

Judicial Officers: Authority and Responsibility

Judicial Disqualification

Indiana Code of Judicial Conduct Rule 2.11

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As of July 31, 2017, Indiana joined the majority of states and the ABA by adopting language permitting parties to waive judicial disqualification under certain circumstances. These amendments to Ind. Judicial Conduct Rule 2.11 are aimed at avoiding unnecessary delays and injustices in proceedings before the court. The amendments are of particular importance to jurisdictions with a single judge and those jurisdictions with judicial officers who were formerly the elected prosecutor, a public defender, or a Department of Child Services attorney.

A judge who is subject to disqualification that may be waived must disclose the basis of the disqualification on the record, allow the parties the opportunity, outside the presence of the judge and court personnel, to consider waiving disqualification, and incorporate any agreement by the parties to waive disqualification (which must be in writing) into the record of the proceeding.

Judicial disqualification continues to be **mandatory** under Jud. Cond. R. 2.11 in the following circumstances:

- 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. Jud. Cond. R. 2.11(A)(1)
- 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 a person is:
 - a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - acting as a lawyer in the proceeding;
 - a person who has more than a de minimis interest that could be substantially affected by the proceedings; or
 - likely to be a material witness in the proceeding.

Jud. Cond. R. 2.11(A)(2)

SAMPLE DIALOGUE AND OPPORTUNITY TO WAIVE A CONFLICT:

The Judicial Conference Ethics & Professionalism Committee has developed the following sample dialogue for advising parties of a potential conflict of interest and the opportunity to waive the conflict to assist judges with the waiver process.

The Court: It has come to my attention that I need to make a disclosure in this case regarding how I might not be impartial in this case. I am advising the parties of the following:

NOTE: Recusal for reasons under Indiana Code of Judicial Conduct 2.11(A)(1 and 2) cannot be waived.

[short statement of your conflict basis under the Code of Judicial Conduct 2.11(A)(3), (5) or (6)]

If under (A)(3): I or a family member have an economic interest in this case. In that: _____.

If under (A)(5): I have made (a) public statement(s) about one or more issues involved in this case. I previously stated _____ about the issue of _____.

If under (A)(6): I participated in this matter as _____, and this creates a potential conflict of interest.

Accordingly, I will disqualify myself unless all parties choose to waive the potential conflict in writing allowing me to remain on this case.

If the parties are interested in discussing waiving the potential conflict of interest, I am required to provide you with the opportunity to privately discuss this with counsel outside of my presence, and we will take a quick break to allow you to do that. If you wish to waive this issue and move forward today, there is a form you will need to complete that the court will provide. If not, we will need to begin the process of securing a new judge. Please let my office staff know when you decide, and we will make a record of what you are going to do.

Do you have any questions about the potential conflict or waiver?

Sample forms may be found with the Benchbooks in INCite.