

## Opinion No. 66-35

March 22, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Mr. Kaiser Michael, Jr., Chairman, Bernalillo County Justice of the Peace Advisory Board, County of Bernalillo, Bernalillo County Courthouse, Albuquerque, New Mexico 87101

### QUESTION

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May either party to a civil or criminal lawsuit filed in justice of the peace court disqualify any justice of the peace other than the one before whom the case was filed?

#### CONCLUSION

No.

### OPINION

#### {\*43} ANALYSIS

In the case of **Rocky Mountain Life Insurance Company v. Reidy**, 69 N.M. 36, 363 P.2d 1031, a detailed history of our "disqualification of district judges" statute is recited. Section 21-5-8 N.M.S.A., 1953 Compilation.

As is pointed out by the Court, prior to an amendment to this statute in 1947, it had been construed to permit the disqualification of one judge only. **State ex rel. Tittman v. McGhee**, 41 N.M. 103, 64 P.2d 825; **State ex rel. Armijo v. Lujan**, 45 N.M. 103, 111 P.2d 541.

Prior to the amendment the statute read substantially the same as the justice of the peace disqualification statute still reads. Section 36-3-11, N.M.S.A., 1953 Compilation. This section provides as follows:

"Whenever a party to any action or proceeding of any kind, civil or criminal, in the justice court shall make and file an affidavit that the justice before whom the action or proceeding is to be tried or heard cannot, according to the belief of the party to said cause making such affidavit, preside over said cause with impartiality, such justice shall proceed no further therein and all of said justice's acts thereafter in said cause shall be void."

Section 21-5-8 N.M.S.A., 1953 Compilation (P.S.), the district judge disqualification statute, reads as follows:

"Whenever a party to any action or proceeding, civil or criminal, including proceedings for indirect criminal contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried and heard, **whether he be the resident judge or a judge designated by the resident judge, except by consent of the parties or their counsel**, cannot, according to the belief of the party making the affidavit, preside over the action or proceeding with impartiality, that judge shall proceed no further. Another judge shall be designated for the trial of the cause, either by agreement of counsel representing the respective parties, or upon the failure of counsel to agree, then the fact of the disqualification and failure to agree upon another judge shall be certified to the chief justice of the Supreme Court of New Mexico, and the chief justice shall designate the judge of some other district to try the cause." (Emphasis supplied.)

The underlined portion of the statute just quoted was added in 1947 and it was this amendment which led the Court to change its position and permit the disqualification of more than one judge in a single affidavit of disqualification. See **Rocky Mountain {44} Life Insurance Company v. Reidy**, *supra*.

It will be immediately noted that the justice of the peace disqualification statute has not been amended in the same manner that Section 21-5-8, *supra*, has been amended. Therefore, the decisions interpreting Section 21-5-8, *supra*, prior to its amendment are applicable and dictate that only the justice of the peace before whom the case was filed can be disqualified.

There is a very practical reason why the legislature has not amended Section 36-3-11, *supra*. There is no insurmountable obstacle created when a party disqualifies all the district judges in a particular judicial district. The Chief Justice simply designates a district judge from another judicial district to hear the case. This is permissible since a district judge has statewide jurisdiction. Article VI, Section 15, New Mexico Constitution.

However, the jurisdiction of justices of the peace is only countywide and when a justice of the peace is disqualified, Section 36-3-12, N.M.S.A., 1953 Compilation provides that the district court "shall designate any other justice of the peace **within said county** to try said cause." (Emphasis supplied.) Now, if a party could disqualify more than one justice of the peace, it would follow that he could disqualify all of the justices in a particular county. If this were permitted, then there would be no justice of the peace to hear the case. Clearly, such a result was never contemplated by the legislature. Accordingly, we conclude that a party can disqualify only the justice of the peace before whom the case was filed.