

48 Op. Att'y Gen. No. 11

COURTS, CITY - Procedure for selecting substitute city judge;
COURTS, JUSTICE - Procedure for selecting substitute justice of peace;
JUDGES - Procedures for selecting substitute city judge and substitute justice of peace;
JUSTICES OF THE PEACE - Procedure for selecting substitute justice of peace;
MONTANA CODE ANNOTATED - Title 3, chapter 3; sections 3-1-803, -805, 3-10-231, 3-11-203;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 26 (1983).

HELD:

1. A substitute city court judge may be selected by the sitting city judge from a list of qualified persons regardless of the availability of another city judge or justice of the peace.
2. If a sitting justice of the peace has been disqualified pursuant to Mont. Code Ann. § 3-1-803 or -805, the substitute justice must be another justice of the peace and may not be someone who has qualified to act as a substitute justice under Mont. Code Ann. § 3-10-231(2). If the sitting justice of the peace is sick, disabled or absent, the substitute justice may be a person who has qualified under § 3-10-231(2), as long as another justice of the peace or a city judge is not readily available. If the sitting justice of the peace is on vacation or in training, the substitute justice is chosen in the same manner as if the justice were sick or absent, as long as there is not another justice of the peace from the county of the sitting justice.
3. In determining who is available to act as a substitute justice of the peace, the sitting justice may rely upon letters from other justices and city judges that they are unavailable. Such letters should not be relied upon indefinitely, however. After a reasonable time, as determined by the sitting justice, the justices and judges who wrote the letters should be contacted to determine if they are still unavailable.

April 20, 2000

Mr. Steven J. Shapiro
Town Attorney
P.O. Box 2187
Clancy, MT 59634

Dear Mr. Shapiro:

You have requested my opinion on two questions which I have rephrased as follows:

1. Is a person who holds the offices of both city judge and justice of the peace required to contact city judges and justices of the peace in neighboring counties and elsewhere before calling a substitute judge who is not an elected or appointed city judge or justice of the peace?
2. May a person who holds the offices of both city judge and justice of the peace rely upon letters from city judges and justices of the peace from neighboring counties indicating that they are unavailable in deciding whom to call as a substitute judge?

Your questions arise from a situation in which the city judge for the Town of Boulder is also the justice of the peace for Jefferson County. Both the Town of Boulder and Jefferson County maintain lists of persons, pursuant to Mont. Code Ann. §§ 3-11-203 and 3-10-231, who may be called upon when the judge is absent or has been disqualified. Three justices of the peace and one city judge from neighboring counties have sent letters stating that each is unavailable to act as a substitute judge or justice of the peace because of heavy caseloads. Your questions concern how these letters should be used when selecting someone to sit as a substitute city judge or a substitute justice of the peace.

With respect to selecting a substitute for a city judge, the answer is fairly straightforward.

Mont. Code Ann. § 3-11-203 defines when a substitute may be called in as a city judge and provides:

(1) The city judge or mayor may call in a city judge, a justice of the peace, or some qualified person to act in the judge's place whenever the judge is:

(a) a party in a case;

(b) interested in a case;

(c) the spouse of or related to either party in a case by consanguinity or affinity within the sixth degree;
or

(d) sick, absent, or unable to act.

(2) The city judge may call in a city judge, justice of the peace, or some qualified person to act in his stead when a disqualifying affidavit is filed against him pursuant to the supreme court's rules on disqualification and substitution of judges.

(3) A city judge of any city or a justice of the peace of any county may sit as city judge at the city judge's request.

Under this section, a qualified person may be called in when the judge is sick, absent, unable to act or disqualified. There is no requirement to contact any city judge or justice of the peace prior to calling in a "qualified person." In response to your questions, then, with respect to calling in a substitute for a city judge, a substitute judge may be called in regardless of the availability of another justice of the peace or city judge and whether or not the other justices have expressed that they are unavailable.

