Hofstra Law Review

Volume 32 | Issue 4 Article 7

2004

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THE JUDGE'S RELATIVE IS AFFILIATED WITH COUNSEL OF RECORD: THE ETHICAL DILEMMA

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Ten years ago the United States Supreme Court deemed it appropriate to issue a special recusal policy. It addressed potential ethical issues raised by seven of the nine justices having spouses, children or other relatives practicing in law firms that regularly appeared before the Court. Although the Supreme Court's unique position led to a somewhat unique removal policy, there is nothing unique about a judge's spouse or child practicing law.

Due to concerns about direct influence or favoritism flowing from the bench to a related attorney, a judge has long been prohibited from presiding over a case when a close lawyer-relative is acting as counsel. However, judicial ethics standards also address the more attenuated connection where the judge is assigned to hear a case in which the lawyer-relative is not counsel of record but is in fact affiliated with that counsel. If that connection results in an appearance of partiality or a suspicion that the lawyer-relative is benefiting from a case in the judge's court, generally it is the judge rather than the relative who should withdraw from the case.

This Article examines various aspects of the judge's ethical dilemma. Part I discusses the relevant federal and state ethical standards. Part II addresses the application of the standards in case law and other situations. Part III proposes supplemental Code or Commentary language for consideration by state and federal courts and legislatures.

I. APPLICABLE ETHICAL STANDARDS FOR JUDGES

Ethical concerns about a judge's relatives appearing as counsel before him have a long history in American jurisprudence.[1] In 1924, the

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House of Delegates of the American Bar Association adopted thirty-four Canons of Judicial Ethics,[2] which a majority of the states subsequently adopted in some form and applied for most of the next half century.[3] Canon 13 addressed the issue of a relative's influence on the judge:

> A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.[4]

In 1972, an ABA Special Committee on Standards of Judicial Conduct, chaired by California Chief Justice Roger Traynor, completed three years of work and persuaded the ABA House of Delegates to adopt higher and more explicit standards of judicial conduct.[5] Federal statutory provisions[6] adopted in 1974 are similar to the 1972 Code of Judicial

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1. The first disqualification statute in the United States was the Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79, which was amended by the Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. The statute was further amended by the Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090, which provided in pertinent part:

> Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, . . . or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court . . . .

The 1911 statute was amended by the Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908. Between 1948 and 1974, the federal statute provided no guidance on the question of how to determine the substantiality of the judge's interest in a party. The statute provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest . . . or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Id.

2. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 581 (2004).

3. *See id.*

4. CANONS OF JUDICIAL ETHICS Canon 13 (1924).

5. *See* CODE OF JUDICIAL CONDUCT Preface (1972) (noting that work began on the Code in 1969); E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 1 (1973) (noting Judge Traynor was committee chairman).

6. The Judicial Conference of the United States adopted the Code with modifications approved April 6, 1973 and March 6, 1975. On December 5, 1974, the Judicial Disqualification Act, Pub. L. No. 93-512, 88 Stat. 1609 was enacted and codified as 28 U.S.C. § 455. In pertinent part, 28 U.S.C. § 455 (2000) currently provides in pertinent part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: . . .
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

Conduct. The Code's general Canon 3 language states that "a judge should perform the duties of his office impartially and diligently."[7] Almost two decades later, in 1990 the ABA House of Delegates adopted a revised Model Code of Judicial Conduct.[8] In addition to the disqualification provisions of Canon 3,[9] Canon 2 of the Code specifically prohibits a judge from allowing his or her family relationships to influence his or her judicial conduct or judgment, or conveying or permitting others to convey the impression that they are in a special position to influence the judge.[10]

A. Appearance of Partiality

Both modern versions of the ABA's Model Code of Judicial Conduct impose a duty upon a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to"[11] a non-exclusive list of specific situations where the likelihood of prejudice or its appearance is presumed.[12]

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

In addition to the federal statute, federal judges adopted a Code of Conduct through the Judicial Conference of the United States in 1992. Its disqualification language mirrors the 1972 Code. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, 150 F.R.D. 307, 311-12 (1992).

7. CODE OF JUDICIAL CONDUCT Canon 3 (1972).

8. *Compare* MODEL CODE OF JUDICIAL CONDUCT (1990), *with* CODE OF JUDICIAL CONDUCT (1972) (replacing the word "should" in Canons 1, 2, 3, and 5, and the word "may," in Canon 4, with the word "shall").

9. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).

10. *See id.* Canon 2B; *see also* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 967-75 (1996).

11. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

12. The 1972 Code states that in such situations a judge "should disqualify," while the 1990 Code mandates that the judge "shall disqualify." Although most courts have construed the 1972 Code's "should disqualify" to signify a mandatory duty, disqualification under Canon 3 in the 1990 Code clearly became mandatory. *Compare* CODE OF JUDICIAL CONDUCT Canon 3C (1972), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990). As the Preamble to the 1990 Code attempts to explain:

> When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "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.

MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

One of the specific examples in both the 1972 and 1990 Code requires recusal 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: . . . (ii) is acting as a lawyer in the proceeding."[13] Both versions of the Code thus require judicial recusal when a close relative appears as counsel or works on the case. No exceptions exist; when the judge's relative is counsel of record, the judge is disqualified.

When the judge's relative does not appear as counsel of record in the proceeding but is a lawyer in the same firm as counsel of record, the specific standard is inapplicable. The judge's relative is not acting as a lawyer in the proceeding but is merely affiliated with the firm. Is the judge then able to preside over the proceeding without any ethical concern? The Codes contain two sources of guidance.

