Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-06
(Finalized and effective October 15, 2012)

ISSUE PRESENTED:

After reporting an attorney to Attorney Regulation Counsel and law enforcement, the requesting judge has recused from the attorney's cases based on his conclusion that his disqualification was required under Rule 2.11(A)(1) of the Code of Judicial Conduct and CJEAB Adv. Op. 2011-01. The judge recently learned, however, that Attorney Regulation Counsel has closed the disciplinary proceeding and imposed no public sanction against the reported attorney, and the judge indicated that he has "no personal bias against the lawyer and believe[s] that a disinterested objective observer, knowing all of the facts, would not reasonably question [his] impartiality." There is no report of any law enforcement agency taking any action and the matter is presumed closed. Thus, the judge has concluded that he is no longer required to disqualify himself from, and therefore has a duty to sit on, the attorney's cases under Rule 2.7.

The judge seeks an opinion regarding whether, when sitting on the attorney's cases, he must disclose his report against the attorney despite the fact that the disciplinary proceeding has been closed. Specifically, the judge asks the following questions:

1. Does the Board's interpretation in Opinion 2011-01 of the disclosure obligation extend without time limit and regardless of whether the disciplinary proceeding was closed?

2. If the judge is required to disclose his report of the attorney after the closure of the disciplinary proceeding, must he hear the lawyer's cases which are assigned to his division, or may he refer the case to other judges to whom the disclosure obligation does not apply?

CONCLUSION:

A judge who reports an attorney to Attorney Regulation Counsel but concludes that disqualification from the attorney's cases is not required has a duty to sit on the reported attorney's cases and must disclose the report to the parties and their counsel until the disciplinary proceeding stemming from the report has been closed.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 2.7 provides that a judge "shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."

Rule 2.11(A)(1) provides that a judge should disqualify himself or herself in any proceeding in which the "judge's impartiality might reasonably be questioned," including but not

limited to instances where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer…."

Comment [5] to Rule 2.11 states: "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

DISCUSSION:

In Opinion 2011-01, the Board determined that a judge's report of attorney misconduct, without more, does not require the judge automatically to recuse from the reported attorney's cases, but that recusal is required if the judge has a personal bias or prejudice against the attorney, or, even absent such subjective bias, "the facts and circumstances surrounding the report would lead a reasonable person having knowledge of those facts and circumstances to question the judge's impartiality in the case." *Id*. at 1. The Board further concluded that the reporting judge must "disclose the fact that the judge has made a complaint against the attorney," even if the judge determines that disqualification from the reported attorney's cases is unnecessary. *Id*. at 4. The Board now considers the duration of this disclosure requirement.

The duration of the automatic disqualification requirement was partially addressed in Opinion 2011-01. Specifically, the Board recognized that in cases of actual bias or prejudice a judge must recuse as long as the bias or prejudice exists. *Id*. at 5; *see* C.J.C. Rule 2.11(A)(1) ("A judge shall disqualify himself or herself in any proceeding in which . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer. . . ."). When a judge concludes that he or she is disqualified "based solely on the appearance of partiality" stemming from the judge's report of an attorney, the Board concluded that the judge must continue to recuse *sua sponte* from the attorney's later-filed cases "for some period of time" after the report, "because the same concerns that required recusal in the original case would still exist." The Board noted, however, that those concerns "will be mitigated by the passage of time and at some point, typically when the Office of Attorney Regulatory Counsel or law enforcement has completed any action on the complaint, the automatic recusal requirement will cease." *Id*. at 2, 5. The Board's use of the word "typically" leaves open the possibility that, under some circumstances, the concerns giving rise to the appearance of partiality could abate such that the disqualification requirement would cease while the attorney discipline proceeding is still pending.

Opinion 2011-01 did not address a specific time period for the duration of disclosure but recognized that the disqualification requirement may end before the disclosure requirement does, and that a judge may thus be required to disclose his or her report of an attorney even after the judge has concluded that disqualification is not necessary. This is so because, while the disqualification and disclosure requirements are both designed to ensure that judges perform the duties of judicial office impartially and conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the judiciary, they focus on different aspects of that overarching goal. Specifically, the question whether a judge is automatically disqualified from a reported attorney's cases focuses on the judge's perspective: does the judge have a personal bias against the lawyer or believe that a disinterested objective observer would reasonably question the judge's impartiality? In contrast, the question whether the judge must

disclose his or her report of an attorney focuses not on the judge's perspective, but on the litigants' perspective: would the parties or their lawyers reasonably consider the report relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification? *See* C.J.C. Rule 2.11 cmt. [5].[1] Because their perspectives might differ, the parties and their lawyers might consider a judge's unresolved report of an attorney relevant to a possible motion for disqualification even if the judge concludes that the concerns that gave rise to the initial disqualification decision have mitigated such that *sua sponte* disqualification is no longer required.

