Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2023-02[1]

(Finalized and effective September 9, 2023)

BACKGROUND:

The requesting judge presides over a criminal docket. The judge has been asked by the Office of Attorney Regulation Counsel ("OARC") to provide information as a potential witness on a district attorney the OARC is investigating. OARC is also investigating the district attorney's staff. Although the district attorney being investigated does not personally appear before the judge, the attorney's staff appears before the judge on a regular basis and all criminal cases in the district over which the judge presides are prosecuted in the district attorney's name. OARC seeks information relating to four cases over which the requesting judge presided. One of the cases is closed, one case is stayed pending review in the Colorado Supreme Court for sanctions the judge imposed against the district attorney's staff for discovery violations, and two cases remain pending before the requesting judge.

The requesting judge has asked the Colorado Judicial Ethics Advisory Board ("Board") to address specific questions relating to what information, if any, the judge can share with OARC and whether the judge must recuse from future proceedings involving the district attorney and the district attorney's staff.

ISSUES PRESENTED:

1. Whether the requesting judge must provide OARC with information concerning the two cases still pending before the judge.

2. If the requesting judge serves as a witness to the complaints OARC is investigating, whether the judge must disqualify from all cases involving the district attorney's staff under investigation by OARC.

3. Because all criminal cases in the district are brought in the name of the district attorney being investigated by OARC, if disqualification is necessary, whether the disqualification obligation extends to all cases brought by the district attorney's office or only those in which the district attorney appears personally on behalf of the People of the State of Colorado.

4. If the judge serves as a witness in OARC's investigation, whether the judge must disclose such participation under Rule 2.11 of the Code of Judicial Conduct ("Code") not just for

[1] Alexander Rothrock, CJEAB Chair, did not participate in this Opinion.

the four cases in question but any other criminal case pending before the judge even if the judge believes there is no basis for disqualification.

SUMMARY:

Although the judge is currently presiding over two criminal cases involving the district attorney and staff under investigation, the requesting judge may testify as a witness in OARC's investigation. Pursuant to Rule 2.16, the judge must cooperate with and be honest with OARC. The judge does not need to disqualify per se from any cases involving the district attorney or staff under investigation but should disclose any participation as an ongoing witness in OARC's investigation.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Several Code provisions apply to the judge's request for an advisory opinion. Rule 2.10(A) provides that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Subsection (D) provides that "notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity, subject to Canon 1."[2]

Rule 2.11 identifies the circumstances in which a judge must disqualify[3] himself or herself from a proceeding.[4] The rule provides, in relevant part, as follows:

[2] Canon 1 provides that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

[3] The term "recusal" is used interchangeably with the term "disqualification." *See* C.J.C. Rule 2.11, cmt. [1].

[4] In addition, Criminal Procedure Rule 21(b) and section 16-6-201 of the Colorado Revised Statutes both provide that a judge should disqualify himself or herself upon a showing that the judge "is in any way interested or prejudiced with respect to the case, the parties, or counsel." Because the Board's authority is limited to inquiries concerning the Code, however, these provisions are not addressed in this opinion. *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"). We nevertheless note them for the requesting judge to review.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[5] 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 has personal knowledge of the facts that are in dispute in the proceeding.

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(5) The judge: . . .

(b) served in government 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;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

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(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 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 proceedings.

Comment [1] to the rule provides that "a judge is disqualified whenever the judge's impartiality might be reasonably questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply."

Rule 2.16(A) provides that "[a] judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies." As explained in the commentary to the rule, "[c]ooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public."

[5] The Code defines "impartiality" as the "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." C.J.C. Terminology Section.

Rule 3.3 provides that "[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned."