First, the Commentary[14] of each Code, like the aforementioned standards, is nearly identical. The 1990 Commentary states in part [with bracketed deletions for the 1972 version of the Commentary]:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a [lawyer-] relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "[his] the judge's impartiality might reasonably be questioned" under Section [3C(1)] 3E(1) . . . may require [his] the judge's disqualification.[15]

The Commentary leaves open the possibility that mere affiliation by a judge's relative with counsel of record may be sufficient for disqualification. The textual basis for disqualification is the general

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Of the forty-nine states that have adopted some form of the ABA Code, all use the term "shall" to describe the judge's responsibility to disqualify, except for Alabama, Colorado, Delaware, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, and Washington, which use the term "should."

13. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d)(ii) (1990); CODE OF JUDICIAL CONDUCT 3C(1)(d)(ii) (1972). The "[t]hird degree of relationship" is defined as a "great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece." MODEL CODE OF JUDICIAL CONDUCT Terminology (1990). Under the 1972 Code, the "degree of relationship is calculated according to the civil law system." CODE OF JUDICIAL CONDUCT Canon 3C(a) (1972).

14. In both ABA Codes, a commentary follows the "black-letter" standards. The commentary is intended to provide guidance to interpretation of the Canons, rather than a statement of additional rules. *See* MODEL CODE OF JUDICIAL CONDUCT Preamble (1990); CODE OF JUDICIAL CONDUCT Preface (1972).

15. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d)(ii) cmt. (1990); CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(d)(ii) cmt. (1972). This provision has been adopted substantially or verbatim by about thirty states. Nine states, on the other hand, have adopted none of the commentary: Louisiana, Maine, Michigan, Ohio, Oklahoma, Oregon, Texas, Utah, and Vermont.

standard requiring recusal when the judge's "impartiality might reasonably be questioned."[16] Because the language following the general rule mandates recusal "including but not limited to" the specific examples, courts interpret and apply the appearance of partiality beyond the rule's explicit illustrations.[17]

> Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's "impartiality might reasonably be questioned" is a basis for the judge's disqualification.[18]

The appearance of partiality thus functions as an inclusive "catch-all" provision available as the source for evaluating recusal in two situations: (1) when facts do not altogether match the language of the specific examples; or (2) when the situation obviously falls outside the specific scenarios.[19] In either case, the general rule operates as a "fall-

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16. Thus, there is a relationship between the general standard of the appearance of partiality and the specific per se examples of disqualifying conditions where unfairness and bias are assumed. Disqualification is not confined to the enumerated "laundry list" examples that follow the general rule.

> The use of the term "reasonably" suggests that the viewpoint for assessing the presence of an appearance of impropriety is not from the perspective of the judge whose continued control of the case is at issue. In part to promote public confidence in the integrity of the judiciary, states use a reasonable person standard to decide the existence of an appearance of impropriety. What purpose does the term "reasonably" serve? Does it operate to affect the care a judge exercises before deciding whether to preside in a case? In other words, if "might" suggests a cautious approach to remaining in a case when there is a concern about appearances, "reasonably" suggests that such caution should be used only if a reasonable person would conclude an appearance of impropriety was present. Thus, a judge who subjectively believes that there is no appearance problem nevertheless may be persuaded to recuse if the reasonable person would find an appearance. Conversely, an overly cautious judge who leans toward recusal whenever anyone raises an appearance problem may decide to remain in a case if a reasonable person could discover no appearance of impropriety.

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 58-59 (2000).

17. *See, e.g.*, Los v. Los, 595 A.2d 381, 384 (Del. 1991) ("[T]he designated instances prompting disqualification do not exhaust all situations in which a judge's impartiality might reasonably be questioned."); State *ex rel.* Wesolich v. Goeke, 794 S.W.2d 692, 698 (Mo. Ct. App. 1990) ("[A] judge's duty to disqualify is not confined to the factors listed . . . but is much broader.").

18. THODE, *supra* note 5, at 60 (1973).

19. *See* King v. State, 271 S.E.2d 630, 633 (Ga. 1980). In *King*, the court found that a district attorney-now-judge had served as a lawyer in the matter in violation of Canon 3C(1)(b). However, because the court found no actual bias, it held that the appearance of partiality sufficed for the

back" position for any judge or party considering judicial disqualification.

When the Commentary describes the issue of judicial disqualification for judges whose "lawyer-relative" is in the same law firm as counsel of record, the scope of such relationships are presumably the same as the Code's explicit standard—a family relationship between a judge and the judge's spouse, the third degree of relationship to either the judge or the judge's spouse, or the spouse of such third-degree relative. Because the Commentary indicates that disqualification is not automatic, the nature of the relationship as well as the fact[20] of the relationship may be relevant. For example, spousal relationships are regarded by the average person "as the closest of all human relationships," so that a judge and his or her spouse would be unable to maintain a wall between their personal lives and their professional responsibilities.[21] In *Smith v. Beckman*,[22] the court presumed that a marriage relationship between a judge and a prosecutor-spouse required the judge's recusal, without any other facts necessary to call into question the judge's impartiality:

> [A]n appearance of impropriety is created by the close nature of the marriage relationship. A husband and wife generally conduct their personal and financial affairs as a partnership. In addition to living together, a husband and wife are also perceived to share confidences regarding their personal lives and employment situations. Generally, the public views married people as "a couple," as "a partnership," and as participants in a relationship more intimate than any other kind of relationship between individuals.[23]

Thus, the risk of favoritism and the chance that confidential information might be transferred may appear greater when the law firm

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judge's disqualification. *See id.* at 634. *But see* Liteky v. United States, 510 U.S. 540, 552-53 (1994) (appearance of partiality standard is no broader than the specific sections that follow it in the federal judicial disqualification statute, 28 U.S.C. § 455).

