Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (C.J.E.A.B.)

C.J.E.A.B. Advisory Opinion 2011-01
(Finalized and effective September 27, 2011)

ISSUE PRESENTED:

The requesting judge has reported a lawyer's conduct to both Attorney Regulation Counsel, per his obligation under Rule 2.15(B) of the Colorado Code of Judicial Conduct, and a law enforcement agency. The judge notes that he has no personal bias or prejudice concerning the attorney as a result of this report or otherwise. The attorney is senior counsel in a small law firm of fewer than five attorneys. At the time of the judge's report, the attorney's law firm had eleven cases assigned to the judge's division. In the past, the lawyer and one or more of the other attorneys in the firm have each listed their names on court filings, although the lawyer has not necessarily electronically signed every court filing or appeared for pre-trial hearings. Given these facts, the requesting judge poses four questions:

1) Do the conclusions of Opinion 2004-01 (which addresses a judge's recusal during and after he reports a lawyer) remain valid in light of the July 2010 amendments to the Code of Judicial Conduct?

2) Is recusal required in pending cases which have been filed by the attorney's law firm if the attorney's own signature does not appear on any filings?

3) Is recusal required in pending cases filed by the attorney's law firm where the reported attorney's name is printed on a filing, regardless of whether the attorney is personally working on the case?

4) In cases filed by the attorney's law firm after the judge's report, may the judge postpone the recusal decision until it is determined whether the reported attorney will personally handle the case?

CONCLUSIONS:

The amendments to the Code of Judicial Conduct do not affect the conclusions of Opinion 2004-01. The Board determines, however, that Opinion 2004-01 should be withdrawn and a new opinion issued which provides better guidance to judges who file a grievance with Attorney Regulation Counsel. The Board concludes that a judge's report of attorney misconduct, without more, does not require the judge automatically to recuse from the attorney's cases. Rather, the judge must consider first whether the judge has a personal bias or prejudice against the attorney, and, if he does, he should recuse. If he does not, the judge must then consider whether the judge's impartiality might reasonably be questioned if he did not recuse, *i.e.* whether 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. If the answer to that question is "yes", the judge should recuse.

Given the unique circumstance present in this request, that the requesting judge also reported the attorney to law enforcement, the requesting judge may determine that his impartiality might reasonably be questioned if he did not recuse from the reported attorney's cases. Therefore, the Board answers the requesting judge's remaining questions. As to the second question, even if he decides he must recuse from the attorney's cases, recusal is not mandated in pending cases filed generally by the attorney's law firm but not including the entry of appearance by the attorney. As to the third question, if the judge determines that he must recuse from the reported attorney's cases, recusal is also required in pending cases where the attorney's name is on a pleading. Finally, as to the fourth question, in cases filed

following the judge's decision to recuse, the judge should not postpone the recusal decision until it has been determined which lawyers will be working on the case; if the attorney's name is on the pleadings then the judge should recuse. To the extent that the decision to recuse is based solely on the *appearance* of partiality, the judge should continue to recuse on cases filed after the judge's decision to recuse until the attorney regulatory complaint and the complaint to law enforcement have been resolved.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 1.2 states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

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…."

Rule 2.15(B) specifies that a "judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."

DISCUSSION:

In answer to the requesting judge's first question, the 2010 amendments to the Colorado Code of Judicial Conduct do not change the result the Board reached in Opinion 2004-01. However, our review of subsequent judicial ethics decisions from around the country as well as further review of Colorado caselaw persuades the Board that it should reconsider and revise the advice the Board gave in 2004-01.

In 2004-01, the Board considered whether a judge who files a grievance against an attorney in a pending case must recuse himself or herself *sua sponte* in the absence of a motion to disqualify, and the Board concluded that to avoid the appearance of partiality, even if actual bias was not present, a judge should recuse himself or herself after the judge reports attorney misconduct. The Board concluded that, even where a judge does not harbor ill will or prejudice against an attorney the judge reports, the public perception of the judge's reportage, and the importance of safeguarding the integrity of the system, demanded that a judge step aside in any pending case involving the reported attorney. *See* CJEAB Op. 2004-01.