ANALYSIS:

1. Whether the Requesting Judge Must Provide OARC with Information Concerning Pending Cases

Rule 2.10(A) prevents judges from making public statements that might reasonably be expected to affect the outcome or impair the fairness of a pending matter. In C.J.E.A.B. Advisory Opinion 2019-02, the Board discussed Rule 2.10 at length and described the difference between comments that were reasonably expected to impair the fairness of a pending proceeding versus those that were not. As we noted in the opinion, the rule recognizes the independence, integrity, and impartiality of the judiciary while simultaneously acknowledging that, in some instances, judges should be able to make public statements about a case even if it is pending. *See* C.J.E.A.B. Ad. Op. 2019-02, at 3. To achieve this balance, the rule permits judges to publicly comment even when a matter is pending or impending if the comments are not reasonably expected to affect the outcome of the case. *See id*. Likewise, notwithstanding the restrictions in Rule 2.10(A), subsection (D) permits judges to make statements in the course of their official duties because such statements will not jeopardize the outcome of a case.

First, although we do not know exactly what information OARC seeks from the requesting judge, it may relate to the judge's personal knowledge overseeing the cases as an administrator and not the substance of the criminal cases pending before the judge.[6] The requesting judge's situation differs from the type of situation the Code seeks to prevent, namely those instances in which a judge discloses confidential information that will affect or impair the fairness of the proceeding pending before the judge. *See, e.g., Matter of Kamada*, 476 P.3d 1146, 1149 (Colo. 2020) (judge publicly censured for repeatedly violating Rule 2.10 when he texted nonpublic confidential information on pending cases to friends and warned a friend to stay away from a drug dealer under FBI investigation). Any information the judge provides as a witness in the disciplinary proceeding is not expected to affect the outcome or impair the fairness of the pending criminal proceedings. Accordingly, we conclude that the judge may act as a witness in the disciplinary matter without violating Rule 2.10(A).

Second, Rule 2.16(A) requires judges to cooperate with and be honest with lawyer disciplinary agencies because such cooperation instills confidence in the judiciary and integrity in the judicial system. We have not yet considered this rule in any of our advisory opinions, but the rule is clear; it requires cooperation and honesty with lawyer disciplinary agencies like OARC. Participation with disciplinary proceedings instills public confidence in the judiciary and, more broadly, in the legal system. Furthermore, cooperating with disciplinary proceedings can be considered part of a judge's official duties, which are also exempt from the prohibition on public comment concerning pending and impending matters under the comments to Rule 2.10.

[6] Even if OARC seeks information relating to the substance of the pending cases, however, the judge may provide it if it complies with the analysis discussed in this section.

Finally, we note that Rule 3.3 prohibits judges from testifying as character witnesses in administrative or adjudicatory proceedings or to otherwise vouch for the character of a person. Because the judge might not be asked to vouch for the character of the attorney under investigation or the attorney's staff, it is unclear if Rule 3.3 applies. Regardless, the rule provides an exception when the judge is "duly summoned." In C.J.E.A.B. Advisory Opinion 2021-01, we determined that the requesting judge could comment on a defendant's clemency application because the judge had been asked to do so by the Office of Executive Clemency and was, therefore, "duly summoned." In this instance, we similarly conclude that the requesting judge has been duly summoned by OARC within the meaning of Rule 3.3 and thus may comment on the character of the attorneys under investigation if asked to do so.

We therefore conclude that, pursuant to Rule 2.16, the requesting judge must "cooperate and be candid and honest with" OARC. Despite continuing to preside over two matters and a possible third matter pending review in the supreme court, the judge may make comments to OARC on the pending and impending matters because the type of information pertaining to the lawyer disciplinary proceeding is separate from and not reasonably expected to impair the fairness of the criminal proceedings pending or impending before the judge. Finally, if asked to do so, the requesting judge may provide character information regarding the attorney and staff under investigation consistent with Rule 3.3. Our conclusion is similar to that of other judicial ethics committees that have determined judges may testify in disciplinary proceedings. *See, e.g.*, FL Jud. Eth. Op. 2021-13 (Aug. 23, 2021) (judge could provide testimony about factual events that took place during a trial over which the judge presided in an investigation against a police officer by the Office of Inspector General); NY Ad. Comm. on Jud. Ethics, Op. 18-138 (Sept. 6, 2018) (judge may testify as a witness in an attorney disciplinary proceeding involving the attorney under investigation for a complaint stemming from a case over which the judge presided); *see also* FL JEAC Op. 2003-04 (May 1, 2003) (in matters dealing with investigations by the Florida Bar regarding attorney misconduct, the judge has an ethical obligation to cooperate).

