

**Colorado Revised Statutes: Title 20: District Attorneys:**  
**20-1-107: Disqualification - court to appoint prosecutor - legislative declaration**  
TITLE 20. DISTRICT ATTORNEYS / ARTICLE 1. DISTRICT ATTORNEYS / PART 1. GENERAL PROVISIONS /  
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(1) The general assembly finds that the office of the district attorney was created by the state constitution and that the state constitution gives to the general assembly the exclusive authority to prescribe the duties of the office of the district attorney.

The general assembly finds and declares that this section is necessary to protect the independence of persons duly elected to the office of district attorney.

(2) A district attorney may only be disqualified in a particular case at the request of the district attorney or upon a showing that the district attorney has a personal or financial interest or finds special circumstances that would render it unlikely that the defendant would receive a fair trial.

A motion to disqualify a district attorney shall be served upon the district attorney at least two weeks before the motion is heard.

Such motion shall contain at least a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the movant and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit.

The district attorney may file a response in opposition to the motion and may appear at any hearing held on the motion.

The judge shall review the pleadings and determine whether an evidentiary hearing is necessary.

The motion shall not be granted unless requested by the district attorney or unless the court finds that the district attorney has a personal or financial interest or special circumstances exist that would render it unlikely that the defendant would receive a fair trial.

The order disqualifying the district attorney shall be stayed pending any appeal authorized by this section.

If the motion is brought at or before the preliminary hearing, it may not be renewed at the trial court on the basis of facts that were raised or could have been raised at the time of the original motion.

(3) An interlocutory appeal from an order of disqualification of a district attorney entered in the district court shall be filed in the supreme court pursuant to section 16-12-102 (2), C.R.S.

An appeal from an order of disqualification filed in the county court shall be filed in the district court.

In computing the time period within which a trial must be commenced, the period during which an appeal pursuant to this section is pending shall be excluded.

(4) If the district attorney is disqualified in any case which it is his or her duty to prosecute or defend, the court having criminal jurisdiction may appoint a special prosecutor to prosecute or defend the cause.

The judge shall appoint the special prosecutor from among the full-time district attorneys, assistant district attorneys, or deputy district attorneys who serve in judicial districts other than where the appointment is made; except that, upon the written approval of the chief justice of the supreme court, the judge may appoint any disinterested private attorney who is licensed to practice law in the state of Colorado to serve as the special prosecutor. Any special prosecutor appointed pursuant to this section shall be compensated as provided in section 20-1-308.

## **Case Notes / Annotation:**

Law reviews. For article, "Disqualifying a District Attorney When a Government Witness was Once the District Attorney's Client: The Law Between the Courts and the State", see 85 Den. U.L. Rev. 369 (2007).

2002 amendment to this section eliminates "appearance of impropriety" as a basis for disqualification of district attorneys. *People v. Chavez*, 139 P.3d 649 (Colo. 2006); *People v. Manzanares*, 139 P.3d 655 (Colo. 2006); *People ex rel. N.R.*, 139 P.3d 674 (Colo. 2006).

Disqualification for appearance of impropriety does not violate separation of powers. Although appearance of impropriety is not specifically codified, it is an acceptable basis for disqualification. Once the decision to prosecute is made, it becomes a matter of judicial responsibility, not a matter of legislative declaration. Thus, there is no separation of powers problem. *People v. Witty*, 35 P.3d 69 (Colo. App. 2000).

Purpose. This section is designed to authorize the disqualification of a district attorney and to allow for the appointment of a special prosecutor only when the district attorney has an interest in the litigation apart from his professional responsibility of upholding the law. *People v. District Court*, 189 Colo. 159, 538 P.2d 887 (1975); *People ex rel. N.R.*, 139 P.3d 671 (Colo. 2006).

