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## Working towards a win you won't lose: the continuing relevance of consanguinity and affinity

By Kristofer Swanson and Rob Gardner

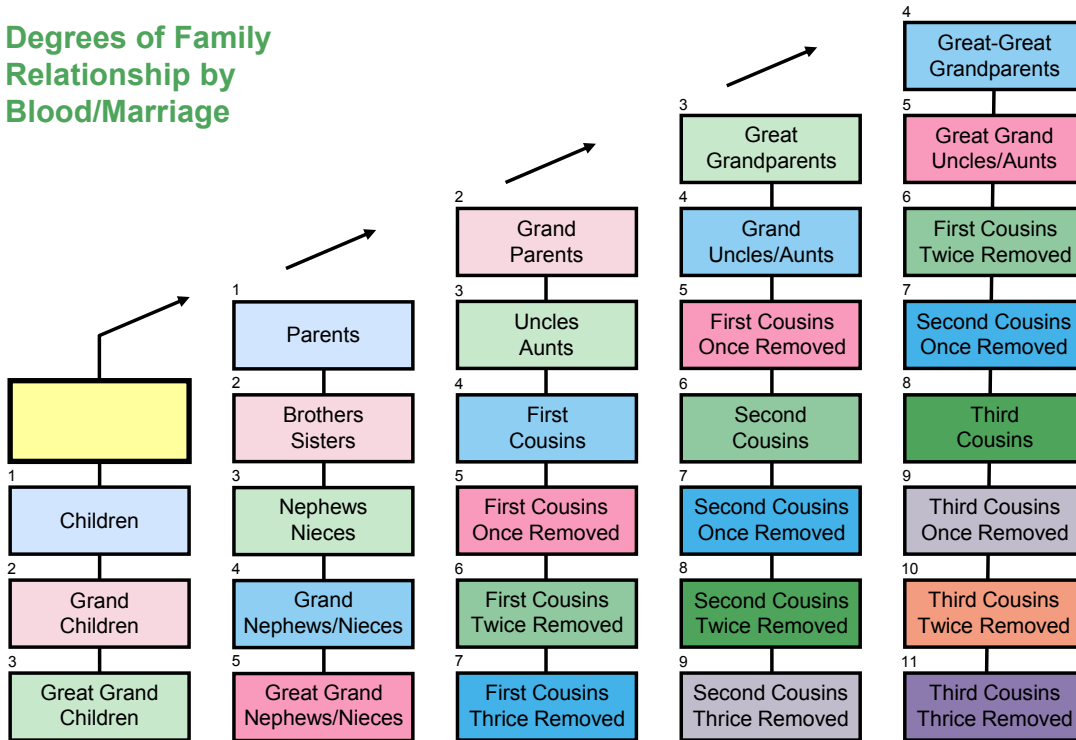
Consanguinity and affinity: one sounds like your cable provider, the other a word you meant to challenge while playing Scrabble®. Good thing you let that 19-point word slide because consanguinity, and its related concept, affinity, can be important elements in determining the outcome of a high profile lawsuit or even whether a decision may withstand appeal. Consanguinity and affinity are clearly not words to ignore due to their significance, the variances in determining their meaning and applicability across various courts, and the methods for assessing these relationship risks.

Instances of consanguinity--when a litigant or lawyer is related by bloodlines to a judge, clerk, or in some states, a juror--and affinity, where the same relationships exist but via marriage, have become more common and are likely to increase in risk and complexity as legal and social definitions about family structures and relationships evolve. With the numerous potential connections that may exist, sophisticated reputational due diligence can be an important step in "stress testing" against the risk that undisclosed relationships exist, and--if said relationships are not identified and disclosed in a timely manner--the risk that a hard-won verdict will be overturned.

Consanguinity translates to kinship or relationship by blood. It can be either lineal, where there is a direct line between parties, such as between a parent and their children, or it can be collateral where persons have the same ancestors, but do not descend (or ascend) from the other, such as cousins, aunts and uncles. Consanguinity is expressed in terms of "degrees" or how close the relationship is between a person and his or her relatives. The following chart illustrates the degrees of relationship caused by consanguinity (N.B.: affinity is measured in the same way except the relationships come from marriage).

## “Consanguinity/Affinity Chart”

### Degrees of Family Relationship by Blood/Marriage



### For Consanguinity (relationship by blood) calculations:

*“Place the officers, directors, trustees or executive personnel for whom you need to establish relationships by consanguinity in the blank box. The labeled boxes will then list the relationship by title to the officers, directors, trustees or executive personnel and the degree of distance from the officers, directors, trustees or executive personnel.*

*Anyone in a box numbered 1, 2 or 3 is within the third degree of consanguinity.*

### For Affinity (relationship by marriage) calculations:

*Place the spouse of the officers, directors, trustees or executive personnel for whom you need to establish relationships by affinity in the blank box. The labeled boxes will then list the relationship by title to the spouse and the degree of distance from the officers, directors, trustees or executive personnel by affinity.*

