated that a judge is not required to leave the house unless its layout is such that the judge would probably be seen by some of those in attendance. Further, the committee advised that the judge could assist his or her spouse by performing household cleaning tasks, caring for their children, preparing food, and replenishing food and

beverages as long as those activities are not visible to the fund-raising participants. See *1992 California Commission on Judicial Performance Annual Report*, at 16 (the commission sent a judge an advisory letter regarding an invitation for a political meeting stated that the meeting would be held at the home of the judge and the judge's spouse).

Campaign signs

Several judicial ethics committee have advised that a judge should not permit a sign endorsing a political candidate to be erected on property jointly owned by the judge and the judge's spouse as this implies an endorsement by both house-holders. *New York Advisory Opinion 96-112*; *Maine Advisory Opinion 94-3*. The committee for federal judges suggested a judge try to dissuade the judge's spouse from posting a political candidate's sign at the marital home. *U.S. Compendium of Selected Opinions*, §7.3(f) (1995). However, recognizing that a judge might fail in that attempt, the committee advised a judge to "make reasonable efforts to dissociate himself or herself from the sign (e.g., by posting a disclaimer, listing spouse's name only on the sign, or placing the sign on the spouse's automobile which judge would not drive)."

Contributions

A judge who is prohibited from making political contributions should ensure that the judge's spouse does not use the couple's joint funds to make a contribution to a political

campaign. In *Application of Gaulkin*, 351 A.2d 740 (1976), the New Jersey Supreme Court stated that the use of any portion of the marital assets suggests at least indirect involvement of the judge. A spouse's contribution of \$1,000 to a gubernatorial candidate from a joint bank account was one of the grounds for a judge's removal in *In the Matter of Briggs*, 595 S.W.2d 270 (Missouri 1980). Noting the "closely woven business and political aspects" of the judge and his wife, the Supreme Court of Missouri stated that the Commission on Retirement, Removal and Discipline "simply did not believe any of the contributions to have been the independent act of Mrs. Briggs or regard as credible Briggs' statements that he was unaware of his wife's check to [the gubernatorial candidate] on this account."

However, a judge's spouse may make financial contributions to a candidate for political office from the spouse's separate funds. *Florida Advisory Opinion 84-19*; *Kansas Advisory Opinion JE-13*; *Nebraska Advisory Opinion 96-6*; *New Hampshire Advisory Opinion 78-3*; *New York Advisory Opinion 90-88*; *New York Advisory Opinion 95-138*; *New York Advisory Opinion 96-2*; *West Virginia Advisory Opinion* (June 19, 1991); *West Virginia Advisory Opinion* (August 28, 1995); *U.S. Compendium of Selected Opinions*, §7.3(a) (1995). See also *Louisiana Advisory Opinion 134* (1996) (a judge's spouse or a member of the judge's immediate family may make contributions to political campaigns provided the contribution is made without reference to the judge or the judge's office and is

not made to do indirectly what the judge cannot do directly); *Pennsylvania Informal Advisory Opinion 99-6-1* (a judge should not encourage his wife to make a campaign contribution, but is not required to discourage her from doing so; if the wife makes a contribution, the judge's name should not appear on the check).

However, the judge and his or her spouse must take all reasonable efforts to ensure that the contribution is perceived as that of the spouse and not the judge. *U.S. Compendium of Selected Opinions*, §7.3(a) (1995); *West Virginia Advisory Opinion* (August 28, 1995). If a spouse makes a contribution:

- ⊙ the judge must play no role in the decision to contribute (*Kansas Advisory Opinion JE-13*; *U.S. Compendium of Selected Opinions*, §7.3(a) (1995)), and
- ⊙ there must be no reference to the judge's name and position (*Florida Advisory Opinion 84-19*).

If a spouse has independent income and the contribution is made from a checking account in which the judge has no interest, the contribution would not constitute a violation by the judge (*New York Advisory Opinion 98-22*). According to the New York advisory committee, if a judge's spouse has no independent source of income, the spouse may make political contributions from funds set aside for the spouse's sole discretionary use but should not use a check from a joint checking account even if the judge's name is deleted from the check (*New York Advisory Opinion 98-111*).

Other political conduct

Membership and holding office in a political organization

A member of a judge's family may be a member or officer of a political party or organization.