20. *See* Blaisdell v. City of Rochester, 609 A.2d 388, 390 (N.H. 1992). In *Blaisdell*, while analyzing the appearance of partiality when a judge's uncle's firm appeared before the judge, the court responded to the contention that the judge's relative would not be substantially affected by the case's outcome because there was no actual relationship between the two by saying "[w]hether there was an ongoing personal relationship between the judge and his uncle is irrelevant" to the effect of the proceeding on the relative. *Id.* at 389-90.

21. *See In re* Billedeaux, 972 F.2d 104, 107 (5th Cir. 1992). Siblings also are assumed to "enjoy a close personal and family relationship and, consequently, would be inclined to support each other's interests." SCA Servs. Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977) (per curiam).

22. 683 P.2d 1214 (Colo. Ct. App. 1984).

23. *Id.* at 1216.

of which a judge's spouse is a partner represents a party before the judge.

B. *Relative-Lawyer's Interest*

The second textual source for disqualification when the judge's relative is affiliated with counsel of record is Canon 3E(1)(d)(iii). It requires recusal when the same family relationship mentioned in Canon 3E(1)(d)(ii)[24] exists and the relative "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding."[25] The judge must make a reasoned assessment of the relative's interest and whether that interest could be substantially affected by the case. The 1972 Code uses similar language in Canon 3C(1)(d)(iii). However, the 1972 standard and the federal statute refer (1) to any "interest" rather than "more than a de minimis interest" by the relative, and (2) to the effect that the "outcome of the proceeding" could have on the relative's interest.[26] In addition to this black-letter approach, the Commentary also addresses the situation [with a bracketed exception for the 1972 version of the Commentary]:

> Under appropriate circumstances, the fact that . . . the [lawyer-]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" under Section 3[C]E(1)(d)(iii) may require the judge's disqualification.[27]

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24. *See supra* text accompanying note 13.

25. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d)(iii) (1990). For all the benefits realized by the addition of a Terminology section to the 1990 Code, there was still no definition of "interest." While it may appear useful that a "de minimis" interest is defined in the 1990 Code as "an insignificant interest that could not raise reasonable question as to the judge's impartiality," its vagueness makes it difficult to apply. *Id.* Conduct Terminology.

26. *See id.* Canon 3C(1)(d)(iii). The phrase "the outcome of" was deleted from the 1990 Code, because "the very existence and interim results of a proceeding, in addition to the proceeding's outcome, could be relevant to the interests of a person in a proceeding." LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 28 (1992). Thus, the lawyer-relative's interest that could be substantially affected can depend either on the proceeding itself or its outcome. The change arguably accommodates a larger role for the lawyer-relative's reputational or goodwill interest.

27. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d) cmt. (1990); CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(d)(iii) cmt. (1972). It is curious that the Commentary carries forward the language about the "outcome of" the proceeding even though the 1990 black-letter text deletes that phrase.

Some discussions about due process focus on whether the *judge* has some interest in the outcome of a case. In *Fero v. Kerby*, the court ruled that the fact that the judge's brother-in-law had a substantial interest in the outcome of a criminal case that would enhance the value of the brother-in-law's parallel civil suit "did not give rise to a direct, pecuniary interest on the judge's part" in the

Regardless of whether the analysis is based on the appearance of partiality or the "interest" approach, the size of the firm and the potential fee from the case are important but often overlooked parts of the analysis about whether disqualification is necessary "under appropriate circumstances:"

> For example, if the judge's relative is a member of a two-person law firm in a case in which the firm stands to earn a $1,000,000 contingency fee, then disqualification is clearly required. On the other hand, if the judge's relative is a new associate in a ninety-person law firm in a case in which the firm stands to earn a fee of $1,000, disqualification clearly is not required.[28]

The nature of the "interest" that may be affected by the lawyer-relative's representation is usually monetary. Some cases also discuss whether the judge's role in the case would advance the relative's non-pecuniary interest such as the reputation of the relative or the firm, or the interest in goodwill which attracts clients.[29] The interests in reputation and goodwill also may create an appearance of impropriety.[30]

C. Disclosure of the Relationship by the Judge and Waiver

Disclosure of the judge's relationship to a lawyer affiliated with an attorney of record may occur in two contexts. In both situations, the openness associated with disclosure advances the integrity of the judiciary and the public's trust in the judge. First, the 1990 Commentary states that a judge "should" disclose on the record any information that the parties "might" consider relevant to disqualification issues.[31] Courts increasingly view the duty to disclose such information as broader than the duty to disqualify.[32] Even though the judge is not required to

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civil case. 39 F.3d 1462, 1479 (10th Cir. 1994). The ethical standard says nothing about whether the judge has an interest; the focus is on the lawyer-relative. But due process analysis includes an evaluation of whether the judge had an interest in the case being adjudicated. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986).

28. Adams v. Deaton, Inc., 644 So. 2d 189, 190-91 (La. 1994) (Lemmon, J., concurring in denial of certiorari).

29. *See, e.g.*, Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 84 (2d Cir. 1996); State v. Logan, 689 P.2d 778, 784-85 (Kan. 1984); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1114 (5th Cir. 1980); SCA Servs., Inc. v. Morgan, 557 F.2d 110, 115 (7th Cir. 1977).

30. *See* Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 258 (Utah 1992).

31. MODEL CODE OF JUDICIAL CONDUCT Canon 3E cmt. (1990). The 1972 Code and the federal statute are silent on the disclosure issue.

32. *See, e.g., In re* Edwards, 694 N.E.2d 701, 711 (Ind. 1998) (holding that the commentary to Canon 3E "reveals a separate obligation to disclose that is broader than the duty to disqualify").

disclose, revealing that a judge's relative is affiliated with a law firm of record in the case can promote public confidence in the bench, because it eliminates the likelihood that a party, or a lawyer, will later learn about the affiliation and conclude that the judge improperly failed to disqualify *sua sponte*. Even if the parties and lawyers disagree with the judge's decision that recusal is unnecessary, revealing the information at least avoids any hint that the judge concealed important information from them. In addition, disclosure permits them to preserve the recusal issue for appellate review.

