

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION 2021-1**

ISSUES

Is a judge disqualified from all cases involving a large law firm employing the judge's daughter-in-law as an associate attorney?

FACTS

A judge's daughter-in-law will be an associate attorney at a large private law firm as a first-year associate. Other attorneys from the law firm will appear in front of the judge and the judge is seeking an opinion on whether recusal is required in every case an attorney from the law firm appears or just those on which the daughter-in-law is the attorney.

ANALYSIS

Canon 1, Rule 1.2 of the Code of Judicial Conduct states: "A judge shall act at all time in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Canon 2, Rules 2.2 and 2.3(A) require the judge to perform all duties and uphold the law fairly, impartially and without prejudice or bias. Rule 2.11(A) states:

A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
- (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) is a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.

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

....

Rule 2.11(C) allows the judge to disclose the basis of the disqualification on the record, other than for bias or prejudice under A(1), and, if the lawyers and the parties agree to waive the disqualification, the judge can continue.

The Rules are clear that a judge is disqualified in those cases in which a close relative is the attorney in the proceeding. What is less straightforward is whether a judge is disqualified in cases in which other attorneys from the law firm appear. Comment 5 to Rule 2.11 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 itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

Other jurisdictions have stated that the determination must be made on a case-by-case basis taking into consideration the specific facts of the situation. Factors to consider include:

- Whether the judge's relative is a partner, shareholder, association, or of counsel;
- The size of the law firm (a partner in a two-person firm vs. an association in a two-hundred-person firm);
- Whether the fee the firm will receive is based on an hourly fee or contingent arrangement;
- 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.

See e.g., Colorado Judicial Ethics Advisory Op. 2005-02; Tennessee Judicial Ethics Advisory Op. 04-01; Illinois Judicial Ethics Advisory Op. 94-18. It is advisable to disclose on the record the relationship and inquire whether the relative was involved in the acquisition or preparation of the case or would have more than a de minimis interest that could be substantially affected by the case. If, in analyzing the factors of the case,

the judge believes their impartiality may reasonably be questioned, the judge is disqualified. However, the judge may follow Rule 2.11(C) and, if the parties agree to waive any disqualification, the judge may remain on the case.

CONCLUSION

The Committee is of the opinion that a judge is not *per se* disqualified when members of their relative's law firm appear in a case. The judge must make a case-by-case determination to determine whether they are disqualified. If the facts would disqualify the judge but the parties agree to waive the disqualification, the judge may remain on the case.