Examples:

- ➔ A judge's wife may be a member of the local Republican Women's Club and the state Federation of Republican Women (*Arizona Advisory Opinion 76-2*).
- ➔ A judge's spouse may hold office in a political party's central committee (*Indiana Advisory Opinion 2-93*).
- ➔ A judge's family member may be a member in or officer of a political party (*New Mexico Advisory Opinion 90-5*).
- ➔ A judge's family member may be a committee member of a political party (*New York Advisory Opinion 94-60*; *West Virginia Advisory Opinion* (November 8, 1993)).
- ➔ A member of a judge's family may be a member of the chair's club of a county political organization (*New York Advisory Opinion 90-88*).
- ➔ A judge's spouse may be appointed to fill the vacancy on a political party's county committee created by the judge's election (*New York Advisory Opinion 92-65*).
- ➔ *But see Arizona Advisory Opinion 76-2* (while a judge's wife could remain a member of political organizations, the judge should encourage her to resign from all offices in those organizations; the Arizona code has since been revised); *Georgia Advisory Opinion 27*

(1978) (the spouse of a candidate for judicial office should not serve on a county political committee); *New Mexico Advisory Opinion 90-5* (a judge should encourage his or her spouse not to serve as an officer of a political party; the New Mexico code has since been revised).

Escorting spouse to political events

In general, a judge may not escort the judge's spouse to political events even if the judge is not introduced at the events and does not participate in the program. The New Jersey Supreme Court noted its sympathy for a judge who could not attend a political event that was important to the judge's spouse. However, stating "Judges must make many sacrifices, sometimes most substantial, in order to maintain the public's confidence in the judiciary," the court concluded: "We are certain that a judge who attends any political event damages the most valuable interests of the judiciary, damages the public's confidence in the judiciary, damages the public's confidence in its independence, and damages the public's confidence in the judiciary's total separation from politics." *Statement by Chief Justice on Behalf of the New Jersey Supreme Court Concerning Judge Alexander D. Lehrer and Judge Sybil R. Moses* (January 29, 1990).

Although the code does not define "political gatherings," the term has been applied to functions, both fund-raisers and non-fund-raisers, sponsored by political parties or other political organizations, such as committees, caucuses, and re-election campaign committees. However, a judge whose spouse is an

elected official may attend purely ceremonial, governmental functions with the judge's spouse (*U.S. Compendium of Selected Opinions*, §7.2(a) (1995)).

Examples:

- ➔ A judge may not escort a spouse to a political gathering of any kind (*New Hampshire Advisory Opinion 78-3*).
 - ➔ Judges should not have attended the inaugural ball for the state's governor, which was also a fund-raiser, with their spouses even if the spouses were active fund-raisers for the governor's campaign. The judges were publicly reprimanded (*Statement by Chief Justice on Behalf of the New Jersey Supreme Court Concerning Judge Alexander D. Lehrer and Judge Sybil R. Moses* (January 29, 1990)).
 - ➔ A judge may not accompany a spouse to a state political party convention, to which the spouse has been elected as a delegate (*New York Advisory Opinion 96-73/96-80*; *South Carolina Advisory Opinion 4-1982*).
 - ➔ A judge may not accompany his or her spouse to a dinner honoring the President sponsored by the Democratic National Committee (*New York Advisory Opinion 96-73/96-80*).
 - ➔ A judge should not have attended fund-raisers for political candidates as his wife's escort. The judge was admonished for this and other misconduct (*In the Matter of Rath, Determination* (New York State Commission on Judicial Conduct February 21, 1989)).
 - ➔ A judge may not accompany the judge's spouse to a reception and dinner to promote the governor's re-election (*Pennsylvania Informal Advisory Opinion 8* (1974)).
- ➔ *But see Arizona Advisory Opinion 76-2* (a judge may attend political functions with the judge's spouse, provided the spouse is only a member of the organization sponsoring the function and not attending as an officer; the judge may be recognized if public officials are recognized at the function); *Michigan Advisory Opinion JI-47* (1992) (a judge may sit on the dais with the judge's spouse when the spouse is serving as co-chair of a political party social event).

Code Variations



- ✦ As of February 2001, **Alaska, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming** have changed their codes of judicial conduct to add the “in support of the candidate” qualification from the 1990 model code.
- ✦ Commentary to the **California** code states that “[a]lthough members of the judge’s family are not subject to the provisions of this Code, a judge shall not avoid compliance with this Code by making contributions through a spouse or other family member.”
- ✦ The **North Carolina** code of judicial conduct states that a judge’s spouse or any other adult member of the judge’s family is not prohibited “from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.”
- ✦ Commentary to the **Delaware** code of judicial conduct contains a specific rule regarding political contributions by a judge’s spouse: “Political contributions by the judge’s spouse must result from the independent choice of the spouse and checks by which such contributions are made shall not include the name of the judge.”

Political Activity

Q & A

May a judge's wife give speeches for the judge's re-election campaign?

Yes, but the judge should encourage her not to make pledges or promises on his behalf or violate any of the other restrictions on judicial campaign speech.

May a judge's wife solicit contributions for his campaign?

No. As a candidate for judicial office, he must discourage his wife from doing on his behalf what he cannot do, and he may not personally solicit campaign contributions.

May a judge whose wife is running for governor endorse her candidacy?

No. A judge is prohibited from publicly endorsing any candidate for public office, including his wife, and may not solicit votes, funds, and other support for a family member through speeches or personal contacts.