The answers are more complicated, however, with respect to the position of justice of the peace because the reason for the absence of the justice determines who may be called in as a substitute justice. Mont. Code Ann. § 3-10-231 describes the procedures for calling in a substitute justice of the peace:

(1) Whenever a justice of the peace is disqualified from acting in any action because of the application of the supreme court's rules on disqualification and substitution of judges, 3-1-803 and 3-1-805, the justice of the peace shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside.

(2) (a) The following requirements must be met to qualify a substitute for a justice of the peace:

(i) Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in the justice's place during a temporary absence when another justice or city judge is not available.

. . . .

(3) Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent justice until the absent justice's return. If the justice is unable to call in a substitute, the county commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).

(4) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county is authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the justice of the peace may designate another person in the same manner as if the justice were sick or absent.

(5) A justice of the peace of any county may hold the court of any other justice of the peace at that justice's request.

The manner in which a substitute justice of the peace is chosen and who may be chosen depend upon the reason for the sitting justice's absence.

If a justice of the peace is absent because of disqualification under Mont. Code Ann. § 3-1-803 or -805, then the justice must either transfer the case to a justice in the same county or call in a justice from another county. If there is no other justice in the county, the only remaining option is to call in a justice from a neighboring county.

You have indicated that there is not another justice from Jefferson County or another city judge from the Town of Boulder, and that justices from neighboring counties and the city judge from Helena have stated in letters they are not available to act as substitutes due to their heavy caseloads. You ask if a non-elected or non-appointed justice can be called as a substitute. Mont. Code Ann. § 3-10-231(2) describes the procedure for qualifying persons to act as substitute justices of the peace and you indicate that a list of such "qualified persons" is being maintained in Jefferson County.

Your question is whether such a "qualified person" may act as a substitute without having to call in a justice from a neighboring county. Mont. Code Ann. § 3-10-231(1) is clear in stating that when a justice is disqualified, *only* another justice from the same county or a neighboring county may be called to substitute. See also 40 Op. Att'y Gen. No. 26 (1983) ("qualified person" may not be called in when the justice is disqualified). As you have noted, the Montana Supreme Court has strictly construed the statutes on substitute justices of the peace. Potter v. District Court, 266 Mont. 384, 880 P.2d 1319 (1994). Therefore, in response to your first question, when a justice has been disqualified, the justice may not call in a substitute who was neither appointed nor elected as a justice of the peace.

Your second question asks whether a disqualified justice may rely on letters from justices from neighboring counties which indicate that the justices are unavailable to act as substitute justices due to their heavy caseloads. Under the statutes on substitution of justices, there is no procedure for determining availability of justices in neighboring counties. It is therefore up to the individual sitting justice who becomes disqualified to determine availability of a neighboring justice each time he becomes disqualified. This does not mean that the disqualified justice must contact justices whom he knows or he reasonably believes cannot serve as substitutes. The law does not require idle acts. Mont. Code Ann. § 1-3-223.

A letter from a neighboring justice stating that he or she is too busy to act as a substitute may be relied upon by the sitting justice for a reasonable period of time. It would be unreasonable, however, to rely upon such a letter indefinitely to determine the availability of the justice. Periodically, the justices who wrote the letters should be contacted to determine if they are still unavailable. The reasonableness of such a time period may vary, but it would be prudent to contact the justices every four to six months to determine whether they are still unavailable.

If the disqualified justice is satisfied that justices from "neighboring" counties are unavailable, whether through reasonable reliance upon letters or other communication, then justices from other counties may be contacted. Under Mont. Code Ann. § 3-10-231(5), a "justice of the peace of any county may hold the court of any other justice of the peace at that justice's request." Thus, a justice of the peace from any county may sit as a substitute, if justices in the neighboring counties are unavailable.

If the sitting justice has not been disqualified, but is sick, disabled, or otherwise absent, Mont. Code Ann. § 3-10-231(3) states that the "justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent justice until the absent justice's return." Although this section could be read to provide that it is discretionary for the sitting justice to call in another justice, if one is readily available, or a city judge or another qualified person, the Montana Supreme Court in Potter read this language as mandatory and stated that a readily available justice or a city judge must be contacted before calling in an otherwise qualified substitute justice.