Like the concerns that trigger a judge's decision to recuse to avoid the appearance of partiality, however, the concerns that give rise to the disclosure obligation and the parties' need to know about a judge's report of an attorney abate over time. Thus, it would be unreasonable for the disclosure requirement to apply indefinitely, because at some point the judge's report of the attorney would be sufficiently attenuated that the litigants could no longer reasonably consider it relevant to a possible motion for disqualification. In our view, that occurs when the attorney discipline complaint is closed, because at that point either a sanction that protects the public from any ongoing concerns about the attorney's continuing licensure has been imposed, or the Office of Attorney Regulation Counsel has concluded that there are no grounds for the reported attorney to be disciplined or that the conduct giving rise to the report has been remedied and/or the attorney has been rehabilitated such that a public sanction is not warranted. *See* C.R.C.P. 251.1 through 251.34 (establishing the grounds for attorney discipline, forms of discipline, alternatives to discipline, and rules of procedure regarding attorney discipline and disability proceedings).

Thus, in cases in which the reporting judge concludes that disqualification from the attorney's cases continues to be required until the complaint against the attorney has been resolved, the disqualification requirement and the disclosure requirement will end at the same time. But when the reporting judge determines that disqualification is not required despite the ongoing pendency of the attorney discipline proceeding, the judge will be required to disclose the report until the complaint is resolved. *See* CJEAB Adv. Op. 2011-01. By requiring disclosure of the still pending report despite the judge's determination that *sua sponte* disqualification is unnecessary, the disclosure rule ensures that the parties are given an opportunity to independently evaluate the circumstances and decide whether to file a motion to recuse, thereby requiring the judge to re-evaluate that determination.

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[1] In CJEAB Adv. Op. 2011-01, the Board cited C.J.C. Rule 2.11 cmt. [5], for its conclusion that "[i]f a judge who has filed a professional conduct complaint against an attorney determines that the judge is not disqualified from hearing a case in which the attorney is counsel, the judge will, nevertheless, be required to disclose the fact that the judge has made a complaint against the attorney." Comment [5] uses the term "should" in reference to the disclosure of information that a judge does not necessarily believe warrants disqualification. *See* C.J.C. Rule 2.11 cmt. [5] ("A judge *should* disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.") (emphasis added); C.J.C., Scope [2] (referring to "may" and "should" as permissive terms); *see also* C.J.C., Scope [3] ("Comments neither add to nor subtract from the binding obligations set forth in the Rules."). As written, Comment [5] encourages but does not require disclosure. In CJEAB Adv. Op. 2011-01, however, the Board determined that disclosure was required in the circumstances at issue.

Our conclusion that the disclosure obligation ends upon closure of the attorney discipline proceeding is consistent not only with the purpose of the disclosure requirement, but also with the rules governing the confidentiality and expunction of attorney discipline records, which recognize the need to balance the public's need to know against the reported attorney's privacy interests. *See* C.R.C.P. 251.31 and 251.33. So limiting the duration of the disclosure obligation also ensures that the requirement is not a deterrent to a judge's compliance with the duty to inform appropriate authorities of conduct by an attorney "that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." C.J.C. Rule 2.15(B); *see also* C.R.C.P. 251.4 ("A judge has a duty to report unprofessional conduct by an attorney to Regulation Counsel.").

In this case, the requesting judge indicated that the disciplinary proceeding stemming from his report of the attorney has been closed and that, applying the standards established in Opinion 2011-01, he has determined that he is no longer required to disqualify from the reported attorney's cases because he has no personal bias against the attorney and believes that a disinterested objective observer would not reasonably question his impartiality. That conclusion is sound, as is the judge's determination that, absent a motion establishing a basis for his recusal, he is required under Rule 2.7 to sit on the reported attorney's cases. *See* C.J.C. Rule 2.7 cmt. [1] ("Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally."); *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (A "judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."); *Wilkerson v. Dist. Court*, 925 P.2d 1373, 1376 (Colo. 1996) ("Unless a reasonable person could infer from the facts that the judge would in all probability be prejudiced against the party, the judge must preside over the case.").

And, in light of our determination that a judge's duty to disclose his or her report of an attorney ends upon closure of the attorney discipline proceeding, we further conclude that the requesting judge is no longer required to disclose the report when sitting on the attorney's cases. We note, however, that in cases in which a judge who has reported an attorney to Attorney Regulation Counsel concludes that *sua sponte* disqualification is not required before the complaint has been resolved, the judge will have a duty to sit on the reported attorney's cases pursuant to Rule 2.7 and must disclose the report to the parties and their counsel from the time the judge resumes sitting on the attorney's cases until the attorney discipline proceeding is closed. Under those circumstances, it would not be appropriate for the reporting judge to refer the attorney's case to other judges in order to avoid complying with the obligation to disclose the report. *See* C.J.C. Rule 2.7 and cmt. [1] ("The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed on the judge's colleagues requires that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.").

FINALIZED AND EFFECTIVE this 15th day of October 2012.