

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 10-03
(November 18, 2010)

**Disqualification Requirements When
Judge Is Related to Local Sheriff**

Issues

1. Is a justice of the peace subject to disqualification in any proceeding involving the sheriff's department when the judge's brother is the sheriff in the county in which the judge serves?

Answer: Yes.

2. If subject to disqualification, may the judge disclose on the record the basis of the judge's disqualification and ask the parties to consider whether to waive disqualification?

Answer: Yes, but see below.

Facts

A newly elected justice of the peace will be serving in the same county where his brother is the county sheriff. The sheriff's office is involved in criminal matters filed in the justice court, including civil and criminal traffic cases.

Discussion

Issue 1

Canon 2 of The Code of Judicial Conduct requires that a judge "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Rule 2.11(A). This includes the circumstance in which the judge knows that "a person within the third degree of relationship" to the judge is a party to the proceeding; or "has more than a de minimus interest that could be substantially affected by the proceeding"; or is "likely to be a material witness in the proceeding." Rule 2.11(A)(2)(a), (c), (d).

When the judge's brother is the sheriff, the rule requires that the judge must disqualify himself or herself if the sheriff or sheriff's department is named as a party. Rule 2.11(A)(2)(a). If the sheriff or the department is not named as a party, the judge must disqualify himself or herself if the sheriff "has more than a de minimus interest that could be substantially affected by the proceedings." Rule 2.11(A)(2)(c). We conclude that the sheriff, who is elected to enforce criminal and civil traffic violations and whose reelection depends largely upon the public perception of the sheriff's success in doing so, has more than a de minimus interest in any case in which the sheriff's office is involved. The judge therefore must disqualify himself or herself. *See Op. Ariz. Att'y Gen. I80-139, 1980 WL 28021* (magistrate whose spouse is chief of police in same town must disqualify self in any criminal case in which the city police department is involved); *S. C. Adv. Op. 01-2009* (municipal court judge may not preside over criminal cases when his uncle is chief of police in same municipality).

Next, we turn to the situation where the sheriff is expected to be a material witness in the proceeding. Rule 2.11(A)(2)(a) clearly applies to the sheriff personally. We conclude that this rule also extends to any deputies or employees of the sheriff's office in any matter involving or investigated by the sheriff's department, because we presume all deputies and employees are subject to the sheriff's supervision. Because Rule 2.11 seeks to avoid circumstances where the judge's impartiality might reasonably be questioned, the above conclusions apply both to court proceedings and to the issuance of warrants and other ex parte proceedings involving the sheriff's department. *See* N. Y. Adv. Op. 09-242 (judge must recuse in all sheriff's department cases when first degree relative, head of road patrol division, involved in any proceeding in which officers under his supervision appear).

Issue 2

The Arizona Code of Judicial Conduct permits the parties to waive disqualification. Rule 2.11(C) provides that a judge subject to disqualification under Rule 2.11 "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification." If they agree, the judge may participate in the proceeding. *Cf.* N. M. Adv. Op. 09-04 (judge married to state police captain for district in which court is located disqualified from cases involving state police and cases may not be assigned to judge to determine if parties will waive disqualification). Although this rule permits the parties to waive disqualification, if a significant number of cases require reassignment, we believe the better course is for the judge to disqualify himself or herself rather than to create unreasonable delay. We also note that whenever disqualification is not waived, the matter necessarily must be reset before another judicial officer and there is likely to be significant inconvenience to counsel, parties, and court staff and a delay in case processing as a result. *See* S. C. Adv. Op. 05-2009 (magistrate may continue to serve after spouse becomes chief deputy sheriff but must disqualify upon request and cannot serve if requests for disqualification create administrative burden).

Despite the availability of the disclosure/waiver option, we conclude that there are circumstances in which it should not be an option. These circumstances include: when the judge has actual bias or prejudice; when there is no opportunity for disclosure prior to judicial involvement; when the process results in repeated, unreasonable delay; when public confidence in the court's independence, integrity or impartiality is compromised or appears to be compromised; and when there are so few judicial officers in the jurisdiction that the disclosure/waiver process creates a coercive atmosphere and therefore the appearance of impropriety.

In rare circumstances, "[t]he rule of necessity may override the rule of disqualification." Rule 2.11, Comment 3. When a judge subject to disqualification is the only judge available in a matter requiring immediate judicial action, "the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable." *Id.* Arizona has numerous statutory provisions which should be utilized to avoid the application of the rule of necessity. Section 22-302, A.R.S., permits a justice of the peace to designate venue in another justice precinct. Section 22-121, A.R.S., allows the presiding judge of the superior court to appoint a justice of the peace pro tempore for any precinct in a county. Under A.R.S. § 1-215(18) and § 13-3911 *et seq.*, the judge of any court may serve as a magistrate to issue a warrant concerning a matter in a justice precinct. And finally, the criminal jurisdiction of justice

court is concurrent with superior court, A.R.S. § 12-123, and the municipal court within each municipality, A.R.S. § 22-402(B). Because the rule of necessity is an exception to the general rule of disqualification, “it is strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in to hear it.” *State v. Dietrick*, 444 S.E. 2d 47, 55 (W. Va. 1994).

References

Arizona Code of Judicial Conduct, Rule 2.11 (2009).

Arizona Revised Statutes §§ 1-215(18), 12-123, 13-3911, 22-121, 22-302, 22-402(B).

Arizona Attorney General Opinion I80-139

New Mexico Advisory Committee on the Code of Judicial Conduct, Opinion 09-04

New York Advisory Committee on Judicial Ethics, Opinion 09-242

South Carolina Special Committee on Standards of Judicial Conduct, Opinions 01-2009; 05-2009.

State v. Dietrick, 177, 444 S.E. 2d 47, 49 (W. Va. 1994).