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

C.J.E.A.B. ADVISORY OPINION 2009-02
(Finalized and effective August 14, 2009)

ISSUE PRESENTED

The requesting judge received a death threat from a man over whose dissolution of marriage proceeding she presided. He has been charged with Retaliation Against a Judge, pursuant to section 18-8-615, C.R.S. (2008), and the case is being prosecuted by the local District Attorney's office, which is not seeking the appointment of a special prosecutor. The case has been assigned to one of the judge's colleagues on the bench, but that judge has already recused and asked for a Senior Judge to handle the matter. The defendant is in custody and qualifies for court-appointed counsel. The local Public Defender's office did not wish to handle the case and is arranging for an Alternate Defense Counsel from another jurisdiction to represent the defendant. The judge presides over criminal as well as domestic matters. The judge states that she has no doubt that she can be fair and impartial on the criminal matters before her, but is concerned that either the local Public Defender's office or private defense counsel may ask her to recuse on her criminal cases due to either an alleged conflict or an appearance of impropriety since the judge is a victim in a separate criminal matter being prosecuted by the District Attorney's Office. The individual DA handling the case is not assigned to the judge's division and does not appear before her, but she expresses concern that defense counsel might nevertheless argue that her impartiality might reasonably be questioned pursuant to Canons 2 and 3 by virtue of the fact that she is the victim of a crime being prosecuted by the DA. May the judge continue to handle her criminal docket?

CONCLUSION

The judge is not required to disqualify herself *sua sponte* under Canons 2 or 3. She should, however, examine her own conscience and emotions for bias that might make *sua sponte* recusal otherwise appropriate.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 2 instructs that a judge should avoid impropriety and the appearance of impropriety, and should conduct himself or herself in a manner that promotes confidence in the integrity and impartiality of the judiciary.

Canon 3 provides that a judge should perform judicial duties impartially and diligently. Subsection C pertains to disqualification and states that a judge should disqualify himself or herself from a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where a judge has a personal bias or prejudice concerning a party.

DISCUSSION

As the Board previously has noted, the question of disqualification generally is left to a judge's sound discretion. *See* C.J.E.A.B. Op. 2006-05 (citing *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635 (Colo. 1987)). Judges with whom a motion to disqualify has been filed should decide the legal question under C.R.C.P. 97 or Crim. P. 21 and the decisions interpreting those rules. In this opinion the Board speaks only to whether the judge should disqualify herself *sua sponte* under the Canons.

Under Canon 3 of the Judicial Code of Conduct, a judge is required to disqualify herself in a proceeding in which the judge's impartiality might reasonably be questioned, including in instances where a judge has a personal bias or prejudice concerning a party. The question here thus becomes whether the judge's impartiality might reasonably be questioned if she were to continue to preside over cases prosecuted by the DA's office when that office, although through a different attorney, is also prosecuting the defendant who threatened the judge. We conclude that based on the facts presented, there is no reasonable basis to question the judge's impartiality if she continues to preside over criminal matters, and thus no required disqualification under Canon 3. Important to this determination is the fact that the judge is not directly represented by the DA. Rather, the DA represents all of the people of the state of Colorado, who are presumed wronged as a collective when a criminal act is committed against one of its members.

The indirect nature of the DA's representation of the judge distinguishes this scenario from the one in 2006-05, where the judge had been represented in his divorce by an attorney who later appeared before him. *See* C.J.E.A.B. 2006-05 at 1. There, we concluded that when the representation is ongoing, the judge must disqualify himself or herself because the judge's impartiality might reasonably be questioned. *See id.* at 2. The nature of the attorney-client relationship, we explained, is founded upon trust and confidentiality, and the intimacy of that relationship reasonably could raise a question regarding the judge's impartiality if the same attorney representing the judge appeared before the judge in another matter. *See id.* Here, there is no attorney-client relationship between the judge and the DA, and the particular attorney handling the matter in which the judge is a victim will not appear before her, obviating the concerns animating our discussion in 2006-05.

We also conclude that the judge's decision to continue presiding over criminal matters would not create an appearance of impropriety within the meaning of Canon 2. This conclusion is consistent with the decisions of a number of state and federal courts that have also held that threats to a judge alone do not create an appearance of impropriety requiring the judge's disqualification. *See New Mexico v. J. Tyrone Riordan*, 209 P.3d 773 (N.M. May 21, 2009) (holding disqualification not required for judge presiding over three other pending cases involving same defendant who threatened judge in fourth, separate matter); *In re Basciano*, 542 F.3d 950 (2nd Cir. 2008) (collecting cases). As the Tenth Circuit has pointed out, "if a death threat is communicated directly to the judge by a defendant, it may normally be presumed that one of the defendant's motivations is to obtain a recusal." *United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994). Although the facts here do not suggest that the defendant issued the

threat in order to manipulate the system and "shop" for a more favorable judge, a defendant "cannot drive a state trial judge off the bench in a case by threatening him or her," and we thus advise that recusal should not automatically be required when a judge is threatened. *See id.* (quoting *Resnover v. Pearson*, 754 F. Supp. 1374, 1388-89 (N.D. Ind. 1991)).

Rather, we endorse the requirement in *Riordan* and *Basciano* that "the circumstances of the case must demonstrate that the defendant's behavior has resulted in actions by the judge which might be viewed by an objective, disinterested observer as evidencing bias." *See Riordan* 209. P.3d at 777 (internal quotations omitted)(citing *Basciano*, 542 F.3d at 957). Thus, we conclude that absent some showing of bias, threats alone do not require recusal. *See Riordan*, 209 P.3d at 776-77; *Basciano*, 542 F.3d at 956. Here, although the judge has been threatened, the facts presented do not suggest that the judge has taken any actions that might evidence bias to an objective observer, and thus do not raise an appearance of impropriety.

Although we conclude that neither Canon 2 nor Canon 3 requires the judge to disqualify herself *sua sponte*, we advise the requesting judge to consult her own conscience and emotions to determine whether she harbors any bias or prejudice toward the DA's office or against defense counsel as a result of the matter in which she was threatened. *See* C.J.E.A.B. 2006-05 at 4. Only the judge knows if her own subjective feelings amount to disqualifying bias or prejudice.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 14th day of August, 2009.