



# Ohio Board of Professional Conduct

**OPINION 2023-05**

Issued June 9, 2023

Withdraws Adv. Op. 1991-08

## **Appearance of a Lawyer Affiliated with the Law Firm of a Judge's Spouse**

**SYLLABUS:** The Code of Judicial Conduct does not mandate a judge's disqualification when a lawyer employed by, associated with, or in partnership with the judge's spouse appears before the judge. The determination of whether a judge's impartiality may be reasonably questioned or whether an interest of the judge's spouse may be substantially affected by the outcome of the proceeding is to be made on a case-by-case basis. A judge should disclose to the parties the spouse's employment with the law firm even if there may be no basis for disqualification.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**APPLICABLE RULES:** Jud.Cond.R. 2.11

#### QUESTION PRESENTED:

Whether a judge should recuse himself or herself in a proceeding in which a lawyer appearing in the proceeding is either employed by, associated with, or in a partnership with the judge's spouse?

#### OPINION:

##### *Analysis*

Jud. Cond. R. 2.11 requires a judge to disqualify himself or herself from a matter under a variety of specific circumstances, including whether the judge's impartiality might reasonably be questioned. The question presented is addressed, in part, by Jud.Cond.R. 2.11(A), cmt. [4]: "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.” When a lawyer affiliated with a judge’s spouse makes an appearance before the judge, the judge must consider: 1) whether hearing the matter may cause the judge’s impartiality to be reasonably questioned, and 2) whether the judge or the spouse has more than a *de minimis* interest that could be substantially affected by the proceeding. Jud.Cond.R. 2.11(A); 2.11(A)(2)(c).

*A reasonable question of impartiality*

In addressing the first consideration, a former Chief Justice held that “[t]he proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is \* \* \* an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, ¶8. (applying the antecedent to Jud.Cond.R. 2.11(A).) “The reasonable observer [in Rule 2.11(A)] is to be fully informed of all the relevant facts in the record—not isolated facts divorced from their larger context.” *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319, ¶6.

A judge’s disqualification is not always required when a lawyer who practices law with someone whom the judge maintains a close relationship appears before the judge. *In re Disqualification of Miller*, 81 Ohio St.3d 1209, 1997-Ohio-13. In *Miller*, the Chief Justice considered factual circumstances similar to the question presented. In that case, the judge was dating a lawyer employed by the same firm as counsel for a party appearing before the judge. The Chief Justice concluded there was no indication that the lawyer whom the judge was dating was serving as counsel in the matter and that the relationship did not raise a reasonable question regarding the judge’s impartiality. *Id.*

*Degree of interest affected by the proceeding*

The second consideration involves an inquiry into the materiality of the spouse’s interest that may be affected by the outcome of the proceeding. The Chief Justice has previously considered the question of disqualification when a lawyer appearing before a judge is a lawyer in the law firm that employs the judge’s relative. In *In re Disqualification of Celebreeze*, 145 Ohio St.3d 1242, 2015-Ohio-5672, the brother of the judge was employed by the law firm making an appearance. The judge’s brother was a non-equity associate

of the firm and did not share in the profits of the firm. The Chief Justice held that under the circumstances, there was no basis to conclude that the judge's brother had an interest that could be substantially affected and consequently the judge's impartiality could not be reasonably questioned. *Id.*

In such a situation the outcome of the case would likely have only an indirect financial impact on the relative since the income of an associate is typically a fixed salary. See Flamm, *Judicial Disqualification* Section 7.6 at 183 (2d.Ed.2007). In the Board's opinion, disqualification is not required when the spouse of the judge is a salaried associate of the firm that is appearing before him or her in a proceeding. However, a judge should always disclose information on the record that the judge believes the parties or lawyers may consider relevant to a potential motion for disqualification, even if the judge believes disqualification is not required. Jud.Cond.R. 2.11, cmt.[5]. A judge's spousal relationship with a lawyer employed by a firm appearing before the judge qualifies as the type of information that a judge should disclose to parties and counsel.

Conversely, in cases where the judge's spouse is an equity partner in the law firm making an appearance before the judge, there is a greater potential that the spouse's interest will be substantially affected by the outcome in the case. A law firm partner may be reasonably viewed as having more than a *de minimis* economic interest in the outcome of the case since his or her income is often tied to the annual financial gains and losses of the firm. Whether the outcome of the case will substantially affect the spouse's economic or other interest will require some degree of inquiry by the judge.

In a case where fees are earned by the law firm's counsel on an hourly basis, the outcome of the case is likely to be immaterial to the spouse's economic interests and the judge's disqualification would not be required. However, disqualification could be warranted in a contingent fee case, where the economic interest of the spouse and other partners in the firm could be directly impacted by the amount of damages awarded, or in a matter involving the award attorney fees or sanctions against the spouse's law firm, if the spouse would bear some financial responsibility for an adverse award.

If a judge determines that the spouse's economic interest will be substantially affected by the case's outcome, then the judge's disqualification is required under Jud.Cond.R. 2.11(A)(2)(c). Jud.Cond.R. 2.11, cmt.[4]. For this reason, it is important that a

judge makes a reasonable effort to keep informed about the personal economic interests of his or her spouse or domestic partner and independently consider the facts of each situation. Jud.Cond.R. 2.11(B).

*Waiver of disqualification*

Other than in situations involving bias or prejudice against a party or his or her counsel, a judge may seek a waiver when disqualification is required by Jud.Cond.R. 2.11(A). Jud.Cond.R. 2.11(C). A judge seeking a waiver should disclose the relevant facts serving as a possible basis for disqualification, permit the parties to discuss whether to waive the conflict outside of his or her presence, then place the decision of the parties on the record. The ability to seek a waiver is not appropriate in all situations and a judge should carefully consider making the request only after ascertaining that he or she can proceed fairly and impartially in the case even when the parties have waived the disqualification.