May a judge display a sign for his wife's gubernatorial campaign in his chambers or drive a car with her campaign sticker on the bumper?

No.

May a judge work behind-the-scenes in his wife's campaign office, compiling voter or contributor lists or giving her advice?

No.

May a judge's wife use their home for a fund-raiser for her campaign for governor?

Yes, as long as the judge is not identified on invitations; does not assist in any preparations or serve as host by greeting guests, mingling with visitors, or serving food and drinks; and stays in another part of the house or leaves the house during the event.

May the judge's wife include a picture of herself, their children, and the judge, identified as a judge and her husband, in her campaign literature?

It depends on what state the judge is in. In some states, as long as the campaign literature does not identify the judge's office or title, discuss his judicial duties, or show the judge in robes and it identifies the occupations of other family members, the judge may be pictured and identified by name and as a judge. (For example, the picture caption could read, "Shirley Rowe is pictured with her husband Ed, a judge, their daughter, Clare, an accountant, and their son Steven, a student at Eastmont High," but not "her husband Ed, District Court Judge for the 11th Judicial District.") However, in other states, the judge's wife's campaign materials cannot use the judge's picture, name, or title. In a third set of states, the judge may be included in a family picture if he is not identified as a judge (for example, "Shirley Rowe is pictured with her husband Ed, their daughter Clare, and their son Steven), or in some states identified by name.

May the judge escort his wife to political gatherings when she is a candidate?

Only in states in which a judge can attend political gatherings at any time. In some states, a judge may only escort his wife to a political event such as a campaign rally, not a fund-raiser. In some jurisdictions, a judge may not accompany his candidate-wife to any political event, although he may escort her to community, religious, social, cultural, or recreational events even if she does some campaigning there if the judge would have attended the event even if his wife were not a candidate.

May a judge's wife serve as campaign manager for a candidate for state senate?

Yes, if she does so without reference to the judge or the judge's office and takes steps to ensure there is no appearance that the judge is directly or indirectly involved in the campaign.

May the judge's wife put a sign on the lawn of their home for the candidate she is supporting for state senate?

The judge should try to talk her out of putting up the sign, but if he does not succeed, the sign should make clear it does not reflect the judge's endorsement.

May the judge's wife contribute money to the candidate she is supporting?

Yes, but only from the wife's own funds without any discussion with the judge about whether to contribute and without reference to the judge's name or position (in other words, the judge's name should not be on the check).

May a judge's husband be a chair of a political party?

Yes.

May a judge whose husband was campaign manager for the governor go to the inaugural ball, which is a fund-raising event for the governor's political party?

No, except in states in which judges are allowed to attend political fund-raisers.

May a judge accompany his wife to a state political party convention to which the spouse has been elected as a delegate?

No, except in states in which judges are allowed to attend political gatherings.

Judicial Family Life

by Jan Aikman Dickson



The American judicial system depends upon quality people serving as judges. Those judges in turn depend upon supportive families who are equipped for the rigors of public life. Without formal training or materials, many judges' families have learned public family life skills strictly by trial-and-error.

Judges and their families who function effectively remember the bigger picture when they deal with the challenges associated with public family life. Judges recall the reasons they became lawyers and judges in the first place and explain that vision to their household to muster genuine support. Taking a global and historic perspective helps amplify the reasons the rule of law is important. Watching videos or reading books about our judicial system uplifts families. Many families visit their judge's courtroom, the state capitol, and Washington D.C. to see the important places and documents celebrating the rule of law. Occasional public ceremonies refresh their enthusiasm and commitment to being supportive of the work of the judge in their family. Keeping perspective on why it is important for judges to serve can help family members enjoy public family life.

Whether public life is a family partnership or a distinct activity of the judge, families thrive and are able to be supportive of a

Jan Aikman Dickson is the founder of Judicial Family Institute, Inc. and the spouse of Indiana Supreme Court Justice Brent Dickson.

The mission of the Judicial Family Institute, Inc. (JFI) is to collect and provide positive information regarding the challenges and opportunities of judicial family life. JFI is a national, low-profile, non-partisan, non-lobbying, not-for-profit corporation organized under the laws of Indiana and qualified as a 501(c)(3) organization under the Internal Revenue Code. JFI serves trial, appellate, and all other judges, their households and extended families, judicial educators, and other experts who provide educational materials and programs. Its supporters since 1987 have included state and federal judges and justices, their family members, judicial educators, and other citizens interested in supporting judicial family life education and an impartial judiciary.

The Judicial Family Institute, Inc. applauds judges. Their work makes a big difference to individuals, communities, and the rule of law in a democratic society. JFI encourages judges' families to be supportive and judges to persevere. Being a member of a judge's family holds some special opportunities and challenges. Balancing good attitude with concrete steps to manage the unique features of judicial family life results in maximum enjoyment of being in a judge's family.