Second, disclosure may also occur when the judge is seeking waiver or "remittal" of a disqualifying conflict from all the parties and attorneys. For a valid waiver, the judge typically must disclose the basis for disqualification and all parties and counsel must waive the disqualification in writing or on the record without any judicial influence.[33] Unlike the aforementioned reason for disclosure of relevant information to enable the parties and attorneys to decide whether to seek the judge's disqualification, disclosure here presupposes that the judge believes that recusal is appropriate; i.e., without the waiver by the parties and attorneys the judge is disqualified from the case. The 1990 Code permits waiver where the basis for disqualification is either the appearance of partiality or the substantial effect of the case on the relative's interest.[34] By contrast, under the 1972 Code, remittal is permitted only for the relative's interest, but not for the appearance of partiality.[35] Conversely, under the federal statute, a waiver of judicial recusal may be obtained for an appearance of partiality but not for an interest that could be substantially affected by the outcome of the case.[36]

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33. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3F cmt. (1990).

34. *See id.* Canon 3F. The 1990 standard, allowing waiver for the appearance of partiality, applies in more than two dozen states. *See* Abramson, *Appearance of Impropriety*, *supra* note 16, at 63 n.42.

35. *See* CODE OF JUDICIAL CONDUCT Canon 3D (1972). Approximately a dozen states still follow this waiver standard. *See* Abramson, *Appearance of Impropriety*, *supra* note 16, at 63 n.41.

36. 28 U.S.C. § 455(e) (2000) provides:

> (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

For an example of a case discussing the issues surrounding waiver of recusal, see *Cloverdale Equip. Co. v. Manitowoc Eng'g Co.*, 964 F. Supp. 1152, 1155-56 (E.D. Mich. 1997) (judge's child was an associate in the law firm representing one of the parties; both parties consented and agreed to judge's continued participation).

II. THE LAWYER-RELATIVE'S LAW FIRM POSITION

A. Lawyer-Relative as Partner

Courts are most willing to disqualify a judge when his or her relative is a partner in the law firm of record.[37] Judicial analysis of the recusal issue for judges whose lawyer-relatives are partners in law firms often begins with discussion of established agency and partnership principles.[38] An agency relationship exists between law firm partners and between each partner and the law firm.[39] As a result of the rights, duties and liabilities of the partnership relationship, a partner has an interest in every matter handled by the firm.[40] The result of any firm representation can affect each partner's financial interest as well as his or her non-economic interest such as reputation or good will.[41] Thus, the law firm's appearance or an entry of appearance by an individual partner of that firm is the equivalent of an entry by each lawyer in the firm.

Several cases apply a per se rule of judicial disqualification when the judge's lawyer-relative is a partner in the same law firm as counsel of record; as with *Potashnick v. Port City Construction Company*, all have applied the specific "interest that could be substantially affected by the outcome" standard.[42] Equity partners typically receive a fixed percentage of the law firm's income that is not dependent on the outcome of any particular case, and that partnership share always has the

37. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1113-14 (5th Cir. 1980) (holding "that when a partner in a law firm is related to a judge within the third degree, that partner will *always* be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm" and thus the judge is required to disqualify him or herself (emphasis added)).

38. *See, e.g.*, SCA Servs., Inc. v. Morgan, 557 F.2d 110, 114 (7th Cir. 1977).

39. *See In re* Moffett, 556 So. 2d 723, 725-26 (Miss. 1990) (where the judge's brother's firm represented one of the parties, the court noted that the public, knowing nothing about the parties, lawyers or the judge would nevertheless probably react to a legal victory by the judge's brother's firm by saying, "'Why, no wonder, the judge's brother was one of the lawyers.' The appearance of impropriety!").

40. *See, e.g.*, Unif. Partnership Act, §§ 6, 9, 11-15 (1914).

41. *See Potashnick*, 609 F.2d at 1113; *SCA Serv., Inc.*, 557 F.2d at 114.

42. *See Potashnick*, 609 F.2d at 1113 (partner); Blaisdell v. City of Rochester, 609 A.2d 388, 390 (N.H. 1992) (partner); Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 258 (Utah 1992) (partner or equity participant); *SCA Serv., Inc.*, 557 F.2d at 112n.2, 116 (partner). These cases were decided either under the federal statute which does not include the permissive language of the Commentary, or by courts in states which have not adopted the Commentary.

potential to be affected by the outcome of each of the firm's cases.[43] A rule of automatic disqualification may be harsh and inconvenient, but the opinions regard the public's confidence in the integrity and impartiality of the judiciary and the specific judge as more important.[44]

In contrast to the per se cases, a fact-bound application of the ethical standard may result in a conclusion that disqualification is unnecessary. The Code and federal statutory standards prescribe recusal when a close relative "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."[45] *Pashaian v. Eccelston Properties, Ltd.*[46] criticized the per se recusal cases by stating that it is "unrealistic to assume . . . that partners in today's law firms invariably 'have an interest that could be *substantially affected* by the outcome of' any case in which any other partner is involved."[47] After considering in camera the extent of financial participation of the judge's wife's sister's husband in the net income of the law firm of record and the amount in controversy in the instant case, the judge concluded that the lawyer-relative's interest in the law firm would not be "substantially affected" by the outcome of the case.[48]

Pashaian's approach is more realistic than *Potashnick's* for measuring whether a lawyer-relative has an interest which could be

43. *See Potashnick*, 609 F.2d at 1113-14; *Reg'l Sales Agency, Inc.*, 830 P.2d at 256. *Regional Sales* recognized that the connection between judicial decisions and the relative's compensation is greatest when the fee arrangement is contingent on the outcome of the case or requires the judge to award attorney fees. *See id. Regional Sales* was distinguished in *Inquiry Concerning a Judge*, 81 P.3d 758 (Utah 2003), because the latter was a "judicial discipline matter[] where no money is at issue . . . ." 81 P.3d at 760; *see also SCA Servs., Inc.*, 557 F.2d at 115 ("[A] favorable outcome would obviously justify a higher fee.").

