Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2019-04
(Finalized and effective December 20, 2019)

BACKGROUND:

The Governor recently appointed the district attorney of one of the State's judicial districts to serve as a district court judge for the district ("the appointee"). The appointee has worked for the office of the district attorney for approximately ten years. Before being elected as the district attorney, the appointee served as the chief deputy district attorney and as a deputy district attorney. The appointment will not be effective until 2020, but the district court clerk has already started assigning cases to judges for next year. Given the appointee's previous employment, the clerk's office would like to avoid assigning her cases that would require per se disqualification.

To that end, the chief judge of the district has asked the Judicial Ethics Board ("Board") for guidance to determine the circumstances in which a judge that served as a former prosecutor must recuse. The chief judge has posed several specific questions, which the Board will address at the end of this opinion once it has given an overview of how the disqualification rule (or its precursor) contained in the Code of Judicial Conduct ("Code") has been interpreted in Colorado.

The Board clarifies, however, that its answers in no way limit a judge's discretion to recuse in a given case if the judge believes his or her impartiality might reasonably be questioned.

ISSUE PRESENTED:

When must a judge who served as a former prosecutor recuse himself or herself from a proceeding?[1]

SUMMARY:

Standing alone, mere association with the district attorney's office does not require a judge's per se disqualification from a proceeding. If, however, the judge has personal knowledge of disputed evidentiary facts concerning the proceeding, had some active supervisory role over the attorneys that prosecuted the case, or played a role in the investigation or prosecution of the case during the judge's former employment, the judge must recuse. A judge may also be required to recuse if he or she has a close personal relationship with a prosecutor in the case, or if the judge previously prosecuted the defendant for a crime related to or material to the current charges against the defendant.

[1] The Board considered this issue broadly and narrowly in the context of the specific questions addressed in pages 7-9 of this opinion.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Rule 2.11 sets forth the circumstances in which a judge must disqualify[2] himself or herself from a proceeding. The rule provides, in relevant part, as follows:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[3] might reasonably be questioned, including but not limited to the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge[4] of facts that are in dispute in the proceeding.
> >
> > . . .
> >
> > (5) The judge:
> >
> > > (a) *served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association*; (emphasis added)
> > >
> > > (b) *served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding*, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; (emphasis added)
> > >
> > > (c) was a material witness concerning the matter; or
> > >
> > > (d) previously presided as a judge over the matter in another court.
> >
> > . . .
>
> (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive

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[2] As noted in Comment [1] to Rule 2.11, the term "recusal" is used interchangeably with the term "disqualification."

[3] Under the Code, the term "impartiality" means "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before the judge."

[4] As defined by the Code, the term, "knowledge," means "actual knowledge of the fact in question," but a "person's knowledge may be inferred from circumstances."

> disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

ANALYSIS:

Colorado law has three interrelated provisions for judicial disqualification: Criminal Procedure Rule 21(b), section 16-6-201 of the Revised Statutes, and Rule 2.11 of the Code. Rule 21(b) and section 16-6-201 both provide that a judge should disqualify herself upon a showing that the judge "is in any way interested or prejudiced with respect to the case, the parties, or counsel."[5]

1. <u>Test for Per Se Disqualification</u>

Colorado courts have addressed disqualification situations involving former prosecutors that are later appointed to the bench on several occasions. The landmark case governing disqualification in such instances is *People v. Julien*, 47 P.3d 1194 (Colo. 2002).[6] The rule from *Julien*, and from which other disqualification cases build, is that, in and of itself, a judge's former employment with a government agency is insufficient grounds for disqualification. Instead, the judge must have played an active role in the case, like taking part in the investigation, preparation, or presentation of the case; supervising someone who did; or having personal knowledge of disputed evidentiary facts.

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[5] The Board's authority is limited to inquiries concerning the Code, and therefore these provisions are not addressed in this opinion but are mentioned because the chief judge and district court clerk may want to review them. *See* C.J.D. 94-01 (Board provides "advisory opinions . . . concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct," and "shall address only whether an intended future court of conduct violates or does not violate the Colorado Code of Judicial Conduct.").

[6] *Julien* interpreted Canon 3(C)(1), which set forth the disqualification provision under the prior Code. Canon 3(C)(1) provided that

> [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 . . .
>
> > (a) a judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the matter;
> >
> > (b) a judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. . .

In *Julien*, the defendant moved to disqualify a judge from presiding over his case on the basis that the judge had worked as an assistant district attorney for several years prior to being appointed as a district court judge for that district. Five weeks after his appointment, the judge was assigned to and began presiding over Julien's case.

Julien claimed that the judge had to recuse himself because (1) he was employed by the district attorney's office at the time charges were filed against Julien; (2) as an assistant district attorney, the judge was a supervising attorney and team leader in the office; and (3) another attorney of the district attorney's office employed at the same time as the judge was prosecuting Julien.