Judges and judicial family members, educators, and experts wishing to learn about the JFI website, speakers, or the newsletter are encouraged to contact:

Judicial Family Institute, Inc.
P.O. Box 1802, Indianapolis, IN 46206-1802
E-mail: jfamilyin@aol.com

judge's service when they understand solutions to the unique challenges that everyone in the family may encounter. The Judicial Family Institute, Inc. collects information demonstrating how various people have managed typical issues unique to judges and their families. In learning from others, new and experienced judges' families can avoid unnecessary trial-and-error and problems others have encountered.

Understanding judicial stress

To be understanding and supportive of judges, family members do well to consider the typical problems that judges face. These may include:

- The responsibility for important decisions about the lives of other people.
- A heavy caseload.
- Concern and compassion for people appearing before the court, especially children.
- The responsibility for seeking funds to run the court.
- Isolation. People may not relate to the judge as before, and a judge may withdraw from old friends to avoid the appearance of favoritism.
- The need to raise money for and participate in an election campaign.
- A lower or fixed salary as a judge with the same home mortgage and other living expenses.
- The need to publicly disclose financial statements.
- Concern about their family members and their increased visibility in public life.
- New issues in parenting.
- Discomfort with seeking help for a problem that results from abuse of alcohol or other drugs or illness in themselves or members of their family because of concerns the matter will become public.

When family members are included in judicial education programs on handling stress, it helps sensitize them to the judge's role and gives them pointers for dealing with the problems they may encounter themselves. Thus, they are better equipped to support the judge. In interactive judicial education programs around the country, Washington, D.C. Psychologist Dr. Isaiah Zimmerman helps judges and their partners identify signs of judicial stress and share antidotes and preventative measures. He notes that many judges benefit by having a "buddy judge" whose occasional companionship may be more important than what they say. Dr. Zimmerman observes the value of a health maintenance program, a hobby, recreation, sports outlets, and a religious or spiritual orientation. He applauds an attitude of being "responsible to" rather than "responsible for" the people judges serve. He suggests three ten-minute breaks throughout the day. At the close of the day, he urges judges to take a 20-minute "decompression" time to relax, do nothing, and

change gears before taking on family responsibilities and interaction.

Meditation and listening to music can give a remarkable boost to judges, according to Judge Adam Fisher of South Carolina. In judicial education sessions for judges and their spouses across the country, Judge Fisher describes the biochemical changes attending stress. He advocates immediate mind control upon signs of stress, physical exercise after a stress "spike," and raising the level of the body's normal resistance to stress.

Local churches, synagogues, mosques, colleges, universities, health clubs, and various counselors all augment judicial family knowledge of stress reduction techniques through education or personal counseling.

Judges considering their partners' perspectives

Partners of judges often report common experiences and share similar changes in their lives and those of other family members when the judge in their family goes on the bench:

- Pride and enthusiasm that their loved one is willing to serve in public office.
- They tend to hear complaints about the legal system or specific cases even when the judge does not.
- Some people assume a judge's partner's ideas are the same as the judge's about current events and controversial topics and

that the judge's ideas are the same as theirs.

- Family members may decide to change or alter jobs, charitable activities, and/or political activity to accommodate applicable code of judicial conduct.
- The family may decide to move if the court offices are in a different community.
- Like judges, family members also may have to adjust to lower or fixed family income, increased security measures, new issues in parenting, isolation, impairment, and/or the need to report personal investments and gifts.

Educational programs held for family members during judicial conferences, materials, and contact with other families can help equip people to adapt to these changes so that they are best able to be supportive of impartial judges.

Managing campaign stress

In 39 states, elections are held to select some, most, or all of the judges or to retain judges in office. Campaign stress is often best tolerated when the judge and the family are in touch with others who have had similar experiences. In some states, other individuals have signed up to be available to receive phone calls during campaign time from judicial candidates and their family members who are immersed in a campaign. Just knowing someone else is available to talk can be helpful. Even people from opposite political par-

ties, from different parts of a state, or from different states have been encouraging resources to each other when campaigns have become negative or hectic.

One proven strategy for managing the family features of political campaigns is a “family priority committee” of friends and volunteers to prepare and deliver nutritional meals to the candidate’s home several nights a week. The group can also provide backup sitters and volunteers to run small errands, rake leaves, and perform similar tasks. Candidates’ spouses report that it is reassuring to have that kind of support.

The bi-partisan national organization Partners in Politics founded by former legislative and later executive branch spouses Carolyn Mutz and Judy O’Bannon (both from Indiana) reprinted as *Political Stress in Indiana* a booklet published originally by the Mental Health Association of North Dakota called *Political Stress in North Dakota*. Consider the following “Common Sense Ways to Cope with Political Stress” from that publication:

- Learn to plan.
- Accept human limits.
- Have fun.
- Be positive about people and life.
- Practice tolerance and forgiveness.
- Don’t compete when it isn’t necessary.
- Take regular, sensible exercise.
- Learn to take time for yourself.

- Expose your problems to those who understand.