The 2002 amendment to subsection (2) eliminates "the appearance of impropriety" as a basis for disqualification. Under the current version of the statute, disqualification is proper only when (1) the district attorney requests his or her own disqualification, (2) the district attorney has either a personal or a financial interest in the prosecution, or (3) special circumstances exist that would make it unlikely that the defendant would receive a fair trial. *People v. Lincoln*, 161 P.3d 1274 (Colo. 2007).

The fundamental inquiry is whether disqualification of a district attorney appears reasonably necessary to ensure the integrity of the fact finding process, the fairness or appearance of fairness of trial, the orderly or efficient administration of justice, or public trust or confidence in the criminal justice system. *People v. Palomo*, 31 P.3d 879 (Colo. 2003); *People v. Lee*, 93 P.3d 544 (Colo. App. 2003) (decided under law in effect prior to the 2002 amendment).

District attorney's charging decision in February 2005 concerning crime allegedly committed in February 2002 was governed by the July 2002 amendment to this section rather than the version of this section in effect prior to the amendment. *People ex rel. N.R.*, 139 P.3d 671 (Colo. 2006).

Appointment is to avoid appearance of impropriety. The most compelling rationale for requiring appointment of a special prosecutor is avoidance of the appearance of impropriety. *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

Any inconvenience to the prosecution resulting from appointment of a special prosecutor is but a small price to pay to avoid the appearance of impropriety. *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

Disqualification is proper when the district attorney has some involvement in the defendant's case, which would impair that office's ability to prosecute the case fairly. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

A finding of "special circumstances" described in subsection (2) is to be made by the court and not the district attorney. *People ex rel. N.R.*, 139 P.3d 671 (Colo. 2006).

A district attorney does not have a personal interest in a prosecution that warrants disqualification unless he or she stands to receive some personal benefit or suffer some detriment from the outcome of the prosecution that is unrelated to his or her duty to enforce the law. *People ex rel. N.R.*, 139 P.3d 671 (Colo. 2006).

A district attorney must be disqualified in a criminal case where the attorney or member of his or her staff will appear as a witness and give testimony of sufficient consequence to prevent a fair trial. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

The fact that the defense intends to call a deputy district attorney as a witness does not, without more, require the court to disqualify the district attorney. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

Construction in pari materia. This section is in pari materia with § 16-5-201 et seq. and these sections should be construed, if possible, so as to be consistent and harmonious, one with the other, and in their several parts. *People v. Gibson*, 53 Colo. 231, 125 P. 531 (1912).

Section authorizes court to supplant district attorney where impartial trial cannot be had through that officer. *Gray v. District Court*, 42 Colo. 298, 94 P. 287 (1908).

And power to appoint is not limited to contingencies specified. The power of the district court to make an appointment of a special attorney in criminal cases to act for and in place of the district attorney is not limited to the contingencies specified in this and the following section. It is within the inherent power of the court to appoint in other cases where necessary in the furtherance of justice, and for the due administration of the law. *Bd. of Comm'rs v. Crump*, 18 Colo. App. 59, 70 P. 159 (1902).

But appointment cannot be made where officer is present and not disqualified. This and the following section are not broad enough to permit the court to appoint a district attorney to prosecute in criminal cases when that officer is present in the court room and not disqualified. *Gray v. District Court*, 42 Colo. 298, 94 P. 287 (1908).

And a writ of prohibition will lie against the appointment of a special prosecutor to act as district attorney where the facts disclosed were not sufficient to authorize the appointment. *People ex rel. Morgan v. First Judicial Dist. Court*, 54 Colo. 237, 130 P. 324 (1913).

Presumption is that statutory ground for appointment existed. The district court has authority, in certain cases specified in this and the following section, to appoint someone to discharge the duties of the office of district attorney. When such an appointment is made, and in the absence of anything in the record to the contrary, the supreme court must presume that one of the statutory grounds existed when the appointment was made. *Wilson v. People*, 3 Colo. 325 (1877).