In the course of considering the current request, the Board reviewed numerous judicial ethics opinions from around the country and learned that Opinion 2004-01 represents a minority view. Judicial Ethics Advisory Boards in Alabama, Massachusetts, Michigan, Utah, Virginia, and the U.S. Judicial Conference Committee on Codes of Conduct, have all concluded that since the Code of Judicial Conduct in those jurisdictions, as in Colorado, requires a judge to file a complaint with attorney regulation authorities whenever the judge becomes aware of certain kinds of unprofessional conduct, the mere filing of the complaint is not sufficient to require the judge's automatic disqualification from presiding over cases in which the reported attorney represents a party.[1] Similarly, the Tenth Circuit Court of Appeals, two

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[1] *Compare* U.S. Judicial Conference Committee on Codes of Conduct, Advisory Op. No. 66, "Disqualification Following Conduct Complaint Against Attorney or Judge" (June 2009)("[W]hen a judge files a complaint of unprofessional conduct against a lawyer . . . and the lawyer is before the judge as counsel in the case giving rise to the unprofessional conduct, or in a later case, the judge is not required to recuse on grounds of bias or prejudice simply because the complaint was filed."), Alabama Judicial Ethics Inquiry Commission Op. 97-656 (June 27, 1997)(Judge's filing of ethics complaint against attorney-litigant does not require judge's disqualification unless

federal district courts, and appellate courts in Alabama, Arizona, Connecticut, Florida, Hawaii, Indiana, and, very recently, here in Colorado, have concluded that the judge's filing of a grievance against an attorney, without more, does not require the judge's disqualification, unless the judge becomes personally biased or prejudiced against an attorney for a party.[2] Finally, at least one judicial ethics commentator agrees with this view.[3] Although holding a minority view is not, of itself, a reason for this Board to change the advice given in Opinion 2004-01, the Board, after a careful review of the opinions expressing the majority view, has determined that it is appropriate to reconsider the result of Opinion 2004-01.

In 2004-01 the Board determined that a judge must automatically recuse from a case involving a lawyer against whom a judge has filed a grievance because the Board was concerned that, whether or not the judge actually was biased or prejudiced against the attorney, if the judge remained on the case, there would be created an appearance of partiality since the litigant represented by the attorney would always believe the judge must be biased or prejudiced against the attorney, and thus, the litigant. While the Board continues to believe this is a serious and valid concern, the Board has determined that the better analysis of the issue must rely on whether a reasonable, disinterested observer would question the judge's impartiality, rather than whether *the litigant* would question the judge's impartiality. This analysis better comports with the language of Rule 2.11(A) which requires disqualification when the judge's impartiality might "reasonably" be questioned. In addition, this analysis better complies with the definition of the appearance of impropriety in Rule 1.2:

> The test for appearance of impropriety is whether the conduct would create *in reasonable minds* a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's . . . impartiality . . . .

C.J.C. 1.2, cmt. 5 (emphasis added). Although it is possible that a litigant will believe a judge is biased against the litigant and his attorney if the judge files an attorney regulation complaint against the litigant's attorney, there are circumstances where a disinterested observer would find that the judge's compliance with the duty to report attorney misconduct does not indicate any partiality on the part of the judge.

Accordingly, when a judge determines that he or she must report an attorney's conduct to Attorney Regulation Counsel, the judge must analyze the situation to determine whether he or she must recuse

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judge becomes personally biased or prejudiced against attorney-litigant), Massachusetts Committee on Judicial Ethics Op. No. 2008-6 (Oct. 6, 2008)("A judge is not automatically disqualified because of the filing of an ethical complaint or because of pending contempt proceedings."), Michigan State Bar Standing Committee on Judicial Ethics JI-123(Aug. 3, 2001)("absent actual bias or prejudice, an [administrative hearing officer] is not disqualified from presiding in an administrative hearing where the [administrative hearing officer] has filed a grievance against the lawyer appearing before the [administrative hearing officer]"), Utah State Courts Informal Op. 05-02 (Nov. 22, 2005)(disqualification is not automatically necessary where judge has referred lawyer to bar authorities.), *and* Virginia Judicial Ethics Advisory Committee Op. 99-4 (Sept. 21, 1999)(judge not necessarily required to recuse for having filed ethics complaint with Virginia State Bar against a lawyer in a case in which the lawyer represents a party), *with* New York State Advisory Committee on Judicial Ethics Joint Opinion 08-183, 08-202, 09-112 (Dec. 4, 2008).

[2] *United States v. Mendoza,* 468 F.3d 1256, 1262 (10th Cir. 2006); *Conklin v. Warrington Township*, 476 F. Supp. 2d 458, 464 (M.D. Pa. 2007); *Honneus v. United States,* 425 F. Supp. 164, 166 (D. Mass. 1977); *Ex Parte Rollins,* 495 So. 2d 636, 638 (Ala. 1986); *Miller v. Superior Court*, 938 P.2d 1128, 1130 (Ariz. App. 1997); *People v. Jones*, ___ P.3d ___ , ___ n.4 (Colo. App. No. 09CA1947, Aug. 18, 2011) (2011 WL 3612230, at *5 n.4); *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194 (Colo. App. 2011); *Joyner v. Comm'r*, 740 A.2d 424, 430-31 (Conn. App. 1999); *5-H Corp. v. Padovano*, 708 So. 2d 244, 248 (Fla. 1997); *State v. Mata,* 789 P.2d 1122, 1125-26 (Haw. 1990); *Blacknell v. State*, 502 N.E.2d 899, 904 (Ind. 1987).