Benefits outweigh challenges for children

In Judicial Family Institute interviews, experienced judicial parents and their partners say that the benefits for children far outweigh the challenges of being part of a judge’s family. Children have an opportunity to look beyond themselves and develop a healthy concern for others. They get to meet fascinating people because of the judge’s work. Judges’ children are included in banquets and other public events where they hear inspiring speakers and learn extraordinary social skills. They develop quality contacts and perspectives that last a lifetime. They are sometimes able to see new places by going along to judicial meetings, and enjoy being in conversations with other judges’ children. Judges’ children are proud to be connected to a parent who is highly respected in their community.

Most judicial parents, however, also say there are some things they would have done differently. New judges and their partners are encouraged to seek out veterans of judicial family life to ask them what has worked for them. These conversations can take place privately or at judicial conferences and similar meetings.

Judges also counter society’s assumptions of their own children by affirming their unique skills, activities, and interests rather than assuming they are destined to become lawyers

or judges. All members of the family thrive when they realize and take time to express appreciation for the changes family members are experiencing to support the rule of law.

Communication is the basic issue in judicial families. It is important for families to be able to discuss the impact of public life issues as well as other topics on all people in the family whether children are at home or grown. With open communication, the family shares the challenges of public life, but more importantly recognizes the opportunities involved.

Because it is vitally important that persons coming into a courtroom are assured of fair and impartial treatment, judges often feel constrained about talking with their family about current events and controversial topics particularly when children are young. Whatever is part of the public record in a court case can be discussed at home with spouse and children. Especially during high-profile trials or those that involve peers, judges' children benefit from conversations before the next day of school that will prepare them for questions and comments.

Some families routinely discuss the day's headlines at breakfast to get ready for the day. Some children in the judge's family will approach these matters differently than others. One wants to talk with peers who make comments. Another avoids any conversation about the news. Parents can help each child adopt a stance comfortable to the whole family.

In some small towns, nearly every case can be a "high profile case." In other settings, media interest can draw national attention to

both trial and appellate proceedings and to the involved judges and their families. High profile cases may become the only civics lesson some citizens may ever get. There is an opportunity for judges and judicial systems to educate the public about the merits of living under a rule of law in a free society. There is a chance to break through the image of judicial isolation and help the public see the good-hearted servant leaders who serve as judges.

But the stresses and sheer time demands of handling a high profile case can shake judges, their households, and even extended family members. Personal privacy can be pierced. A judge's concentration on the work at hand can be maximized when they and their family members are equipped to function well in spite of the pressures and changes they are experiencing.

Children of judges appreciate a family policy regarding who answers the telephone or door and how it should be answered. When children participate in answering the door or the telephone, they like being instructed ahead of time on how to respond to calls from the judge's staff, the press, attorneys, litigants, unhappy citizens, and even their own friends and teachers. Many families screen calls with a telephone answering machine and answer the door with an intercom. In other families, parents answer all calls as well as the door.

Political involvement of children is often routine where judges campaign for their own office. When vicious attacks occur during a political campaign, special efforts should be

made to equip children to cope and to respond. While one child thrives on public appearances, another might abhor them. Children appreciate parents' consideration in this matter and conversation about their role. Helping children understand the bigger picture in which the election occurs can excite their enthusiasm.

When teenagers and young adults who live in the judge's household want to become personally involved in political activity apart from the judge's own campaign, it is important to consult the code of judicial conduct applying to the judge's jurisdiction or ask the judicial ethics advisory committee.

Being proponents of the judicial system

Judicial Family Institute leaders see their relationship to a judge as an opportunity to educate children and adults alike about the merits of the legal system. Some judicial spouses are docents with the Florida Supreme Court Historical Society. The society sponsors programs in the Florida Judicial Building in Tallahassee for over 5,000 people a year. Many other judges' spouses across the country are involved in peer mediation projects in schools or volunteer for the "We the People" program that sends whole high school classrooms to Washington D.C. to demonstrate their knowledge of the U.S. Constitution.

An excellent exercise for judges and their families is to spend a few hours thinking and talking about what seems most valuable about the American judicial systems. That is

a good time to consider and select a main positive point to have ready if called upon to answer a criticism from schoolmates, teachers, friends, complainers who call the home at night, or media representatives who are writing stories. It is useful to use complaints as opportunities for making positive statements about the legal system and educating the complainers. Some family members carry the business card of the judge's bailiff, secretary, or public information officer who can offer detailed accurate information to inquirers. Many complaints are better referred to these professionals, who appreciate feedback and suggestions for improvement. Complainers like to know that their opinion as a citizen is valuable and that their concerns are heard somewhere where it can make a difference.