A second appointment may be made. Where the regular prosecuting officers are disqualified, and the special prosecutor declines to act further, it is not only within the power of the court, but is its clear

duty to appoint an attorney to take action upon the matters thus presented. *People ex rel. Morgan v. First Judicial Dist. Court*, 54 Colo. 237, 130 P. 324 (1913).

Where all conditions are present to give the court authority under this section to appoint a special prosecutor, although such appointee be a second one, the court has power to again make an appointment. *People ex rel. Morgan v. First Judicial Dist. Court*, 54 Colo. 237, 130 P. 324 (1913).

Defendant should not have to demonstrate prejudice or lack of integrity. *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

Defendant need not demonstrate prejudice where the issue is the authority to commence the prosecution itself. Even though a new district attorney had replaced a disqualified district attorney when motion to revoke a deferred judgment and sentence was heard and determined, the issue was authority to commence prosecution itself and the fact that there was no prejudice to the defendant was not determinative of defendant's motion to dismiss. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

District attorney to be given notice of grounds for disqualification. This section requires that the district attorney be given sufficient notice of the grounds for the disqualification to enable him to determine the facts behind the motion to disqualify and to consider the state of the law relating to the grounds for disqualification. *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

Trial courts have broad discretion in determining whether they should disqualify a district attorney from prosecuting a particular case. *People v. Lee*, 93 P.3d 544 (Colo. App. 2003) (decided under law in effect prior to the 2002 amendment).

A court commits an abuse of discretion if it makes a manifestly arbitrary, unreasonable, or unfair decision. *People v. Lee*, 93 P.3d 544 (Colo. App. 2003) (decided under law in effect prior to the 2002 amendment).

The question of whether an appearance of impropriety exists and the remedy therefor are uniquely questions for the court and must be committed to the trial court's broad discretion. *People v. County Court, City & County of Denver*, 854 P.2d 1341 (Colo. App. 1992).

Interest requiring removal defined. The interest which requires the removal of a district attorney for the particular occasion is not that which results from his becoming biased in favor of a defendant, but is such a concern in the outcome of the matter that he will either reap some benefit or suffer some disadvantage. *Gray v. District Court*, 42 Colo. 298, 94 P. 287 (1908).

It is the district attorney's duty to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct in the performance of his duties which may result in false accusations, and it is equally his duty to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to obtain a just conviction. *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1973).

The allegations of interest must show a concern in the outcome of the matter such that the district attorney will either reap some benefit or suffer some disadvantage; mere partiality will not suffice. *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

Interest that creates the appearance of impropriety is sufficient to warrant disqualification. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

Accusing prosecutor of wrongdoing does not automatically create a conflict of interest sufficient to merit disqualification. *People v. Jimenez*, 217 P.3d 841 (Colo. App. 2008).

Meaning of phrase "having criminal jurisdiction". The general assembly, by the words "having criminal jurisdiction", meant having such jurisdiction at the time when the appointment should become necessary, and when criminal jurisdiction is conferred all powers of criminal procedure are conferred with it. *Glavino v. People*, 75 Colo. 94, 224 P. 225 (1924).

It is incumbent upon one seeking to disqualify a prosecuting attorney to establish facts from which the trial court may reasonably conclude that the accused will probably not receive a fair trial to which he is entitled. *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1973).

Appointment should be made where district attorney has private interest in criminal case. If a district attorney has a private interest in a criminal case under his jurisdiction, it is the court's duty to appoint another to act for him. In such a case the prosecutor should not act even by consent. *People ex rel. Colo. Bar Ass'n v. ...*, 90 Colo. 440, 9 P.2d 611 (1932); *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1973).

Where he files information or dismisses cause because of interest. If, because of his interest, the district attorney files an information, the court should appoint some person to try the cause; if he dismisses a cause because of his interest, the court can and should appoint someone to file a new information and to prosecute the cause. *Gray v. District Court*, 42 Colo. 298, 94 P. 287 (1908).

