

ADVISORY OPINION 10-04
(December 3, 2010)

Disqualification Considerations When Spouse Works As Secretary for Public Defender

Issues

Is a justice of the peace whose spouse works as a secretary in the local public defender's office automatically required to disqualify himself in a criminal case in which the defendant is represented by the public defender's office? If not, is the justice of the peace required to disclose that his spouse is employed with the public defender's office?

Answer: Disqualification is not automatic but may be advisable in certain circumstances. See discussion.

Facts

The spouse of a justice of the peace works as a secretary in the local public defender's office. The justice of the peace presides over criminal cases in which defendants are represented by the public defender's office. The secretarial duties of the spouse were not specified.

Discussion

Rule 1.2 requires a judge to act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. The test for the appearance of impropriety is whether the conduct at issue would create in reasonable minds a perception that the judge violated the Code of Judicial Conduct or engaged in conduct that reflects adversely on the judge's honesty, impartiality, temperament or fitness to serve as a judge. Rule 2.4 states that a judge shall not permit family relationships to influence the judge's judicial conduct or judgment. It further provides a judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge. Rule 2.11 requires a judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. Impartiality means the absence of bias or prejudice in favor of or against the parties and maintaining an open mind in considering issues that may come before a judge.

This committee previously determined there was no automatic impropriety with a judge hearing criminal cases when his spouse was a staff member of the public defender's office as long as the spouse did not appear before that judge nor have any interest in the outcome of a case that could reasonably affect the judge's professional or financial interest. *See Adv. Op. 85-01*. In another opinion, the committee concluded the mere fact a judge is married to a prosecutor does not disqualify the judge from sitting on criminal cases. *See Adv. Op. 95-19*. In that case, the committee considered the duties of the judge's spouse in determining whether disqualification was required. When there is no direct connection between the judge's case and the spouse's duties, most concerns regarding

impartiality are eliminated. However, other factors may generate concerns about the judge's impartiality or independence in the minds of the public and litigants. For example, if the spouse's duties at the public defender's office involve frequent contact with lawyers or defendants who appear in the judge's court and if the spouse handles all the paperwork for those matters, the judge may need to consider disqualification under Rule 2.11(A) or perhaps disclosure as described in Comment 5 to this rule. Another factor to consider is the nature of the local community. A judge who sits in a small town or county may be well known in the community and all of the attorneys, including prosecutors, may be aware that the judge's spouse works for the public defender, in which case neither disqualification nor disclosure would be required.

Disqualification and disclosure are not required when a judge's judicial independence and impartiality cannot reasonably be called into question. In situations where an objective, reasonable observer can question a judge's impartiality, disqualification is required. If a judge is uncertain about the need to disqualify himself or herself, the better course of action would be for the judge to disclose the spouse's employment with the public defender's office and invite the parties to consider the remittal process described in Rule 2.11(C), or to follow the disclosure process in Comment 5 and let the parties decide what to do. *See Adv. Ops.* 91-01 and 90-09.

Conclusion

A justice of the peace whose spouse works as a secretary in the local public defender's office is not automatically disqualified from hearing criminal cases in which a public defender represents one of the parties. However, the judge must determine whether his impartiality or independence might reasonably be questioned in a given case and, if so, disclose the spouse's employment so that the parties will be fully informed and can decide whether to file a motion to disqualify or waive the issue.

References

Arizona Code of Judicial Conduct (2009): Terminology, Canons 1 and 2, Rules 1.2, 2.4, 2.11, and Rule 2.11, Comment 5.

Arizona Judicial Ethics Advisory Committee, Opinions: 77-01, 85-01, 90-09, 91-01, 95-19, 98-02, 00-01, and 02-09