

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 94-12  
(August 17, 1994)

**Propriety of Hearing Matters Involving an Attorney  
Married to a Court Clerk**

**Issues**

1. Must judges recuse themselves from hearing cases where an attorney is the spouse of the judge's clerk?

**Answer:** No, with reservations.

2. May the judge appoint the attorney to indigent defense cases?

**Answer:** Yes, with qualifications.

**Facts**

A superior court judge's clerk is married to an attorney who appears regularly in the judge's court. The attorney's name also appears on the list of attorneys willing to accept appointments to represent indigent defendants. The appointment list is used on a rotational basis.

**Discussion**

**Issue 1**

A court clerk is an integral part of the adjudicative process. The clerk not only marks exhibits, retains custody of exhibits, retrieves files, and conveys messages from the judge to the litigants, but may also be privy to the private and personal comments and musings of the judge. Because of this special position of responsibility and trust, the clerk may be perceived as an extension of the judge's office or function and thus subject to the same ethical standards imposed on the judge when it comes to relationships with attorneys, family members, and friends.

A judge's obligation is to avoid the appearance of impropriety by performing judicial duties impartially. *See* Canon 2. This committee has issued several opinions wherein the subject of a judicial conflict of interest with attorneys and their spouses or relatives has been explored. *See* Opinions 77-01, 84-01, 85-01, 90-08, 91-01, 92-01 and 92-11. In those opinions, the need for recusal was not found to be automatic. In each case, the judge had to first determine the nature of the relationship and its potential effect on the judge's impartiality and objectivity.

The test for disqualification as enunciated in Canon 3E of the Code of Judicial Conduct is whether the judge's impartiality might reasonably be questioned. We believe that so long

## Advisory Opinion 94-12

as a judge establishes strict protocols for insulating the clerk from participating in or having contact in any way with the spouse's cases, disqualification is not necessary. These protocols may include removing the clerk from the courtroom, prohibiting the clerk from physically handling the spouse's files, and, especially, restraining from commenting or discussing the spouse's pending cases with the clerk. The judge should also be cognizant of any other activity of the clerk which would give rise to the appearance of impropriety. Even with these safeguards, a judge should disclose to an attorney, when circumstances warrant, the fact of opposing counsel's marriage to the clerk. *See* commentary to Canon 3E.

### **Issue 2**

In this instance, the judge has informed the committee that there is a court appointment list that is used on a rotational basis. If in fact there is a true rotation with little or no discretion exercised by the judge, no impropriety exists. However, if the judge exercises discretion, such as appointing attorneys based on the complexity of the case, potential hours to be billed, or the negotiation of a fee for the handling of indigent defense cases, then the judge should request another judge to handle those administrative matters. A judge's administrative responsibilities should be discharged at all times with impartiality, on the basis of merit, and avoiding all appearances of nepotism or favoritism.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 2 and 3E (1993).

### **Other References**

Arizona Judicial Ethics Advisory Committee, Opinions [77-01](#) (April 29, 1977); [84-01](#) (March 3, 1984); [85-01](#) (1985); [90-08](#) (Sept. 28, 1990); [91-01](#) (April 29, 1991); [92-01](#) (Jan. 24, 1992); [92-11](#) (Sept. 9, 1992).