

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 22-02
(Revised March 10, 2023)
(Originally Issued November 21, 2022)

**DISQUALIFICATION CONSIDERATIONS WHEN A JUSTICE OF THE PEACE IS
MARRIED TO THE CONSTABLE IN THE SAME PRECINCT**

FACTS/ISSUE

The Judicial Ethics Advisory Committee was asked to opine on the disqualification issues that arise when a justice of the peace is married to the constable in the same precinct.

Specifically, is the justice of the peace subject to disqualification in any proceeding in which the constable, the justice of the peace's spouse, is involved? And if the justice of the peace is subject to disqualification, can such disqualification be waived by the parties?

ANSWER

Except as to certain involvement in protective orders as discussed herein, a justice of the peace is subject to disqualification under Rule 2.11 of the Code of Judicial Conduct in any proceeding which their constable-spouse is involved. This disqualification cannot be waived under Rule 2.11(C) because the justice of the peace would appear to a reasonable disinterested observer to have, or might actually have, personal bias in favor of their constable-spouse.

DISCUSSION

I. Applicable Code Provisions

Several provisions of the Arizona Code of Judicial Conduct ("Code") are relevant to this inquiry, including:

TERMINOLOGY SECTION

RULE 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of

the judiciary, and shall avoid impropriety and the appearance of impropriety.

RULE 2.11. Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person is:

...

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

...

(C) A judge subject to disqualification under this rule, other than for bias or prejudice under paragraph (A)(1), 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, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Cmt. 1: Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) - (5) apply.

Cmt. 2: A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

...

Cmt. 5: A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

II. Analysis

Constables and justices of the peace are separately elected officials who serve together in a single precinct. Pursuant to A.R.S. §22-131(A), a constable “. . . shall execute, serve and return all processes, warrants and notices directed or delivered to them by a justice of the peace of the county or by competent authority.” However, a justice of the peace does not have supervisory authority over a constable. A constable is considered to be a peace officer, although their primary duties are not law enforcement. See *e.g.*, A.R.S. §§1-215, 13-105, and 22-131(E); *Ariz. Att’y Gen. Op* I84-167. As peace officers, constables are executive branch officials. Both judges and constables are subject to their respective Codes of Conduct. While the voters may have elected related individuals to these two separate positions, a judge becomes subject to the full provisions and restrictions of the Code of Judicial Conduct upon taking office, and a judge is not free to disregard the terms of the Code merely because the voters elected a relative to the constable position.

A constable’s involvement in a matter in the justice courts will most typically be related to service of process, primarily in protective order proceedings, eviction actions, and some civil/small claims matters. While a constable may only be a material witness in a proceeding in which there is a challenge to service of process, the constable still completes an affidavit of service in each matter that they serve. In proceeding forward with any action in which a constable has effectuated service, a justice of the peace is making a finding that the constable properly made service and necessarily passes judgment on the affidavit that the constable filed demonstrating that service was properly made. In the factual scenario at hand, if the constable’s service of process is challenged, the constable-spouse would be a material witness, and Rule 2.11(A)(d)(2) would require the justice of the peace to disqualify themselves.

With respect to protective orders, Rule 38(a), Arizona Rules of Protective Order Procedure allows a defendant to request a hearing “at any time while a protective order or a modified protective order is in effect.” To be “in effect,” a protective order must be served. See Rule 23(j), *Ariz.R.Protect.Ord.Pro.* The committee is aware that often times, defendants come to the court to seek a hearing prior to the court having received back proof that the defendant was served from either law enforcement, the constable, or a private process server. In some instances, a defendant may not have been served, but learned of the existence of the protective order through other means, and comes to court

requesting a hearing. The committee understands that the practice by many courts in these instances is to require the defendant to complete an acceptance of service form, receive a copy of the protective order and petition, and then complete the form requesting a hearing. Such a practice appears to eliminate any challenge to service the defendant could raise within the contested hearing context, and would allow the justice of the peace to preside over those matters. In dealing with violations of an order of protection, which primarily occur in the criminal context, service of process can be challenged, and thus, the justice of the peace would be disqualified from hearing those matters if service was effectuated by the constable spouse.