The judge stated that he had never worked on Julien's case, had no recollection of it, had never supervised anyone involved in the case, and had no knowledge of disputed evidentiary facts. Nevertheless, to avoid the appearance of impropriety, the judge suspended proceedings and referred the matter to another judge to determine if he should recuse. The other judge determined that there was no basis for disqualification and returned the case to the original judge for sentencing. The judge sentenced Julien to eighteen years' incarceration.

The court of appeals reversed, concluding that the judge should have recused. The supreme court disagreed. It looked to Canon 3(c)(1)'s commentary applicable to former government attorneys, which struck a balance between not needing to recuse based on prior employment alone and requiring recusal in cases of affirmative participation or knowledge:

> [a] lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.[7]

The court recognized that the applicable "canons, statutes, and rules governing judicial conduct do not require disqualification of a judge *if the only prior association the judge has with the defendant's case is that the judge was associated with the district attorney's office when the case was in the office*." *Julien*, 47 P.3d at 1198 (emphasis added). However, the court also recognized that the judge "must disqualify himself or herself sua sponte or in response to a disqualification motion, if facts exist tying the judge to personal knowledge of disputed evidentiary facts concerning the proceeding, some supervisory role over the attorneys who are prosecuting the

[7] This language requiring action or knowledge on the judge's part is similar to the language in current Rule 2.11(A)(5)(b) involving active participation and requiring recusal if the judge "served in governmental employment, and *in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding*, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." (Emphasis added).

case, or some role in the investigation and prosecution of the case during the judge's former employment."[8]

Julien did not contend that the judge had any actual bias or prejudice against him; rather, as evidence of an appearance of bias, Julien relied solely on the fact that the judge had been employed as a supervisor in the district attorney's office a mere five weeks prior to being assigned to Julien's case. The supreme court determined that this allegation alone did not require the judge to recuse because he took no part in the investigation, preparation, or presentation of Julien's case while employed by the district attorney, nor did he supervise those who did or have personal knowledge of disputed facts. The court held that recusal was unnecessary, as "Canon 3(C)(1) d[id] not impute the knowledge of government attorneys to other attorneys in that office, and Colorado ha[d] no bright-line rule that imposes a waiting period before one may serve as a judge in cases involving the judge's former office."[9]

2. Disqualification Per Se Based on Association with Former Coworkers

In *Schupper v. People*, 157 P.3d 517 (Colo. 2007), the supreme court built on the rule announced in *Julien* as it concerned relationships with former coworkers. In *Schupper*, the defendant moved to recuse the judge on the basis that an attorney for the prosecution was the judge's former supervisor. The judge acknowledged that the attorney in question had been his supervisor and friend while he was employed by the district attorney's office, but he stated that he and the attorney had lost contact and were no longer close.

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[8] The concept of a judge's knowledge of disputed facts as the basis for disqualification was mentioned but not addressed in *Julien* because the court determined that the judge had no prior knowledge of Julien or his case. A different case, however, held that legally sufficient facts requiring disqualification are those "from which it may reasonably be inferred that the respondent judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the petitioner." *People v. Hagos*, 250 P.3d 596, 612 (Colo. 2009) (judge did not have personal knowledge of disputed evidentiary facts and thus did not have to recuse from presiding over present case even if the judge was called as a witness for future prosecution against the defendant because the judge did not see the defendant allegedly mouth to the victim, "you're dead" while both were in the judge's courtroom).

[9] Justices Bender and Martinez dissented. In their opinion, rather than focusing solely on the judge's involvement in Julien's case while employed with the district attorney's office, the inquiry should have also included the degree of loyalty that the judge may have felt toward the attorney prosecuting the case. In the dissent's opinion, this would have led any reasonable person to question the judge's impartiality, and the majority's approach was inconsistent with the Code and the core values of the judicial system. The dissent thought that consistent with the Code, the judge should have disclosed his recent employment with the district attorney's office and given Julien the opportunity to request a recusal or to waive the appearance of impropriety. Because the dissent believed that the judge's failure to disclose—and if necessary, recuse himself—amounted to structural error, it would have reversed the conviction and remanded for a retrial before another judge.

The supreme court applied its holding in *Julien* and determined that the "mere existence of a relationship—whether personal or professional—is insufficient grounds for disqualification." Rather, the "closeness of the relationship and its bearing on the underlying case determined whether disqualification [was] necessary." *Id*. at 520. Based on the record presented, the court concluded that nothing showed a close, existing friendship between the attorney and the judge and that Schupper had failed to show that the alleged friendship would create bias or would make the judge appear biased.[10]

Thus, following *Schupper*, a relationship with a prior coworker does not per se require disqualification; however, judges should consider the closeness of their relationships and any bearing that relationship may have on the underlying case.

