FOR IMMEDIATE RELEASE

November 1, 1993

Supreme Court of the United States
Washington, D. C. 20543

# STATEMENT OF RECUSAL POLICY

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. In connection with a case four Terms ago, the Chief Justice announced his policy (with which we are all in accord) regarding recusal when a covered relative is "an associate in the law firm representing one of the parties before this Court" but has "not participated in the case before the Court or at previous stages of the litigation." See Letter to Joseph Spaniol, Clerk of the Court, from the Chief Justice (Feb. 20, 1990), pertaining to Brutsche v. Cleveland-Perdue, No. 89-1167, cert. denied, 111 S. Ct. 368 (1990). We think it desirable to set forth what our recusal policy will be in additional situations—specifically, when the covered lawyer has participated in the case at an earlier stage of the litigation, or when the covered lawyer is a partner in a firm appearing before us. Determining and announcing our policy in advance will make it evident that future decisions to recuse or not to recuse are unaffected by irrelevant circumstances of the particular case, and will provide needed guidance to our relatives and the firms to which they belong.

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 a 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)(ii) 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 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.

Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case. One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect "his" or "her" case and its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation. We shall recuse ourselves whenever, to our knowledge, a relative has been lead counsel below.

Another special factor, of course, would be the fact that 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 success or failure will affect the amount of the fee, and hence 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.

William H. Rehnquist

John Paul Stevens

Sandra Day O'Connor

Antonin Scalia

Anthony M. Kennedy

Clarence Thomas

Ruth Bader Ginsburg