

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

The Hon. Donald F. Parsons, Jr., Chair
The Hon. Richard F. Stokes, Vice Chair
The Hon. Robert B. Coonin
The Hon. Mary M. Johnston
The Hon. Bonita N. Lee
The Hon. Michael K. Newell
The Hon. Charles W. Welch, III

JEAC 2009-2

April 20, 2009

The Honorable Deborah Foor
Justice of the Peace
Justice of the Peace Court No. 6
35 Cams Fortune Way
Harrington, DE 19952

Re: Request for Opinion from the Judicial Ethics Advisory Committee

Dear Judge Foor:

By correspondence dated February 10, 2009, you have requested an advisory opinion from the Judicial Ethics Advisory Committee (“Committee”). The subject is what a Justice of the Peace’s obligations are regarding administrative communications with a brother-in-law employed at the Milford Police Department whose colleagues prosecute criminal cases before the Justice of the Peace. Upon the Committee’s request, we were provided with a description of the Police Prosecution Project which has been placed into effect with local police departments. A letter answering several of our questions was provided on April 1, 2009. From this helpful information, it has become clear that your brother-in-law is not the officer that has been designated to communicate

with the Court; however, since he could be designated for this purpose in the future, we will still make a ruling on the issue. For the following reasons, the Committee has determined that, pursuant to the Delaware Judges' Code of Judicial Conduct ("Code"), a Justice of the Peace may communicate with a police officer who is a brother-in-law, provided that these communications are purely administrative in nature. Further, a Justice of the Peace may hear cases involving police officers from that department, as long as the brother-in-law is not a witness.

A. The Applicable Rules of the Code

Your inquiry implicates Rules 1.2, 2.3, 2.9, and 2.11 of the Code. The relevant portions of these rules provide as follows:

Rule 1.2: Promoting Confidence in the Judiciary

A. A judge should act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities.

Rule 2.3: Bias, Prejudice and Impropriety

A. A judge should perform the duties of judicial office, including administrative duties, without bias or prejudice.

B. A judge should avoid impropriety and the appearance of impropriety in all activities.

Rule 2.9: Ex Parte Communications

A. A judge, except as authorized by law, should neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

COMMENT: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. ... It is not intended to preclude communications between a judge and lawyers, or parties if unrepresented by counsel, concerning matters which are purely procedural, such as those which pertain to scheduling, and which in no way bear on the merits of the proceeding. However, such communications should, as soon as practicable, be fully disclosed by the judge to all lawyers, or parties if unrepresented by counsel, involved in the proceeding. ...

Rule 2.11: Disqualification

A. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

1. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

2. The judge or judge's spouse or domestic partner, or a person within the third degree of relationship, calculated according to the civil law system, to either of them, or the spouse or domestic partner of such a person:

- a. is a party to the proceeding, or an officer, director, or trustee of a party;
- b. is acting as a lawyer in the proceeding;
- c. is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- d. is to the judge's knowledge likely to be a material witness in the proceedings.

C. A judge disqualified by the terms of Rule 2.11, except a disqualification by the terms of Rule 2.11(A)(1) or Rule 2.11(A)(4), may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification. If the parties and their lawyers, after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

B. A Justice of the Peace may communicate with a police officer that is married to her sister, provided that these communications are purely administrative and general in character involving policy matters.

The Milford Police Department has joined a Police Prosecution Project to help make prosecutions by police officers more efficient. In the Justice of the Peace Courts,

prosecutions are handled by the police officers. In the past, that had led to difficulties with scheduling and efficiency. Plea bargains were difficult to arrange and officers had to be called into court to handle them in many cases. Under the new program, one officer appears in court on behalf of a department to handle plea negotiations. Arresting officers are only required to attend if a defendant goes to trial, instead of having to attend each arraignment.

There were some issues that had to be resolved with the police as the program was implemented. Police did not understand the need for plea colloquys which necessitated time-consuming mass arraignments. They also used the court's files to handle plea negotiations rather than having their own records. These issues were resolved through meetings and directives. The Court also worked with each police agency to schedule their cases at standard days and times to make the schedule easier to implement. Continuance and dismissal issues are now handled through the officer designated by the police agency to communicate with the Court about those matters. The key reason for this project is that it affords defendants the opportunity to speak with a prosecuting police officer about a plea at their first court appearance, thus saving time for both defendants, police officers, and the Court. Also it reduces the need for defendants to transfer their case to the Court of Common Pleas in order to arrange a plea deal.

Rule 1.2 states that judges should not only avoid impropriety, but also the appearance of impropriety in all activities.¹ Since you are not hearing cases in which your brother-in-law is a witness, there should not be any problem with this rule. Hearing

cases that he is involved in would create an appearance of impropriety. Communicating with him for administrative matters such as scheduling does not raise the concerns present in a trial situation. It is difficult to think of opportunities for bias towards your brother-in-law that would arise while scheduling cases generically which is a routine and clerical function. As a result, these administrative communications would not violate Rule 1.2.