3. Disqualification Based on Prior Prosecution by Judge in Earlier Case

Another situation in which disqualification arises is when a judge prosecuted the defendant in a prior case. Seven years before the judge took the bench in *People v. Flockhart*, 304 P.3d 227 (Colo. 2013), he had charged Flockhart in an unrelated case with similar offenses (possession and cultivation of marijuana). Flockhart moved to disqualify the trial judge on that basis and argued that the judge was biased and could not preside over the case in a fair and impartial manner. The trial judge remembered Flockhart's earlier prosecution but stated that he had no personal bias against Flockhart and found no other basis that would support disqualification, so he denied the motion. Flockhart appealed, and the court of appeals affirmed the trial court's decision.

The supreme court acknowledged that, in reality, "many judges have spent a portion of their careers working for government agencies . . . and when a former prosecutor assumes the bench as a judge, he [or she] likely will confront defendants that he [or she] has prosecuted in the past." *Id.* at 238. The court applied *Julien* and sought additional guidance from jurisdictions that had addressed the issue. The court adopted the majority rule and held that a judge was not per se disqualified simply because he or she had prosecuted a defendant in the past and that "[a]bsent facts demonstrating some material relationship between the two proceedings, or facts showing that the past prosecution is relevant to the current case, disqualification is not invariably required." *Id*.; *see also* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 11.4, at 294-95 (2d ed. 2007) ("A judge is not deemed to be disqualified from presiding over a case merely because she, or the office with which she was formerly affiliated, prosecuted a defendant on an offense that is different from the one with which defendant is presently being charged.").

[10] The dissent disagreed and thought that there was ample evidence that a close relationship existed because the judge said they used to be friends, and the attorney in question was the judge's supervisor in a division of the district attorney's office that only consisted of two or three attorneys. Because of the judge's friendship—and because the contentious relationship between the district attorney's office and Schupper gave an impression of bias and partiality—the dissent thought that the judge should have recused.

Thus, even though the two prosecutions against Flockhart involved similar marijuana charges and the judge had prosecuted Flockhart in the first proceeding, the supreme court found that the record showed no material relationship between the two proceedings, and nothing suggested that the earlier prosecution was relevant to the later prosecution. Accordingly, disqualification was not required.

4. <u>Application of Disqualification Case Law to Posed Questions</u>

The chief judge has asked the Board to consider whether recusal is necessary under the following scenarios:

1. If a criminal proceeding was initiated by the district attorney's office while the judge was the elected district attorney, will the judge be required to recuse himself or herself from that case even if the judge did not actively prosecute the case, was not personally involved in another manner, and has no personal knowledge of the case?

The Board is aware that, regardless of whether the judge personally participated on a case, as the district attorney, his or her name was affixed to any and all motions, briefs, and similar documents filed by the State during his or her tenure. Colorado has not yet determined whether merely affixing a title to a document constitutes supervision over a case, but several other courts have opined that it does not. *See, e.g.*, *United States v. Wilson*, 426 F.2d 268 (6th Cir. 1970) (judge in criminal trial was not disqualified on the ground that he was the U.S. attorney at the time formal charges were brought against defendant because a mere supervisory role without any actual participation in the prosecution of the case did not disqualify the judge); *Lampkins v. Gagnon*, 539 F. Supp. 359 (E.D. Wis. 1982) (habeas corpus petitioner's motion to disqualify judge would be denied where ground asserted was that, while serving as the state attorney general, the judge's name appeared on a brief of petitioner's direct appeal when the judge had no recollection of the prior appeal); *Commonwealth v. Jones*, 663 A.2d 142 (Pa. 1995) (fact that judge's name appeared on briefing urging affirmance of conviction when judge was the district attorney did not warrant recusal where the judge had no direct personal contact with the defendant's file at the time, and formal administrative step of requiring his name on the signature block did not, per se, demonstrate bias or knowledge of the case).

The cases from other jurisdictions strongly suggest that merely including the judge's name and former title on every document filed, whether the judge signed it or not, is an administrative function and is not indicative of supervision, as in most jurisdictions, an active supervisory role is required. The supreme court's opinion in *Julien* tacitly supports this proposition too because Julien had argued that the judge's supervisory position with the district attorney's office should have disqualified him from presiding over Julien's case, but the court held that it did not.

What has been decided in Colorado is that a judge need not recuse from a criminal case merely because the judge worked in a prosecutor's office before taking the bench unless the judge had acquired personal knowledge of disputed evidentiary facts concerning the proceeding, performed some supervisory role over the attorneys who were prosecuting the case, or had some

role in the investigation and prosecution of the case. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009). If these conditions are not present, the judge should not have to recuse.