44. *See Potashnick*, 609 F.2d at 1112. It is doubtful whether the "interest" analysis, as a financial "interest," compels recusal when the lawyer-relative does not join the firm until after the representation. For example, weeks before the 2000 election, John Scalia, Justice Scalia's son, accepted a position with the firm later representing George W. Bush in the Florida courts although he did not join the firm as a shareholder until January 2001. *See* Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 425 (2003). Reputational interests, on the other hand, inure to the partners at the time of the representation as well as to partners who later join the firm.

45. *See* CODE OF JUDICIAL CONDUCT Canon 3C(1)(d)(iii) (1972).

46. 88 F.3d 77 (2d Cir. 1996).

47. Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 83 (2d Cir. 1996) (citing 28 U.S.C. § 455(b)(5)(iii)) (emphasis in original).

48. *See id.* at 78. A lawyer-relative who is a partner also may lack an interest "that could be substantially affected by the outcome of the proceeding" when the partner is a salaried partner rather than an equity partner. *See, e.g.*, Nobelpharma AB v. Implant Innovations, Inc., 930 F. Supp. 1241, 1266-67 (N.D. Ill. 1996).

substantially affected by the outcome of a case.[49] Increasingly, law firms have different levels of partnership based in large part on investment and compensation. Traditionally, all law firm partners shared in the profits (or losses) of the firm, but many large firms now have both equity partners and salaried partners. Because salaried partners have a set income with no investment in the partnership, it is more difficult to identify how they possess an interest that could be substantially affected by the outcome of a particular case. Thus, whether a lawyer-relative has an "interest" in the outcome of a proceeding, requiring judicial disqualification, may depend in large part on the type of partnership held by the relative.[50]

Even if disqualification is denied because the judge's relative lacks an "interest" in the outcome of the case, disqualification is also possible when lawyer-relatives are partners, under the general "appearance of impropriety" criterion and pursuant to the Codes' Commentary. In *Jenkins v. Forrest County General Hospital*,[51] the judge's brother was a senior partner in the law firm representing a hospital, and the medical community had assisted in electing the judge.[52] Finding no wrongdoing by the judge, the appellate court nevertheless found that its "potential" for wrongdoing and how the situation appears to the public and the parties would raise doubts in reasonable persons' minds about the judge's impartiality.[53]

The appearance of partiality also may be a concern when the judge's relative is a partner in a firm that does not represent a party in the current case, but instead represents it in other litigation and therefore receives fees from that client. In *Microsoft Corporation v. United States*,[54] Chief Justice Rehnquist stated that he had not recused himself from consideration of Microsoft's petition for certiorari in an antitrust suit brought by the United States, even though his son is a partner in the

49. The *Pashianan* approach appears to disregard a law firm's non-pecuniary interests in reputation or goodwill with its clients and in the ability to attract new clients as part of the "interest" analysis. *Potashnick*, on the other hand, addresses the issue as part of the "interest" analysis. *See Potashnick*, 609 F.2d at 1113.

50. Withdrawal from representation of a party cures the disqualifying interest for the judge. *See, e.g.*, S.J. Groves & Sons Co. v. Int'l Bhd. of Teamsters, 581 F.2d 1241, 1248 (7th Cir. 1978).

51. 542 So. 2d 1180 (Miss. 1989). The following year, the same court cited *Jenkins* in support of the same judge's disqualification when his brother's firm was counsel of record. *See In re* Moffett, 556 So. 2d 723, 724 (Miss. 1990). However, four dissenters noted that reliance upon *Jenkins* was misplaced. *See id.* at 728 (Sullivan, J., dissenting).

52. *See Forrest County Gen. Hosp.*, 542 So. 2d at 1180.

53. *See id.* at 1181.

54. 530 U.S. 1301 (2000).

party's law firm retained as local counsel by Microsoft in private antitrust litigation.[55] He conceded that the Court's decision could affect Microsoft's exposure in other antitrust lawsuits, but he reasoned that

> [e]ven our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to [the appearance of impropriety rule] seems contrary to the "reasonable person" standard which it embraces.[56]

Certainly, every case decided by an appellate judge may affect a client represented by a law firm that includes a judge's relative. However, Chief Justice Rehnquist's broad statement ignores the fact that he had decided a case involving not just any party, but the same party his son's firm was representing in pending litigation about the same types of issues.[57] An objective observer might conclude that his participation in the certiorari application would give rise to an appearance of partiality, and that observer at least would be interested in knowing more information about the connection between the Supreme Court appeal and the other litigation before a definitive conclusion could be reached.

In 1993, seven Justices of the United States Supreme Court issued a "Statement of Recusal Policy" about lawyer-relatives of Justices who are

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55. *See id.* at 1301.

56. *Id.* at 1303.

57. An interest that a judge might have in the lawyer-relative's success "is not the type of interest which would lead the average judge to fail to apply the proper" rules in a trial. *Fero v. Kerby*, 39 F.3d 1462, 1480 (10th Cir. 1994). In In re *Billedeaux*, 972 F.2d 104 (5th Cir. 1992), the court believed that the interest of the judge's relative was too remote and speculative for the appearance of partiality standard to require recusal. *See id.* at 106. The decision prompted a stinging dissent about how a reasonable person would respond:

> [I]f the average person is asked whether he would feel comfortable having his own personal injury case tried by a judge whose spouse was a partner in a law firm that represented the defendant in other matters, the answer would be, "Would the judge really be impartial?" I think that question is reasonable.