[3] *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, Leslie W. Abramson, 14 Geo. J. Legal Ethics 55, 86-87 (Fall 2000).

from the case before the judge as well as from other cases in which the attorney is or will be appearing. To do so, the judge must consult his or her own conscience to answer the subjective question of whether the judge is biased or prejudiced against the attorney. *See, e.g.,* CJEAB Op. 2009-02, 2006-05. If the judge determines he or she is not biased or prejudiced against the attorney, the judge must review the circumstances of the case and decide whether a disinterested objective observer, knowing all of the facts, would reasonably question the judge's impartiality. In making this determination, the judge should consider a number of factors, including:

1. Whether the judge's words or actions have manifested "an attitude of hostility or ill will toward an attorney [so] that the judge's impartiality in the case can reasonably be questioned. *See S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988).
2. Whether it is likely the judge will be called to testify as a witness in the attorney discipline proceeding while the case is pending before the judge. *See Wright v. Dist. Court*, 731 P.2d 661, 664 (Colo. 1987)("The appearance of impropriety that would arise from [the judge's] appearing as a witness before the grievance committee to support his complaint that he said required 'harsh discipline' while sitting as a trial judge on a case charging the same firm with malpractice is apparent.").
3. Whether the judge acquired the information about the attorney in the course of the proceeding in which the judge is deciding whether to recuse. *See Comiskey v. Dist. Court*, 926 P.2d 539, 545 (Colo. 1996)("[I]nformation a judge learns in the performance of his or her judicial duties is generally not sufficient grounds for disqualification.").

If, after reviewing these and all other pertinent factors, the judge determines that he or she is not biased or prejudiced against the attorney and that an objective observer would not reasonably question the judge's impartiality, the judge need not recuse *sua sponte*.

If 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:

> 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.

C.J.C. 2.11, cmt. 5. With regard to this requirement, the Board notes that, unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in the Colorado Rules of Procedure Regarding Attorney Discipline "shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules . . . ." C.R.C.P. 251.31(a).

The requesting judge informed us that he has no personal bias or prejudice against the attorney whose conduct he reported. Thus, there is no subjective basis for recusal. Because it was not the focus of his request, the requesting judge has given the Board few specific facts from which to determine whether an objective observer would believe his impartiality could reasonably be questioned. One fact, however, makes the requesting judge's circumstances unique: the requesting judge also reported the attorney's conduct to law enforcement. The requesting judge should consider whether this factor together with the other circumstances surrounding his report of the attorney would lead an objective observer to determine that his impartiality could reasonably be questioned if he presided over the attorney's cases then pending or filed in the future.

Since the Board does not know how the reporting judge will answer that question and since he may decide that he must recuse from the reported attorney's cases, the Board will answer the remaining three

questions he asked. As to the judge's second question, where the law firm of the reported attorney is involved in a pending case before the judge, but the reported attorney himself has not signed and is not listed on any of the pleadings, the judge need not recuse *sua sponte*. When the reported attorney is not participating, the concerns about the appearance of partiality that would require recusal of the judge are not implicated.

As to the third question, when the reported attorney's name is listed on a pleading, irrespective of whether the attorney seems to the judge to be actively participating in the case, the judge should recuse *sua sponte*. Although the judge obviously would know whether the reported attorney has appeared in court to argue motions, for example, parsing out precisely what role the reported attorney is or is not playing in a case outside the courtroom – drafting pleadings, supervising the work of junior attorneys, advising the client, and so forth – is simply beyond the judge's ken. Therefore, if an attorney's name is included on the pleadings, that attorney is deemed to be participating in the case, and thus recusal is appropriate.

The same reasoning informs our analysis of the last question, *i.e.* in cases filed by the attorney's firm after the judge's report, whether the judge may postpone the recusal decision until it is determined whether the reported attorney will "personally handle" the case. Not only do the same concerns described above about the limits of a judge's ability to ascertain the scope of the reported attorney's role compel the same conclusion, but so do considerations about the burden that a wait-and-see approach would place on the administration of justice. Deferring the decision would lead to delay and could invite undesirable strategic behavior by counsel seeking to judge-shop. Accordingly, we hew to a bright-line rule: if the reported attorney's name is on the pleadings, the judge should recuse.

To completely answer the last question, however, the Board must also consider when the judge's duty to recuse from the reported attorney's cases ends. Obviously, if a judge is recusing because of his or her personal bias or prejudice against the attorney, the duty to recuse will be present so long as the judge has such a bias or prejudice. But, if the judge has decided to recuse because of the appearance of partiality, rather than actual partiality, then, the judge must continue to recuse *sua sponte* from the reported lawyer'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. *See* CJEAB Op. 2006-05. Those concerns, however, 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.

FINALIZED AND EFFECTIVE this 27th day of September, 2011.