Security ideas for judges, spouses, and families

One area where judges cannot separate their professional life from their family life is in dealing with threats to security by litigants, criminals, and other persons who are seeking revenge or trying to affect the outcome of a case. These persons do not necessarily limit their threats to judges. Occasionally, spouses, children, others in a judge's household, and extended family members are also targeted. Incidents of attempted harm to judges or their family members away from the courthouse are probably rare. Nonetheless, there have been enough serious incidents to warrant taking security precautions and developing attitudes and activities that minimize concern for personal safety.

Stories of families that will not be intimidated by threats are encouraging. Some say that the one thing they would emphasize is the importance of good communications in the family generally. If a problem should arise for anyone, they will be able to bring it up because good communication lines are open.

Judges' children have surprised their parents years later by telling how when they were young, they were frightened that a criminal or custody litigant might take revenge on them or their friends. Much of this thinking resulted from conversation with peers in tune with the news, television and film drama, and their own highly active imaginations. Too often judges' children did not bring up the topic with their parents because they felt their

parents had enough on their minds. Openness to what the children are experiencing takes time that is well worth the effort. In age-appropriate discussions, family closeness and security skills can be further developed as children are assured of the protection available to them.

Experienced judicial families know it is important to develop a personalized family security plan. Planning to prevent or deal with security problems would be smart whether a family were in public life or not. Some threats to judges and their families may be prevented by a judge's respectful attitude toward people who appear in court. Judges and their families can take safety precautions, but still thoroughly enjoy their lives. That enjoyment is enhanced by keeping in balance about security concerns. Neither ignoring security nor being overly-focused on it is healthy.

The Judicial Family Institute, Inc. has compiled security ideas from various sources, which are listed below. Some of the measures or attitudes may not be appropriate in your community or circumstances, but are shared for your consideration. Many judges and their family members have shared their ideas for the list. Indiana State Police officials have suggested many ideas for safety at home and while traveling that are interwoven in the list below. Additional suggestions from the National Judicial College are also included.

Perspective

- Remember that people and families like yours keep democratic principles and the rule of law alive through courage, commitment, and confidence. They will not be intimidated.
- Draw a comparison to traffic safety issues and the many automobile accidents reported daily.
- Be aware and take precautions without catastrophizing what might happen.
- Realize a judge may not get as many threats as an attorney, prosecutor, corporate head, university president, member of the clergy, social worker, psychiatrist, or person in another profession.
- Chat with other judges and their spouses or families to learn how they function with confidence without being preoccupied with security.
- Talk with people in your faith community about resources and attitudes.
- Be aware that threats and extra needs for security do not occur in a vacuum. Families in public life thrive when they minimize other sources of stress and maximize other sources of security.
- Always keep calm and use logic if threatened or placed in a dangerous situation.

Planning tips

- Teach your family what you have learned about security with consideration for ages and individual needs.
- Get the facts on incidents of actual harm to judges or their families in your area.
- Let law enforcement officials do a security analysis of your home.
- Have a plan if you are taken hostage.
- Have a fire safety plan for your home.
- If you decide to keep or carry a weapon, make sure it is in proper working condition and you and your family have been trained in its proper use. Keep your skills sharp by practicing frequently. A policeman's wife accidentally shot her husband when he arrived home unexpectedly in the middle of the night without turning on the lights. A photographer's child accidentally killed his father. Since judges' families are not immune from accidents, instruct the whole household.
- Instruct family members not to trust strangers.
- Make sure state, county, and local police and local fire departments know where you live.

Home security suggestions

- Consider installing a home security system. Consult *Consumer Reports* and local experts. The signal from your home should feed into an answering service capable of processing your call quickly. Some systems cause unnecessary delays because they receive too many other calls or serve too many other accounts such as physicians' answering services.
- Use an intercom system to answer the door. If a litigant appears at your door, explain that the judge in your household can meet with them only at the court during office hours.
- Consider having an audible or silent duress alarm.
- First look through a peephole or know who is on the other side before answering the door. Avoid opening your door to a stranger. Cover any glass panel next to your front door.
- Keep a cellular telephone close at hand and/or by your bed.
- Use security lighting at your home.
- Install deadbolt locks.
- Consider living in a gated community or building or at the end of a street or cul-de-sac.
- Do not use your name on your mailbox or lamppost.
- Consider owning a dog. Post "Beware of Dog" signs

Mail and newspaper safety

- Never open suspicious packages. Call the U.S. Postal Service for speakers or a flier describing bombs in the mail. Call law enforcement or the U.S. Postal Service if packages or letters arrive with grease marks or no return address.
- When going out of town, make arrangements to have your mail and newspapers secured.

Campaigning precautions

- Arrange for security at parades, dinners, and other events.
- Avoid riding in parades unless provisions are made for security and crowd control.
- Appear at campaign fund-raising events only when you have arranged for security. Consider control of admission by invitations or limited ticket sales or distribution.
- Take someone along for door-to-door campaigning.
- Do not personally post or remove your campaign signs if you can have someone else do it for you.
- Avoid using your residence address on any campaign materials.
- Limit campaign signs at your residence or bumper stickers on your personal vehicles.