Id. at 107 (DeMoss, J., dissenting).

When the lawyer-relative represents *similarly named but different* parties than those in the instant case, it has been held that a reasonable person knowing all the facts likely would find no conflict. *See, e.g.*, Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 2003 WL 282187 (S.D.N.Y. 2003) (noting that "Sony defendants in this case and the Sony entities represented by [the judge's] husband's firm are not the same parties . . . [but] merely two of many separate, although related, corporations bearing the Sony name"); Canino v. Barclays Bank, PLC, 1998 WL 7219, at *3 (S.D.N.Y. 1998) (finding that spouse's law firm had been retained by Barclays on an unrelated case does not require recusal).

partners in law firms appearing before the Court.[58] The pertinent portions state:

> We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys. . . . We think it desirable to set forth what our recusal policy will be . . . when the covered lawyer is a *partner* in a firm appearing before us. . . .
>
> The provision of the recusal statute that deals specifically with a relative's involvement as a lawyer in the case requires recusal only when the covered relative "[i]s acting as a lawyer in the proceeding." § 455(b)(5)(ii). It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, see, *e.g.*, *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U.S. 820 (1980). It is also apparent, from use of the present tense, that current participation as lawyer, and not merely past involvement in earlier stages of the litigation, is required.
>
> A relative's partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific provisions of § 455, which require recusal when the judge knows that the relative has "an interest that could be substantially affected by the outcome of the proceeding," § 455(b)(5)(iii), or when for any reason the judge's "impartiality might reasonably be questioned," § 455(a). We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not *automatically* trigger these provisions. If that were the intent of the law, the *per se* "lawyer-related recusal" requirement of § 455(b)(5)(ii) would have expressed it. *Per se* recusal for a relative's membership in the partnership appearing here, or for a relative's work on the case below, would render the limitation of § 455(b)(5)(iii) [sic] to *personal* work, and to *present* representation, meaningless.
>
> We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today's

58. Statement of Recusal Policy, Supreme Court of the United States (Nov. 1, 1993) (on file with Hofstra Law Review). Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg signed the Statement. *See id.*

> national law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.
>
> . . . .
>
> [We will recuse ourselves where] the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that . . . the outcome will have a substantial effect upon each partner's compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares.[59]

The statement covers past, active involvement of the lawyer-relative in the instant proceeding,[60] as well as the lawyer-relative situation. For the lawyer-partner, the Statement observes that the federal statutes may suggest recusal under the "two less specific provisions of § 455"—"'an interest that could be substantially affected by the outcome of the proceeding'" and the appearance of partiality—but it notes that a lawyer-relative's partnership in a firm appearing before it, or the relative's earlier work on a case later coming before the Court do "not automatically trigger these provisions."

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59. *Id.*

60. Although it is beyond the scope of this Article, past involvement of the lawyer-relative can create an appearance of partiality when the judge later presides in the case. For example, the relative's fee arrangement may be dependent upon the ultimate outcome of the case, which the judge's decisions may influence. Moreover, a bright-line rule negating recusal for past involvement could result in lawyer-relatives remaining as counsel until the case finds its way to the judge-relative's court.

The final text of the "Statement of Recusal Policy" suggests a series of drafts and compromises which led to a rather disjointed result. The Justices initially stated that it does not serve the public interest to recuse "out of an excess of caution, whenever a relative is a partner in the firm before us." They noted that unnecessary recusals would harm the Court's functioning. "Needless recusal[s]" affect the certiorari process and may produce an even division on the merits of the case. In addition, they would produce opportunities for the "common occurrence" of recusal especially as a preferred matter of strategy.[61] The Statement assumes that the relatives will be in "national law firms" that frequently appear before the Court. At this point in the Statement, recital of these legitimate arguments suggests to the reader that the Justices will presume that recusal is not essential and instead look at the possibility of recusal on a case-by-case basis.

In a stunning turnabout from the declarations in the earlier part of the Statement, the Justices then stated that recusal will occur in "all cases in which appearances on behalf of parties are made by firms in which our relatives are partners." They recognized "that in virtually every case before us with retained counsel there exists a genuine possibility that the outcome will have a substantial effect upon each partner's compensation." Their statement appears to exclude those cases where the lawyer-relative's large firm is representing a party pro bono or as the result of a court appointment.

The Statement also seems conclusively to eliminate any nonpecuniary interest in reputation or goodwill as relevant to the Justices' recusal decision. "The policy takes no account of the prestige benefit of winning a case in the Supreme Court—especially a controversial case."[62] The primary benefit to a law firm of taking and winning a case in the Court may well be to the enhanced reputation of the law firm and its partners instead of a financial interest. And complying with the Statement by not providing a portion of the fees derived from a case in the Court to the lawyer-relative does not prevent

61. If a court finds that the sole or primary reason for retaining the judge's relative is to disqualify the judge, the lawyer is disqualified. *See, e.g., In re* BellSouth, 334 F.3d 941, 949 (11th Cir. 2003).

62. Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 630 (2002) (discussing the written assurances sent to the Court by his law firm that Eugene Scalia would receive no pecuniary benefit from his firm's representation of George W. Bush in the Supreme Court litigation).

him or her from receiving a reputational benefit attaching to all partners.[63]

For the signatories to the Statement, the only exception to the bright-line recusal in the Statement occurs when the Court has "received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares." Imprecision in this exclusion leaves open such issues as when the written assurance needs to be received.[64] Common sense indicates that the law firm would forward the written assurance no later than the time when a response to a petition for certiorari is due.

