

ISSUE

May a judge hear cases in which attorneys from the law firm in which the judge's niece practices represent litigants before the judge?

ANSWER

Yes, with some caution.

FACTS

A judge's niece is an associate in a law firm. The judge withdraws from cases in which the niece represents litigants. As an associate, the niece receives a salary and may also receive bonuses depending upon the financial success of the firm. Other attorneys from the firm also represent clients before the judge.

DISCUSSION

The Committee concludes that the issue presented involves the provisions of SCR 60.04(4)(e).

SCR 60.04

SCR 60.04 states:

A judge shall perform the duties of the judicial office impartially and diligently.

SCR 60.04(4)(e) states more specifically:

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

....

(e) The judge or the judge's spouse, or a person within the third degree of kinship to either of them, or the spouse of such a person meets one of the following criteria:

1. Is a party to the proceeding or an officer, director or trustee of the party.
2. Is acting as a lawyer in the proceeding.
3. Is known by the judge to have a more than a de minimus interest that could be substantially affected by the proceeding.
4. Is to the judge's knowledge likely to be a material witness in the proceeding.

The judge is complying with the Code of Judicial Conduct by withdrawing from cases in which the niece represents litigants since she is "within the third degree of kinship" under SCR 60.01 (16) and SCR 60.04(4)(e) and is "acting as a lawyer in the proceeding" under SCR 60.04(4)(e)2.

With respect to other attorneys in the niece's law firm, the Code is less clear and leaves the answer to the judge's analysis on a case by case basis. The Comment to SCR 60.04(4) provides some general guidance: "Under this rule, a judge must recuse himself or herself whenever the facts and circumstances the judge knows or reasonably should know raise reasonable question of the judge's ability to act impartially, regardless of whether any of the specific rules in SCR 60.04(4) applies." More specific guidance is provided in the Comment to SCR 60.04(4)(e) which 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 require the judge's recusal. Under appropriate circumstances, the fact that the judge's impartiality may reasonably be questioned or that 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' may require the judge's recusal.

Additionally, factors that a judge may consider in a case by case analysis include but are not limited to the following:

- a) the appearance to the general public of the failure to recuse;
- b) the appearance to other attorneys, judges and members of the legal system of the failure to recuse;
- c) the administrative burden of the recusal on the courts; and
- d) the extent of the financial, professional, or other interest of the relative in the matter.

In a case in which recusal is not required, a judge may choose to disclose an affiliation to the parties and their lawyers may ask them to consider, out of the presence of the judge, whether or not they want the judge to recuse himself or herself. As stated in the Preamble to the Code of Judicial Conduct, the provisions of the Code are "rules of reason" and should be applied "in the context of all relevant circumstances."

CONCLUSION

A judge may hear cases in which attorneys from the firm in which the judge's niece practices represent clients, depending upon the judge's case by case analysis of the appropriateness of doing so.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60-Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 00-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 18th day of January, 2001.

Thomas H. Barland
Chair