Or where connected with defense of another case whose facts were interwoven with those of present case. The connection of the district attorney with the defense of another case, the facts of which were interwoven with the facts in the case at bar, held sufficient to warrant his being excused from prosecuting. *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888).

Prosecutor to withdraw when appearing as witness. The proper course of conduct, when the prosecutor knows in advance that he is going to appear as a witness, is to secure a replacement and withdraw as prosecutor. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973).

Disqualification proper if district attorney from office is material witness in the case. *Pease v. District Ct.*, 708 P.2d 800 (Colo. 1985).

Disqualification not required merely because deputy district attorney called as defense witness. Trial court properly denied motion to disqualify district attorney because the testimony was entirely favorable to defendant; its significance would not have been enhanced had the case been prosecuted by

a different office; and the testimony was not material in any event. *People v. Victorian*, 165 P.3d 890 (Colo. App. 2007).

Disqualification of district attorney due to involvement in suit against defendant. District attorney's employment, prior to filing criminal charges against defendant, as counsel in private capacity representing injured party in suit against defendant arising out of the circumstances leading to criminal prosecution, was grounds for disqualification in criminal action. *People v. Jiminez*, 187 Colo. 97, 528 P.2d 913 (1974).

Disqualification proper if prosecuting attorney had attorney-client relationship with defendant prior to employment as a prosecutor. *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

Section requires the disqualification of an assistant district attorney who, as a private attorney, had developed an attorney-client relationship with the defendant in connection with the case for which the defendant was being prosecuted. *People v. Chavez*, 139 P.3d 649 (Colo. 2006); *People v. Manzanares*, 139 P.3d 655 (Colo. 2006); *People ex rel. N.R.*, 139 P.3d 674 (Colo. 2006).

For motion to disqualify the district attorney's office when an employee of the office previously represented the defendant, trial court must determine whether "special circumstances" exist that render it unlikely that defendant would receive a fair trial if prosecuted by the district attorney's office. *People v. Chavez*, 139 P.3d 649 (Colo. 2006); *People v. Manzanares*, 139 P.3d 655 (Colo. 2006); *People ex rel. N.R.*, 139 P.3d 674 (Colo. 2006).

Prosecutor, a part-time district attorney, was permitted to practice law civilly in matters unrelated to the performance of his official duties. *People v. Jiminez*, 187 Colo. 97, 528 P.2d 913 (1974).

District attorney is disqualified from acting in grand jury's investigation of his own conduct. If, from any source which he deems sufficiently reliable to prompt him to act, the judge obtains information implicating the district attorney in any alleged offense which he has called to the attention of the grand jury, and acting on such information, directs that body to investigate the district attorney with respect to such offense, such action ipso facto disqualifies the district attorney from acting in such matters. *People ex rel. Lindsey v. District Court*, 29 Colo. 5, 66 P. 896 (1901).

It is neither manifestly arbitrary, unreasonable, nor unfair for the county court, in the exercise of its discretion, to hold that a public perception was created that intervenor was likely to be unfairly prosecuted where a deputy district attorney, on his own volition and without apparent necessity, had a warrant check run on intervenor he recognized in the county courthouse as a defendant in a pending county court criminal case, and, when instructed by the court not to have intervenor arrested, initiated and became involved in physically subduing intervenor and in effecting just such an arrest, and then becoming the complaining witness against intervenor in a new complaint filed against him for violation of city ordinances arising out of the altercation. *People v. County Court, City and County of Denver*, 854 P.2d 1341 (Colo. App. 1992).

But is free to act as to all other matters before such grand jury. As to all matters which come before the grand jury other than those for which a special prosecutor has been appointed, the regular district

attorney is free, and it is his duty, to act. *People ex rel. Lindsey v. District Court*, 29 Colo. 5, 66 P. 896 (1901).