In Potter, the court read subsections (2) and (3) of Mont. Code Ann. § 3-10-231 together and stated that the first sentence of subsection (2) affects the manner in which a substitute justice may be called in under subsection (3). Section 3-10-231(2) states, with respect to the procedures for qualifying someone to be on the "qualified persons" list, that the "justice of the peace shall provide a list of persons who are qualified to hold court in the justice's place during a temporary absence when another justice or city judge is not available." The court in Potter interpreted subsection (2) as providing that a sitting justice may call in a qualified person only when no other justice or city judge is available, stating:

Additionally, the defendants maintain that, before calling in a substitute judge from the list, there must be no other justice of the peace, or city judge available to act as a substitute judge. We agree with that conclusion. Reading § 3-10-231(3) and (4), MCA, *in pari materia*, with § 3-10-231(2), MCA, as we must (§ 1-2-101, MCA), it is clear that a sitting judge may call in a substitute judge from the list ". . . when no other justice or city judge is available." Section 3-10-213(2), MCA. Accordingly, we conclude that, under the statutory scheme enacted by the legislature, in addition to the three requirements set forth in the immediately preceding paragraph of this opinion, a sitting justice of the peace must first attempt to call in another justice of the peace, if there is one readily available, (§ 3-10-231(2), MCA), or a city judge before resorting to calling in a qualified substitute judge from the list. Sections 3-10-231(2), (3) and (4), MCA.

Potter, 880 P.2d at 1324.

Thus, only if neither a justice of the peace nor a city judge is available may a qualified person be called in to act as a substitute justice of the peace when the sitting justice is unavailable as defined in Mont. Code Ann. § 3-10-231(3). As discussed above, the sitting justice may reasonably rely upon current and accurate letters indicating that another justice of the peace or city judge is not available.

If the sitting justice is absent due to training or a vacation, and there is not another justice in the county, the procedure for calling in a substitute justice of the peace is the same as if the justice were sick or absent.

In summary, how a substitute justice is selected depends upon the reasons for the absence of the sitting justice. In cases where the sitting justice is disqualified, only another justice may be called in. When the sitting justice is sick, disabled or absent, another justice or city judge may be called if he or she is readily available. Otherwise, a person who has been qualified under Mont. Code Ann. § 3-10-231(2) may be called as a substitute. When the sitting justice is on vacation or in training, and there is not another justice from the sitting justice's county, then a substitute is determined in the same manner as if the justice were sick or absent.

As a caveat, it should be noted that nothing in this opinion addresses or is intended to address the selection of a municipal court judge as a substitute or acting justice of the peace, or as a substitute or acting city judge.

THEREFORE, IT IS MY OPINION:

1. A substitute city court judge may be selected by the sitting city judge from a list of qualified persons regardless of the availability of another city judge or justice of the peace.
2. If a sitting justice of the peace has been disqualified pursuant to Mont. Code Ann. § 3-1-803 or -805, the substitute justice must be another justice of the peace and may not be someone who has qualified to act as a substitute justice under Mont. Code Ann. § 3-10-231(2). If the sitting justice of the peace is sick, disabled or absent, the substitute justice may be a person who has qualified under § 3-10-231(2), as long as another justice of the peace or a city judge is not readily available. If the sitting justice of the peace is on vacation or in training, the substitute justice is chosen in the same manner as if the justice were sick or absent, as long as there is not another justice of the peace from the county of the sitting justice.
3. In determining who is available to act as a substitute justice of the peace, the sitting justice may rely upon letters from other justices and city judges that they are unavailable. Such letters should not be relied

upon indefinitely, however. After a reasonable time, as determined by the sitting justice, the justices and judges who wrote the letters should be contacted to determine if they are still unavailable.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/elg/dm