Second, does "permanent basis" for the relative's exclusion from the partnership share refer only to the case at bar? It is possible to read the "permanent basis" language so that law firms with relatives of Supreme Court Justices will effectively "register" their financial arrangement with the relative-partner so that it is effective for any case thereafter in which the firm is appearing. Otherwise, it could be argued that the Statement's reference to "permanent basis" could be construed to be a case-by-case financial agreement perhaps excluding the lawyer-relative from compensation as long as each case is pending before the Court.

Finally, why did the Justices not acknowledge the possibility that the parties can waive the disqualification? As already mentioned, the federal statute permits a waiver of judicial recusal for an appearance of partiality but not for an "interest that could be substantially affected by the outcome" of the case. Failing to consider waiver as an alternative may leave the Court with the "possibility of an even division on the merits of the case, and . . . a distorting effect upon the certiorari process" that the Statement itself seeks to avoid.

B. Lawyer-Relative as a Non-Partner

Case law generally shows a judicial reluctance to disqualify when the judge's lawyer-relative is merely affiliated with a law firm but is not a partner.[65] The analysis generally focuses on whether the relative's

63. *See id.*

64. Apparently, Supreme Court litigation profits had been deducted from Eugene Scalia's partnership income for at least two years before his firm's involvement in *Bush v. Gore*. *See* Neumann, *supra* note 44, at 443.

65. *See, e.g.*, Jenkins v. Ark. Power & Light Co., 140 F.3d 1161, at 1162-63 (8th Cir. 1998) (child had accepted but not begun position as associate); United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 463-64 (5th Cir. 1977) (child was associate); Wilmington Towing Co.

association with the law firm raises the issue of whether the judge's "impartiality might reasonably be questioned."[66] One of the earlier cases that addressed the issue was *United States ex rel. Weinberger v. Equifax, Inc.*,[67] in which the trial judge refused to recuse after discovering that his son was an associate in the law firm representing one of the parties.[68] Conceding that the issue might be resolved differently if the judge's son were a partner in the law firm, the court found that automatic disqualification was inappropriate because the son's salary interest as an associate was "too remote" to constitute a "financial interest" under the federal statutory scheme.[69]

After assuming that the relative-judge had examined the lawyers' arguments, the *Equifax* court also concluded that the judge had not abused his discretion by denying the motion to recuse under the general appearance of partiality standard.[70] While the court recognized that the judicial viewpoint for deciding the appearance of partiality issue is that of the reasonable person, the court noted that the trial judge had "perceived no justification for removing himself," perhaps implying that the analysis was exclusively from the judge's subjective perspective.[71]

As mentioned, most appellate decisions rely on the appearance of partiality standard,[72] because it is generally assumed that a non-partner lawyer-relative is salaried. As the Commentary and the decisions state

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v. Cape Fear Towing Co., 624 F. Supp. 1210, 1211 (E.D.N.C. 1986) (child was temporary summer employee and tentatively accepted offer of employment as associate); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp 84, 85 (S.D. Ala. 1980) (father was "of counsel" to firm); Washington v. Mont. Mining Props., Inc., 795 P.2d 460, 462 (Mont. 1990) (son was intern); Keene Corp. v. Rogers, 863 S.W.2d 168, 171 (Tex. Ct. App. 1993) (son-in-law was associate); Stephens v. Stephens, 292 S.E.2d 689, 690 (Ga. 1982) (child was associate). *Cf. In re* Kan. Pub. Employees Ret. Sys., 85 F.3d 1353, 1357 (8th Cir. 1996) (child accepted but later withdrew acceptance of employment offer to be an associate with party-law firm).

66. *See, e.g., United States ex rel. Weinberger*, 557 F.2d at 463-64 (son was an associate); Cloverdale Equip. Co. v. Manitowoc Eng'g Co., 964 F. Supp. 1152, 1155 (E.D. Mich. 1997) (son was a junior associate); *Wilmington Towing Co.*, 624 F. Supp. at 1211-1212 (child was summer intern and tentatively accepted offer of employment as associate after graduation from law school).

67. 557 F.2d 456 (5th Cir. 1977).

68. *See id.* at 463-64.

69. *See id.* at 463; *see also* 28 U.S.C. § 455(b)(5)(iii) (2000).

70. *See United States ex rel. Weinberger*, 557 F.2d at 464.

71. *See id.*

72. Decisions applying the "interest" standard usually conclude that there is no need for disqualification, finding no effect, much less a substantial effect, created when the salaried-lawyer-relative's firm is counsel of record. The salaried attorney's position with the firm affords no discernible interest that could be substantially affected by the outcome of the case. *See, e.g.*, Jenkins v. Ark. Power & Light Co., 140 F.3d 1161, 1164-65 (8th Cir. 1998); Miller Indus., Inc. v. Caterpillar Tractor Co., 516 F. Supp 84, 85-86 (S.D. Ala. 1980)

without explanation, the affiliation with the law firm by itself provides no reasonable basis for questioning the judge's impartiality, even when the relationship with the judge is a first-degree connection.[73] On the other hand, a concern for the harm caused to public confidence in the judicial system creates an arguable appearance of partiality even when a nonpartner-relative's firm appears before the judge.[74] The reasonable person may conclude that, "No wonder that party won. The judge's relative works for their law firm!"

C. Lawyer-Relative as Public Attorney

Judicial decisions are split about whether recusal is necessary when a relative is a government attorney but is not counsel of record in the pending case. A government lawyer's "compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case."[75] Thus, a prosecutor usually has no interest that would be affected by a prosecution brought by another prosecuting attorney in the same office, and the fact that a judge is disqualified when a lawyer-relative is counsel of record is not imputed to the lawyer-relative's fellow prosecutors.