Travel and vehicle techniques

- Travel with a cell phone. Make sure the battery is fully charged.
- When you are in your automobile, keep the doors locked at all times.
- Vary your travel routes and times, i.e., shopping, work, school, etc.
- Keep your name off assigned parking spaces at home and at work.
- Avoid going alone to events or on trips.
- Before entering your vehicle, be sure nothing has been placed behind the wheels and that the hood has not been tampered with. One judge ties a string on the hood and car doors and routinely checks to assure no one has broken in. Take a quick examination of the interior to look for any signs of hidden persons or tampering.
- Avoid being paranoid, but be aware if someone is staring at you or following you.
- Avoid personalized license plates.
- Do not have distinguishing plates on vehicles. Some people feel safer with distinguishing plates, but the Indiana State Police think they make you a target.
- Park in well-lighted areas.
- When leaving a shopping center, have your car key in your hand and ready to insert in the lock rather than fumbling for the key at the car.
- When you are involved in a minor property damage vehicle crash, use your cell phone to call law enforcement officials without identifying yourself as a judge or member of a judge's family; let the others involved in the accident know you have called for help. Request that the driver of the other vehicle follow you to a well-lighted area to exchange pertinent information.
- If someone driving an unmarked car with flashing lights attempts to stop you, use your cell phone to call law enforcement officials to verify if the driver is an officer. If he or she is not, tell law enforcement officials where you are.
- Do not transport your judicial robe in your automobile by hanging it up unless it is covered with colored paper, plastic, or fabric. If it is not covered, lay it flat in your back seat or trunk.
- Avoid becoming physically involved in chasing or apprehension of disorderly persons or escapees.
- When out of town for a long period of time, make arrangements with someone to move your vehicles to a different location.
- Let law enforcement know when you and your family are out of town.
- Do not leave your luggage unattended anywhere.
- Avoid using your full name and title or home address on luggage tags.

Media contact suggestions

- Invest time to get acquainted with media personnel to help them understand your concerns.
- Encourage media not to show photographs of your family or your residence after there has been an incident of court-related news or violence.
- Avoid being quoted in the news in a manner that makes the public think you fear violence or that you think you are not at risk. Such quotes can be taken as an invitation or as a challenge.
- Do not allow the media to learn the names, ages, or schools of your minor children.
- Do not tell the news media the security you have in place.
- Do not upgrade any photographs that may be on file with the news media or the government if you can avoid it. An exception is the photograph that should accompany an official “Personal and Family Information Sheet” that is confidentially maintained.

Communication ideas

- Address people with a tone of respect and humility rather than anger or sarcasm.
- Use a home telephone answering machine or voice mail to screen calls.
- Do not announce your name and phone number on the outgoing message of your home answering machine.

- Never provide personal information to the public, i.e., when and where family members are to arrive. Do not announce to the public that you are going out of town for vacation, school, or business. In public, discuss ideas or past activities rather than future activities with friends, barber, hairdresser, repairmen, and others. Let your friends and extended family know your travel plans are confidential.
- Only individuals with a need to know have knowledge that your family is connected with the judiciary. If asked, identify yourself or your spouse as an attorney, government employee, etc.
- Do not allow strangers to overhear your personal telephone calls.
- If you discover vandalism to your home, avoid calling 911 or other switchboards broadcast on citizen’s band radios. One family reports their call to 911 reached journalists who rushed to their home and later published their address in the newspaper. Instead, use a direct, more secure number for law enforcement or call a judicial staff employee familiar with security officers. Keep that number on your person and near telephones at your home.

Service calls

- Always require credentials from individuals performing work at your home.
- Always verify the legitimacy and reputation of individuals performing any work at your residence.

Suggested ways to handle threats

- Report any threats. Studies suggest some people making threats are trying to get attention and will escalate their activities if not regarded. Law enforcement officials are trained to discern the difference between mere ventilation and a true concern.
- Take a self-defense course.
- Consider assigning divorce and custody cases to mediation. Litigants who reach their own conclusions on money and custody tend not to retaliate against the judge or the judge's family.
- Leave the children with someone you trust for a few days.
- Use telephone caller identification or ask the telephone company or law enforcement to have suspicious calls traced.
- Question whether attempts to assassinate prominent figures such as the President correlate with threats to you. Visit <http://www.ojp.usdoj.gov/nij>, the National Institute of Justice website to obtain an electronic version of Protective Intelligence and Threat Assessment Investigations or call 800-851-3420.
- Do not sound intimidated. One spouse responds to telephone threats with humor: "I don't take that type of call here at home, you'll have to call the office at 999 9999."

- Act like you are crazy if you are approached by someone who seems to want to harm you.