*A husband and wife are related in the first degree by marriage. For other relationships by marriage, the degree of relationship is the same as the degree of underlying relationship by blood.”  
(see <https://www.leg.state.nv.us/NAC/NAC-082.html>)*

Consanguinity affects a variety of common law issues, including marriage (i.e., when it is incest), and inheritance, especially if there is no will. But in litigation, consanguinity and affinity also play important roles in guarding against nepotism and inferences of partiality. Key areas potentially covered, depending on the jurisdiction, by consanguinity and affinity may include:

- As a challenge to a juror related to one of the attorneys,
- The relationship between the Court and the litigants, including people who are officers, directors, or trustees of the litigants,
- The relationship between the Court and a material witness,
- The relationship between the Court and those with a financial outcome in the matter, regardless of whether they are a party to the proceeding, and
- Judicial appointments, including referees, commissioners, special masters, receivers' guardians, appraisers and personnel, such as clerks, secretaries, and bailiffs.

All of these family ties can become litigation concerns. A party can lose its desired venue due to consanguinity. In addition, no matter how hard it is to trace the relationships, if not uncovered and brought to the Court's attention in a timely manner, they can cast a shadow of doubt on even the strongest of cases, leaving open the possibility that a win will be overturned on appeal.

The limits or degrees of consanguinity vary among jurisdictions and by issue. A close examination of where cases are filed, defended, or sought to move forum are important. Here are several examples of the differences in consanguinity standards:

- In Ohio, in assessing a judge's relationship between parties, the state looks to three degrees of consanguinity (Ohio Code of Judicial Conduct Canon 2 Rule 2.11 (2)); however, lawyers can challenge a juror for cause with up to four degrees of consanguinity (Ohio Revised Code 2313.17).
- New York rules on judicial conduct state, "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the *sixth degree*" (emphasis added) (NY Jud Law Section 14; NY Code Section 14).
- In the US Federal Courts, financial conflicts only apply to the financial interests of the judge's spouse and the judge's minor children who reside in the same household; but for the judge's relationships to the parties, material witnesses, and those with a financial interest in the outcome, for example, the standard is three degrees (Code of Conduct for United States Judges Canon 3 (C) (1) (c) and (d)).
- Interestingly, the Code of Conduct for US Judges does not explicitly cover the United States Supreme Court. From time to time, there have been efforts to codify such a code of conduct. If such a code is written, it will likely add to the array of varying consanguinity and affinity standards that apply across the country.

In examining potential conflicts from consanguinity and affinity, understand upfront the relevant standard in the jurisdiction where the litigation may occur. The applicable rules may be used by opponents, for example, as considerations in forum shopping.

Two factors challenge and magnify these risks in modern litigation. First, litigation often encompasses multiple interested parties, and in class action matters many, many more. The more parties involved, the increased potential for a relationship that amounts to consanguinity or affinity. Second, many of the applicable state laws were passed when definitions of marriage and family were different from today's norms, creating genuine ambiguity. That ambiguity is already baked into the Code of Conduct for Federal Judges, where the following definitions are provided:

*[T]he degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and **most** step relatives.*

-- (emphasis added) (Code of Conduct for US Judges Canon 3 Chapter C (3) (a)).

An array of parties and an array of family ties present challenges. It may not be obvious that consanguinity or affinity exists. How do litigants assess their risks? Lawyers document relationships during discovery via depositions or documents. They may also discover relationships through interviews and/or public record research. Take this recent example from a matter where our professionals were involved:

- The client was a defendant in a large environmental, class action matter. The plaintiff pool included known and potential claimants within a floodplain. To properly assess the risks related to consanguinity and affinity, it was necessary to determine the full extent of this pool. The challenge in finding all the plaintiffs resided in the fact that the floodplain did not draw across regular boundary maps. We used investigative databases to pull addresses, and then leveraged mapping tools to place those addresses inside or outside of the litigation zone. We then assessed who lived at the addresses of interest during the relevant time period to determine whether relationships existed that counsel should assess to determine if disclosure was required.

A variety of records may be used to locate information regarding consanguinity and affinity. Start with common investigative reports that list potential family members. These same reports also provide neighbor information, and investigators can contact these parties as a way of finding relationships. Relationships also show up in a variety of documents. Campaign disclosure forms, current and past, often include family member names. Titled property, real estate, motor vehicles, and watercraft that are jointly owned will list spousal names. Other records may exist, such as UCC filings, where a parent co-signed a loan for a child. Searches of assumed name filings and Secretary of State records may also find family businesses. When there have been divorces, the case files may be another avenue for family background. Other resources include media sites, profiles of the parties, biographies on the Internet, etc. With all these potential avenues of information, relying on more than discovery questions to confirm the completeness of the information set is crucial.

Failure to check parties' exposure to consanguinity and affinity can introduce an air of mystery into any judicial proceeding, opening the door to outright loss or the possibility that a win will be but a fleeting moment of victory that will not survive the appeal process. Some things are worth digging, and potential case-crashing relationships are among them.

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