The commentary to Rule 2.3 addresses bias and prejudice in terms of race, ethnicity, stereotypes, or personal characteristics.² While it does not limit the rule to that area, clearly it was intended to address those issues more so than familial relationships between judges and the people they deal with. The Code tends to follow the ABA Model Code of Judicial Conduct very closely; Rule 2.3 of the Model Code explains bias and prejudice as being “based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”³ While the rule is not limited to only those areas, it would appear that it is meant to cover a different type of conduct than that which is implicated here.⁴

Rule 2.11(A) states that “[a] judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”.⁵ The issue here is simply communications to resolve procedural issues across the board in the universe of cases from the Milford Police Department. While these communications

1 Rule 1.2 of the Code.

2 Comment, Rule 2.3 of the Code.

3 Charles E. Geyh and W. William Hodes, Reporters’ Notes to the Model Code of Judicial Conduct, ABA Publishing, 2009, p. 28.

4 *Id.*

5 Rule 2.11(A) of the Code.

could be considered part of a proceeding in the abstract,⁶ they do not involve the hearing of any testimony or arguments, or the making of any rulings involving a defendant. They do not have the characteristics of a proceeding that would be argued before the Court. While the comment to Rule 2.9 pertains to a different issue than the one at hand, it does differentiate procedural communications which do not affect the merits of the proceeding from those which are subject to a restriction on ex parte communications.⁷ Since it is unlikely that there would be any opportunity for you to favor your brother-in-law during these communications, your impartiality should not reasonably be questioned. The fact that a different officer has been designated to handle these administrative matters certainly helps; should your brother-in-law take over that role some time in the future, though, there should still not be a problem since it appears that general scheduling would be the only subject of interest.

Your situation does not present the concerns represented in the *Matter of Rowe* in which a judge was suspended for six months.⁸ In that case, a Justice of the Peace arraigned his own son for a DUI and admitted him to the First Offender's Program. He argued that admitting him into the program was an administrative decision that was not a judgment.⁹ This position is problematic as an arraignment and final disposition of a criminal case occurred to benefit his son. Your communications are truly administrative and not judicial; the consequences flowing from your role are substantially different.

⁶ Black's Law Dictionary 1204 (6th ed. 1990).

⁷ Comment, Rule 2.9 of the Code.

⁸ 566 A.2d 1001, Del. Jud. 1989.

⁹ *Id.*

Provided that your dealings with your brother-in-law are purely administrative and do not involve any substantive issues, you will not be in violation of the Code by making them.

C. A Justice of the Peace may hear cases involving police officers from her brother-in-law's department, as long as the brother-in-law is not a witness or a party to the proceeding.

Rule 2.11(A)(c) states that a judge should be disqualified when a close relative of the judge or the judge's spouse "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding".¹⁰ The issue is whether your brother-in-law has an interest that could be substantially affected in a proceeding that involves officers from his police department. He does not have a direct economic stake in the criminal cases. By law, prosecutors and police officers acting in that role are required to do justice.¹¹ In this context, it would not be reasonable to say that your brother-in-law's position presents a disqualifying interest.

This case is distinguishable from JPC 1994-2, in which the presiding magistrate was advised not to work in Milford or hear cases involving the Milford police due to the fact that his son was a staff sergeant there. In recent years, the Milford police force has become substantially larger; one relative is not nearly as significant a factor as it was then. Also, the district now encompasses more than just Milford. There are other police

¹⁰ Rule 2.11(A)(c) of the Code.

¹¹ *Hughes v. State*, 653 A.2d 241, 249 (Del. 1994) ("this court has 'recognized a rebuttable presumption that criminal prosecutions are undertaken in good faith and in a nondiscriminatory matter.'"); *Hardy v. State*, 962 A.2d 244, 248 (Del. 2008) ("[i]t is [the prosecutor's] duty to see that the State's case is presented with earnestness and vigor, but it is equally his duty to see that justice be done by giving the defendant a fair and impartial trial.")

departments which conduct business before that Court now and are part of this project.

Thus, the son in that case had a more substantial interest in the business of the Court than your brother-in-law does today. Also, you are one of three judges assigned to the Court; your presence in Milford and involvement will be one-third of the time, i.e., four months on a calendar year basis.

The comment to Rule 2.11 states that “[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge.”¹² While not technically lawyers, as indicated above, the police officers do act as prosecutors in the Justice of the Peace Court. If private law firms which receive revenue based on the results of their cases are not automatically disqualified, then a police department should not be either. While the comment does go on to emphasize that a judge may have to be disqualified under “appropriate circumstances” it would appear that the standard is a catchall provision considering the myriad of circumstances which can arise in adversarial proceedings.¹³ Consequently, you should not have to be disqualified.

D. Conclusion

Your participation in this project will hopefully improve the efficiency and effectiveness of your Court; it would be unreasonable to reduce the Court’s effectiveness by forcing you to recuse yourself from it over an issue that has no real bearing on the disposition of the merits of particular cases. From the information

¹² Comment, Rule 2.11(A) of the Code.

¹³ *Id.* In that event, the two prong standard applied in *Los v. Los*, 595 A.2d 381, 384-385 (Del. 1991), would apply.

presented, no one should have reason to question your role in the Police Prosecution Project.

For the Committee,

/s/Richard F. Stokes

Richard F. Stokes
Vice Chair, Judicial Ethics Advisory Committee

cc: The Honorable Carolyn Berger, Liaison Justice
Members of the Judicial Ethics Advisory Committee:
The Honorable Donald F. Parsons, Jr., Chair
The Honorable Mary M. Johnston
The Honorable Charles W. Welch, III
The Honorable Robert B. Coonin
The Honorable Michael K. Newell
The Honorable Bonita N. Lee
The Honorable Alan G. Davis, Chief Magistrate