Information management

- Consider having an unlisted or unpublished telephone number and address.
- If you decide to put the telephone number in the telephone book, exclude the address.
- Have all bills and credit card accounts sent to a post office box.
- Avoid using "Judge" on your personal checks, credit cards, airline tickets, etc.
- Avoid using your home address on your driver's license, checks, and return address. Some judges use a post office box or office address.
- Request that your name not be included in the city directory.
- Ask federal census takers to exclude your social security number and other relevant information from published lists.
- Shred identifying or personal papers.
- Remove any mailing labels containing your name and home address from subscription magazines before taking them to the courthouse.
- Do not display photographs of your family in your office where visitors can see them, but turn them towards you.

Public contact suggestions

- Do not put your child's name on personal clothing.
- Avoid becoming intoxicated in public places, therefore becoming vulnerable.
- Avoid wearing shirts or caps that identify you as a judge when you're out in public. "Have Gavel will Travel," "Take The Law Into Your Own Hands, Hug A Judge," "Here Comes The Judge," etc. are all right for around the house or while attending judicial seminars, but may be too risky elsewhere.

Additional Resources



About ethics

The American Judicature Society web-site has a directory of judicial conduct commissions and links to their web-sites at www.ajs.org/ethics1.html. Commission web-sites frequently include the state code of judicial conduct and other helpful information. The AJS web-site also has links to the judicial ethics advisory committees in those states that have them. Judges can ask the committees for advice regarding future action, and many of the committees have put their opinions on-line.

AJS publications with information on judicial ethics that may be of interest to judges and their families include:

Judicial Conduct Reporter (a quarterly newsletter)

Ethical Standards for Judges (AJS 1999) by Cynthia Gray

Communicating with Voters: Ethics and Judicial Election Campaigns (AJS 2000) by Cynthia Gray

When Judges Speak Up: Ethics, the Public, and the Media (AJS 1998) by Cynthia Gray

An Ethics Guide for Part-Time Lawyer Judges (AJS 1999) by Cynthia Gray

Judicial Disqualification under Canon 3C of the Code of Judicial Conduct (AJS 1992) by Leslie W. Abramson

Judicial Ethics and the Administration of Justice (a videotaped instruction program)

Key Issues in Judicial Ethics by Cynthia Gray (1996)

Information about ordering AJS publications is available on the AJS web-site at www.ajs.org/pubs1.html or by contacting rwilson@ajs.org or 312-558-6900 ext. 147.

Additional resources on ethics

The Development of the ABA Judicial Code (ABA 1992) by Lisa L. Milord

California Judicial Conduct Handbook (California Judges Association 1990) by David M. Rothman

Judicial Conduct and Ethics (Lexis 2000) by Shaman, Lubet, & Alfini

About stress and other judicial family issues

Judicial Wellness: A Stress Management Guide For and By Judges (National Judicial College 1996, 800-25-JUDGE)

“The Loneliness of Command: One Perspective on Judicial Isolation” by Kathryn Fahnestock, *The Judges’ Journal* (Spring 1991).

The Judge’s Book (2nd ed. National Conference of State Trial Judges of the Judicial Administration Division of the American Bar Association and the National Judicial College; NJC 800-25-JUDGE)

About security away from the courthouse

Personal Security Handbook (Unified Judicial System of South Dakota; contact State Court Administrator, 605-773-3474).

Personal Security Handbook: How You and Your Family Can Minimize Risks to Personal Safety (U.S. Department of Justice U.S. Marshals Service).

Protective Intelligence and Threat Assessment Investigations (National Institute of Justice <http://www.ojp.usdoj.gov/nij> electronic version or 800-851-3420 printed version).

The Gift of Fear: Survival Signals That Protect Us From Violence by Gavin DeBecker (on-line and in bookstores, printed, and audio versions).

Protecting the Gift: Keeping Children and Teenagers Safe (And Parents Sane) by Gavin DeBecker (on-line and in bookstores, printed, and audio versions).

Judicial Family Institute, Inc.

Judicial Family Institute, Inc.
P.O. Box 1802
Indianapolis, IN 46206-1802
e-mail: jfamilyin@aol.com

Current and former board members of the Judicial Family Institute:

Ann Jones (Arizona)
Norma Feldman (Arizona)
Carolyn Lewis Newbern (Arkansas)
Barbara George (California)
Ilona Holland (Delaware)
Suzy Veasey (Delaware)
Tom Korson (Colorado)
Linda Wells (Florida)
Jane Harding (Florida)
Ruth McDonald (Florida)
Justice Norman Fletcher (Georgia)
Cynthia Gray (Illinois)
Jan Aikman Dickson (Indiana)
Judge Deanell Reece Tacha (Kansas)
Judge Debra Lambert (Kentucky)
Judge Ben Logan (Michigan)
Dorothy Souza (Nevada)
Barbara Grimes, honorary (New Hampshire)
Shirley Taylor Frye (North Carolina)
Barbara Lumpkin (Oklahoma)
Mary Moyer (Ohio)
Lyn Phillips (Texas)
Lou Nebeker (Virginia)
Lynn Guy (Washington)