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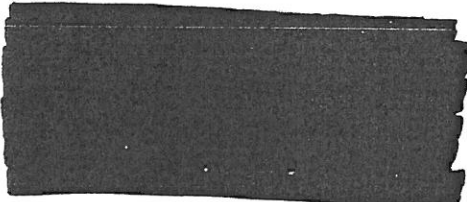
OCT 18 2016

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# Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair  
~~Hon. Maria A. Baca~~  
~~Hon. Kevin L. Fitzwater~~  
Paul L. Biderman, Esq.  
Prof. Robert L. Schwartz  
Hon. Freddie J. Romero  
Hon. Sandra W. Engel

October 18, 2016



Re: Judicial Advisory Opinion No. 16-05

Dear Judge 

Your spouse is a detective for the police department in the town in which your court is located. You recuse from any case or investigation in which your spouse has had any involvement whatsoever. You have asked the Advisory Committee on the Code of Judicial Conduct whether you are disqualified by the Code of Judicial Conduct from addressing warrant requests on cases in which your spouse is not involved.

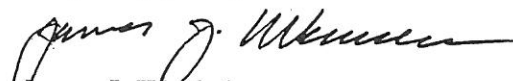
The relevant provision of the Code of Judicial Conduct is Rule 21-211(A) NMRA, which states that a “judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned[.]” That rule lists specific circumstances in which a judge is disqualified, and the list includes when a judge’s spouse is “a person who has more than a de minimis interest that could be substantially affected by the proceeding”; or is “likely to be a material witness in the proceeding.” Rule 21-211(A)(2)(a), (c), (d).

Rule 21-211(A), therefore, requires your disqualification in the cases in which your spouse has had any involvement, and you recuse from all such cases. Your spouse does not have any supervisory responsibilities that would indicate a direct interest in cases handled by other members of the police department. *See* Rule 21-211(A)(2)(c) (requiring disqualification if a judge’s spouse “has more than a de minimis interest that could be substantially affected by the proceeding”). The question you pose is, as a result, whether your impartiality might reasonably be questioned in any case involving the police department even though your spouse has not participated in the case in any manner.

The Committee does not believe that, as a general rule, the mere fact of your spouse's employment requires your disqualification. *Cf. Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984) (holding that judge was not required to disqualify himself from case prosecuted by district attorney's office in which his wife was employed but handled cases in a different court). Your spouse does not have supervisory responsibilities and thus does not benefit in more than a de minimis manner from the outcome of any case in which your spouse does not have any involvement.

There may be cases, however, in which your recusal would be appropriate. For example, if there are issues that involve police practices of broad applicability, your spouse's interest may be more than de minimis. The Committee urges, therefore, that you examine the circumstances in each case and recuse in any case in which you believe that there may be doubt. In addition, in cases in which you are not called upon to make an ex parte determination (as you are with respect to a warrant) and in which there may be some doubt, the Committee suggests, in the interest of caution, that you consider disclosing your spouse's position to the parties. *See* Rule 21-211(C) ("A judge subject to disqualification under this rule, other than for bias or prejudice under Subparagraph (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.").

Very truly yours,

  
James J. Wechsler  
Chair

cc: Paul L. Biderman, Esq.  
Hon. Sandra W. Engel  
Hon. Freddie J. Romero  
Professor Robert L. Schwartz