Unsworn allegations that petitioner had testified against district attorney insufficient. Where petitioner's motion to disqualify sought to recuse the district attorney and his deputies and two special prosecutors because of conflict of interest because petitioner had testified against the district attorney before a grand jury, but petitioner offered no testimony or evidence to support the unsworn allegations, the trial court's denial of the motion will be upheld. *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1973).

No grounds shown for disqualification. The language of a newspaper editorial which has been reproduced as a paid political advertisement by the district attorney, who is a candidate for mayor, indicates only the newspaper's belief that the district attorney is properly performing his responsibilities and duties as district attorney in the defendant's case and there are no other inferences which could be drawn from the language. It would be beyond belief that anyone could state on the basis of the editorial that defendant would be subjected to an unfair trial because of this district attorney's past, current, or future participation in the case, and hence, the district attorney is not to be disqualified under this section. *People v. District Court*, 189 Colo. 159, 538 P.2d 887 (1975).

District attorney's potential political benefit from the defendant's conviction was not sufficiently distinct from his or her professional responsibilities to warrant any finding of an improper interest in the outcome of the case. *People v. Lee*, 93 P.3d 544 (Colo. App. 2003) (decided under law in effect prior to the 2002 amendment).

Involvement in forfeiture proceeding too attenuated to create a conflict of interest. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

District attorney's interest in forfeiture action is part of obligation to enforce the laws of the state and therefore not an interest in the outcome of the case apart from upholding the law. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

Trial court abused its discretion in disqualifying the district attorney as the alleged interest did not rise to such a level as to impede or impugn his professional responsibility to uphold the law. To allow disqualification in this case would essentially provide defendants the unfettered option of disqualifying a prosecutor whenever a district attorney had knowledge of any fact surrounding a case. *People v. C.V.*, 64 P.3d 272 (Colo. 2003).

Trial court had insufficient evidence to reach the conclusion that the district attorney had an interest in the case or that an appearance of impropriety existed such that the public would perceive the continued prosecution by the district attorney as so unjust and improper as to undermine their confidence in the criminal justice system. *People v. C.V.*, 64 P.3d 272 (Colo. 2003).

District attorney's or his or her office's financial interest is a statutorily authorized basis for disqualification only if the financial interest would render it unlikely that defendant would receive a fair trial. For a financial interest to implicate the fairness of a trial, it must be outcome dependent or

have a substantial impact on the district attorney's discretionary functions, such that the district attorney's conduct interferes with, is contrary to, or is inconsistent with his or her duty of seeking justice. *People v. Perez*, 238 P.3d 665 (Colo. 2010).

The special circumstances provision of subsection (2) requires a showing that facts exist rendering it unlikely that the defendant would receive a fair trial. *People v. Perez*, 238 P.3d 665 (Colo. 2010).

Trial court erred in disqualifying district attorney because none of the four grounds cited by the trial court constituted "special circumstances . . . that would render it unlikely that the defendant would receive a fair trial". The inquiry into whether an entire district attorney's office should be disqualified because of a prior representation by an individual prosecutor depends on whether confidential information gained from that prior representation has been or could be passed from the individual prosecutor to other members of the office who continue to prosecute the case. *People v. Perez*, 201 P.3d 1220 (Colo. 2009).

District attorney who had previously represented defendant did not have confidential information that could have been passed on to prosecutors because district attorney did not recall prior representation of defendant, did not perform any substantive work on case, and never received any information from defendant. *People v. Perez*, 201 P.3d 1220 (Colo. 2009).

District attorney's previous representation of potential witness and possible alternate suspect did not constitute a special circumstance. District attorney who aided preliminary investigation and who had previously represented potential witness and possible alternate suspect did not have confidential information and left the office before charges were filed. *People v. Perez*, 201 P.3d 1220 (Colo. 2009).

Discovery violation not a special circumstance warranting disqualification. For allegedly inadequate witness list, trial court should impose the least restrictive sanction that preserves the truth-finding process, restores a level playing field, and deters prosecutorial misconduct, not disqualification. *People v. Perez*, 201 P.3d 1220 (Colo. 2009).