In other matters in which the constable-spouse is involved, the justice of the peace must still disqualify themselves. Under Rule 2.11, a judge shall disqualify themselves whenever the judge's impartiality might reasonably be questioned. This committee has previously stated that the standard of objective reasonableness applies. In Opinion 98-02, we stated, "It is not a question of whether the judge thinks he or she can be objective, but rather would an objective, disinterested observer reasonably question the impartiality of the judge." The committee believes an objective, disinterested observer, being fully informed about the marital relationship between the constable and the justice of the peace, would reasonably question the judge's impartiality on matters involving their spouse. For these reasons, we conclude that the justice of the peace must disqualify on any matter in which the constable-spouse is involved. This would include matters in which one side has defaulted. This comports with the requirements of Rule 1.2 of the Code to avoid impropriety and the appearance of impropriety. *See Matter of Haddad*, 128 Ariz. 490, 627 P.2d 221 (1981) (judge is required not only to be impartial, but to be seen as impartial).

Our conclusion here is consistent with our reasoning in Opinion 10-03, in which we held that a justice of the peace is 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. Other jurisdictions have reached identical conclusions that a judge must disqualify in similarly situated scenarios in which a judge has a spouse or relative within the third degree who is a law enforcement officer. *See e.g.*, Georgia Advisory Opinion 235 (2007) (judge's spouse is the sheriff); Kansas Advisory Opinion JE-113 (2003) (judge's brother is chief of police); Kentucky Advisory Opinion JE-129 (2021) (judge's spouse is the city chief of police); South Carolina Advisory Opinion 1-2009 (2009) (uncle is chief of police); West Virginia Advisory Opinion (1989) (spouse is chief of police).¹ This committee's conclusion in Opinion 10-03 was based in part on the

¹ A.R.S. §22-131(C) permits constables, with the consent of the board of supervisors, to appoint deputies to conduct the affairs of their office. Upon information and belief, no such deputies have been authorized for this particular precinct at issue. However, this committee's reasoning would apply to any deputies under the constable's supervision, even if the elected constable-spouse had no direct participation in a case. *See Arizona*

requirement of Rule 2.11(A)(2)(c) that a judge must disqualify themselves if the sheriff “ha[d] more than a de minimis interest that could be substantially affected by the proceedings.” We determined that the sheriff’s reelection largely depended on the public perception of the sheriff’s success in enforcing criminal and civil traffic violations, and thus, the sheriff had more than a de minimis interest in any case in which the sheriff’s office is involved. Similar to this perception, the public perception of a constable’s success in properly effectuating service of process would weigh on the constable’s likelihood of being reelected. This is another reason why the justice of the peace must disqualify from any matter in which the constable-spouse is involved.

Under Rule 2.11(C), a judge subject to disqualification under Rule 2.11 may seek a remittal of the disqualification with disclosure and waiver, other than for bias or prejudice under Rule 2.11(A)(1). While other jurisdictions have permitted remittal of the disqualification, this committee is more aligned with how its counterpart in New Hampshire addressed the issue of whether a remittal of the disqualification is appropriate when there is a close familial relationship. *See* New Hampshire Advisory Opinion 2013-1. In that opinion, the New Hampshire Advisory Committee on Judicial Ethics determined that a judge is disqualified from presiding over cases brought by a local police department when the judge’s son is employed as an officer in that department. That committee found that such disqualification was not subject to remittal by a disclosure and waiver, stating that “[a] reasonable person would perceive that the judge, either consciously or subconsciously, has a personal bias in favor of his son.” This committee believes a reasonable person would perceive that the justice of the peace, either consciously or subconsciously, has a personal bias in favor of their constable-spouse. The committee also believes that allowing the disclosure and waiver presents issues with intimidation and undue pressure in light of the relationship, particularly when a substantial portion of litigants in the justice court are self-represented. Additionally, in default cases, one party is not present and cannot consider the disclosure and waiver. Therefore, this committee finds that the disqualification is not subject to the remittal procedure under Rule 2.11(C). The onus is on the justice of the peace to disqualify and step away from the matter.

CONCLUSION

The Code treats actual impropriety equally with the appearance of impropriety. The justice of the peace’s impartiality could reasonably be questioned when handling any matter in which the constable-spouse is involved, and therefore, they must disqualify

Advisory Opinion 10-03 (2010). This reasoning is also consistent with other jurisdictions which have held the disqualification extends to cases involving individuals under the law enforcement spouse’s supervision. *See e.g.*, Colorado Advisory Opinion 2005-1; Connecticut Informal Advisory Opinion 2011-20; Georgia Advisory Opinion 235 (2007); Kansas Advisory Opinion JE-113 (2003).

themselves from those matters, with the limited exception of certain protective order proceedings noted herein. This disqualification is not subject to remittal with disclosure and waiver, as Rule 2.11(C) bars such remittal if the disqualification is for bias or prejudice. A reasonable person could conclude a justice of the peace would have a personal bias in favor of their constable-spouse.