2. If a case was referred to the district attorney's office for investigation and/or for the filing of a complaint while the judge was the elected district attorney, but the complaint is filed following his or her resignation, will the judge be required to recuse from the case?

This scenario is similar to the one in *Julien* where the judge had been employed by the district attorney's office while Julien was charged and took the bench five weeks before Julien's trial began. As the court held in *Julien*, recusal will depend not on the timing of the case but whether the judge has personal knowledge of the disputed evidentiary facts surrounding the proceeding, performed a supervisory role over the attorneys who investigated or prosecute the case, or had some role before the complaint was filed.

3. May a judge preside over cases that were not pending during his or her tenure at the district attorney's office but which involve individuals who were investigated or prosecuted by the district attorney's office for unrelated offenses during the judge's tenure with the district attorney's office? Does it matter if the individual is the defendant in the new case or if he or she is merely a witness?

In *Flockhart*, the supreme court held that there is no per se rule requiring disqualification in every instance in which a presiding judge, as a former prosecutor, brought previous unrelated criminal charges against the defendant, and absent facts demonstrating some material relationship between the two proceedings or facts showing that the past prosecution is relevant to the current case, disqualification is not invariably required. *Flockhart*, 304 P.3d at 238. By extension, if *Flockhart* does not require the judge to recuse from presiding over unrelated cases against the same defendant the judge prosecuted, it will not require the judge from recusing in (a) unrelated cases against other individuals (e.g., witnesses) involved in the current case or (b) unrelated cases against other individuals involved in the current case in which the judge played no part.

Thus, as long as the charges against the defendant (both past and current) are unrelated to those in the present case, and there is no material relationship between the past and present case, per se disqualification is not required.

4. Is the judge required to recuse from cases in which he or she did not serve as the prosecuting attorney, but which were active during the period in which the judge served as the chief deputy district attorney or deputy district attorney?

As explained in *Flockhart*, disqualification is required if there are facts demonstrating some material relationship between the two proceedings or facts showing that the past prosecution is relevant to the current case. Although there is no case law directly on point, a situation requiring recusal may occur where a defendant, who was prosecuted by the district attorney's office during the judge's employment and in which the judge played a role, was sentenced to probation. If the judge is presented with a complaint to revoke probation, the two

proceedings could be materially related under the *Flockhart* test, and the judge may need to recuse.

5. If recusal is required in any of the circumstances described above, does this obligation continue indefinitely, or may the judge preside over such cases following the passage of a specific period?

The cases on disqualification do not focus on any temporal aspect. Rather, as detailed above, the inquiry is focused on whether the judge acquired personal knowledge of disputed evidentiary facts concerning the proceeding, played an active supervisory role over the attorneys who were prosecuting the case, had some role in the investigation or prosecution of the case, maintains a close relationship with the prosecuting attorney, or is somehow biased or prejudiced against the defendant. Time is a factor only in that eventually any cases in which the judge participated will be resolved.

If disqualification is not based on bias or prejudice, Rule 2.11(C) allows the judge to disclose "on the record the basis of the judge's disqualification" and "ask the parties . . . to consider, outside the presence of the judge and court personnel, whether to waive disqualification." If, following disclosure, the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding**.**

6. Is there a minimum period during which the judge will be required to refrain from presiding over new criminal cases even if those cases are referred to and investigated by the district attorney's office following the judge's resignation from that office and the complaints are filed under the name of the judge's successor as district attorney?

The case law does not mention a minimum period of time in which a judge must not preside over new criminal cases referred to by the district attorney's office. In *Julien*, the court noted that Colorado has no bright-line rule that imposes a waiting period before one may serve as a judge in cases involving the judge's former office. In that case, the judge in question had only been sitting on the bench for five weeks, and the supreme court determined that, based on the record, he did not need to recuse. Instead of having a dedicated waiting period, the factors considered are the judge's knowledge of the case, his or her supervisory role, and whether the judge participated in the investigation or prosecution.

CONCLUSION:

Standing alone, a judge's former association with the district attorney's office does not per se require disqualification. But if the judge has personal knowledge of disputed evidentiary facts concerning the proceeding, had some active supervisory role over the attorneys who are prosecuting the case, or had some role in the investigation or prosecution of the case during the judge's former employment, then the judge must recuse sua sponte or in response to a disqualification motion. The judge may also be required to recuse if he or she is close with the prosecutor in the case, or if, in the judge's capacity as a district attorney, the judge previously prosecuted the defendant for a crime related or material to the current charges.

Even if recusal is necessary, however, pursuant to Rule 2.11(C), if the recusal is not for bias or prejudice, the judge may disclose her reasons for recusal to the parties who may then decide to waive recusal.

FINALIZED AND EFFECTIVE this 20th day of December.