In *State v. Logan*,[76] the judge's son worked as an assistant prosecutor whose colleague was trying to convict the appellant.[77] The appellate court upheld the trial judge's denial of the motion to disqualify for two reasons. First, unlike a private law firm, a prosecutor lacks an interest in developing the goodwill that attracts clients.[78] Building a reputation, moreover, is inadequate to create an appearance of partiality.[79] Second, no reasonable person would believe that a judge is likely to be pro-prosecution merely because a relative is a prosecutor.[80]

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73. *See, e.g.*, Wilmington Towing Co. v. Cape Fear Towing Co. 624 F. Supp. 1210, 1212 (E.D.N.C. 1986); Keene Corp. v. Rogers, 863 S.W.2d 168, 172 (Tex. Ct. App. 1993); *see also* Washington v. Mont. Mining Props., Inc., 795 P.2d 460, 464 (Mont. 1990) (although the judge's son's internship with counsel of record did not create the appearance of impropriety, recusal was required in light of other circumstances that were considered).

74. *See, e.g.*, Stephens v. Stephens, 292 S.E.2d 689, 692 (Ga. 1982).

75. Smith v. Beckman, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984).

76. 689 P.2d 778 (Kan. 1984).

77. *See id.* at 780.

78. *See id.* at 784-85.

79. *See id.* at 785.

80. *See id.*; *see also* State v. Harrell, 546 N.W.2d 115, 116 (Wis. 1996) (finding no duty for judge to disqualify when spouse works in prosecutor's office, when spouse did not participate in or help prepare instant case); Trimble v. State, 871 S.W.2d 562, 567 (Ark. 1994) (determining that

By contrast, the court in *Smith v. Beckman*[81] prohibited a judge from presiding in a case because the judge's spouse worked in the prosecutor's office, even though steps had been taken to ensure that the spouse had no contact with cases in which the judge presided.[82] As in the private law firm context, the *Smith* decision leaves the relatives with a choice. Either the relative can forego certain types of law practice, or the judge's docket can be adjusted significantly to eliminate cases involving the lawyer-relative's public agency. The latter adjustment may be feasible in a multi-judge district. However, in a single-judge area, the logistics of special judge appointments may result in unwanted delays for attorneys and litigants.

III. PROPOSALS FOR CHANGE

Public confidence in the judiciary can be restored by modifying the interpretation and application of ethical norms. Judges may not recuse themselves as frequently as may be necessary to preserve public confidence in the judiciary. The black-letter language of the ABA Code and the federal statute should be modified so that a judge is disqualified:

> When the judge knows that a lawyer in a proceeding is affiliated with a law firm in which a relative of the judge is a partner or has an ownership interest in the law firm.

The new standard clarifies that recusal is mandatory when the lawyer-relative is a partner, regardless of how the relative's partnership interest in the firm is defined. Recusal is necessary whether the lawyer-relative is an equity or salaried partner. The status of the lawyer-relative as a partner, rather than the method of remuneration, determines whether recusal is compulsory. From the perspective of the reasonable person, a lawyer-relative's partnership position in a law firm creates the appearance of partiality, or an interest that could be substantially affected by the outcome of the case, or both. Withholding litigation profits from the lawyer-relatives is not an alternative to recusal, because removing the financial interest still leaves a reputational or goodwill

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although the appearance generated by employing the judge's son for the summer in the prosecutor's office was "none too good," no disqualification was required).

The *Logan* concurrence found it "preferable . . . for a trial judge to recuse himself from the trial of criminal cases or . . . to offer to do so on the record." *Logan*, 689 P.2d at 785 (Miller, J., concurring).

81. 683 P.2d 1214 (Colo. Ct. App. 1984).

82. *See id.* at 1216.

interest for the lawyer-relative. Nevertheless, the parties and attorneys could still use the remittal provisions to waive the conflict.

For non-partner, lawyer-relatives who are affiliated with a law firm or government agency, the Commentary to the Codes should be amended to emphasize the importance of a careful factual analysis under the appearance of partiality standard.

> Under appropriate circumstances, when the judge knows that the relative is affiliated with a law firm of record in a proceeding disqualification may also be required, because "the judge's impartiality might reasonably be questioned." The relevant factors for making a decision about recusal include consideration of (1) the size of the lawyer-relative's law firm, the nature and notoriety of the proceeding, (2) the fee arrangement between the law firm and the client, (3) whether the lawyer-relative is working for a private law firm or a public agency, (4) whether the lawyer-relative's reputation or goodwill will be significantly enhanced by a successful result in the proceeding, (5) the nature and degree of the relationship between the judge and the lawyer-relative, (6) the prospect of an imminent decision regarding promotion or retention for the lawyer-relative, and (7) whether the law firm's compensation plan includes a bonus or other reward system.

While it is possible that these factors often will result in judicial disqualification, a per se rule is inappropriate for all the various combinations of factors under the Commentary. As a Commentary should, the language informs judges, lawyer-relatives, and other lawyers and parties about the relevant standards which a judge should weigh when faced with a motion to disqualify or a decision to recuse *sua sponte*. The list is not exhaustive, but it reflects important circumstances in the current case law. As more legal decisions are reported, other factors can be added.

CONCLUSION

The ABA Model Codes of Judicial Conduct and federal statutes describe the ethical duty of a judge to recuse himself or herself from a case when the judge's lawyer-relative is affiliated with counsel of record. This Article has noted specific ways in which trial and appellate courts have interpreted or applied the ethics standards. The common law of judicial disqualification which has developed attests to the difficulty in drafting ethical standards which address every specific situation that might arise. Periodic modification of the standards is important to reflect

legal developments as well as current levels of public confidence in the judiciary.