Finally, funding arrangement whereby district attorney's office billed department of corrections for costs related to prosecuting crimes committed in a prison and department then forwarding reimbursements to counties was not a "special circumstance". District attorney's office did not obtain any intentional financial gain nor was there any double-billing. *People v. Perez*, 201 P.3d 1220 (Colo. 2009).

Facts showing an appearance of impropriety are no longer relevant in court's determination whether to disqualify a district attorney. The general assembly amended the statute, eliminating the "appearance of impropriety" as a ground for disqualifying a district attorney. *People v. Loper*, 241 P.3d 543 (Colo. 2010).

The "special circumstances" justifying disqualification of a district attorney must be extreme and must render it unlikely that a defendant would receive a fair trial. The suspicious manner in which the charges were brought and the involvement and possible influence on the district attorney by a probation officer employed by the judicial department raises concerns of potential impropriety, but this evidence



does not bear on whether defendant would be unlikely to receive a fair trial. *People v. Loper*, 241 P.3d 543 (Colo. 2010).

Court erred in disqualifying district attorney based on finding of "special circumstances". The appearance of impropriety is no longer a valid reason for disqualifying a district attorney, and the ordered defense disclosure did not constitute extreme circumstances under the statute. *People v. Kendrick*, 2017 CO 82, 396 P.3d 1124.

Appointment of special prosecutor constituted an abuse of discretion where the only fact relied upon by the court was that one of the deputy district attorneys, not assigned to the case, was the brother of a state trooper who would be testifying in the case. *People v. County Court, Jefferson County*, 902 P.2d 413 (Colo. App. 1994).

Trial court abused its discretion in finding the present appearance of impropriety sufficient to warrant removal of the district attorney and the capital crimes unit. Where there are other remedies for the trial court to consider when timely, the remedy of disqualification for the appearance of impropriety in relationship to the victim's medical records is too severe. *People v. Palomo*, 31 P.3d 879 (Colo. 2001).

Special prosecutor, if ineligible because of membership in general assembly, is nevertheless an officer de facto. *Glavino v. People*, 75 Colo. 94, 224 P. 225 (1924).

When a special prosecutor is appointed, that person becomes the district attorney for that particular case, exercising plenary power. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

When an indictment is procured by or with the assistance of a prosecuting attorney who is disqualified to conduct the prosecution or when an information is presented by a disqualified prosecuting attorney, it is invalid. Once the disqualification of a district attorney is entered and the appointment of a special prosecutor becomes effective, the special prosecutor, and only the special prosecutor, is the authorized prosecuting attorney on the case. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

The scope of a special prosecutor's responsibility to prosecute cases after being appointed pursuant to this section includes not only the guilt phase of a case but also the means adopted to impose punishment upon an offender. Therefore, only the special prosecutor was authorized to make determinations regarding the necessity of filing a motion to revoke a deferred judgment and sentence. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

Trial court does not have discretion in ruling on the disqualification of a prosecuting attorney where the district attorney has confessed a disqualification and a special prosecutor has already been appointed. Trial court should have granted defendant's motion to dismiss even though disqualified district attorney's term of office was due to expire before a motion to revoke a deferred judgment and sentence filed by the district attorney was heard on the merits. The district attorney was not authorized to act after special prosecutor was appointed and an abuse of discretion standard of review has no application under these circumstances. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

Where district attorney seeks to disqualify himself or herself, no evidentiary showing is required. The statute only requires the filing of a motion by the district attorney. However, the standard is different

when a defendant seeks to disqualify a district attorney; in that case, the defendant must show that the district attorney has a personal or financial interest in the case or that there are special circumstances that would render it unlikely that the defendant would receive a fair trial. *People v. Aryee*, 2014 COA 94, 356 P.3d 918.

Applied in

*People v. Epps*, 2017 CO 112, 406 P.3d 860.