2. Whether the Judge Must Recuse from All Cases Involving the Lawyers Under Investigation

In Advisory Opinion 2011-01, we withdrew Advisory Opinion 2004-01. In the earlier opinion, the Board concluded that a judge's report of attorney misconduct in a case pending before the judge required the judge to recuse himself or herself from the pending case because it called into question the judge's impartiality and the appearance of fairness. In Advisory Opinion 2011-01, however, we determined that a judge's report of attorney misconduct, without more, did not require the judge's automatic recusal from the attorney's case. Instead, we determined that judges had to follow a two-part inquiry to decide if recusal was necessary. First, a judge had to consider, subjectively, whether he or she had a personal bias or prejudice against the attorney. If so, the judge must recuse; if not, the judge must then consider whether the judge's impartiality might reasonably be questioned if the judge did not recuse. In making this determination, the judge had to ask 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. We clarified that the inquiry was objective and hinged not on whether

the litigant would question the judge's impartiality, but whether "a reasonable, disinterested observer would question the judge's impartiality." C.J.E.A.B. Ad. Op. 2011-01, at 3.

The same two-part recusal analysis applies here. The requesting judge must first consult his or own conscience to determine whether the judge is biased or prejudiced against the attorney or any of the staff attorneys under investigation that have pending or impending cases before the judge. The judge must answer this question for each of the attorneys involved in the investigation, as the judge's subjective feelings may differ for each attorney. If the requesting judge determines no bias exists, the judge must next review the circumstances of the disciplinary proceeding, the judge's role as a potential witness in the disciplinary proceeding, and the cases pending or impending before the judge and must decide whether a disinterested observer, knowing all the facts, would reasonably question the judge's impartiality with respect to the district attorney or any attorney under OARC's investigation if the judge continued to preside over pending or impending matters. *See id*. at 4.

3. Whether the Judge Must Recuse from all Cases Brought in the Name of the District Attorney

In addition to discussing whether a judge had to recuse from presiding over a case involving the reported attorney in Advisory Opinion 2011-01, we also addressed whether the judge had to recuse from pending cases filed by the attorney's law firm if (1) the attorney's own signature or name did not appear on the pleadings, or (2) the attorney's name was printed on a filing, regardless of whether the attorney had personally handled the case.

We concluded that even if the judge determined recusal was necessary from the cases in which the reported attorney personally appeared, the judge did not need to recuse from pending cases filed by the attorney's firm if the attorney had not signed any pleadings or the attorney's name did not appear on the pleadings. In contrast, if the judge recused from the reported attorney's cases, the judge also had to recuse from pending or impending cases where the attorney's name appeared on the pleadings irrespective of whether the attorney participated on the case. We reasoned that while the judge could obviously determine whether the attorney participated if he argued a motion in the courtroom, there was no way to determine to what extent, if any, the attorney participated in the case if his name appeared on the pleadings. Rather than guessing, recusal was appropriate.

Here, if the requesting judge determines recusal is necessary whenever the district attorney or other attorneys under investigation personally appear before the judge, the judge must similarly recuse from pending and impending cases in which the district attorney's name or signature appears on pleadings even if the district attorney does not make a personal appearance. If the attorney's name or signature does not appear on the pleadings or a new district attorney is elected, the judge need not recuse from pending or impending cases filed on behalf of the People of Colorado.

4. Whether the Judge Must Disclose Witness Participation in Pending and Impending Cases

Even if the requesting judge determines recusal is unnecessary under any of the circumstances discussed above, the judge should disclose any participation in an OARC investigation to the parties in any pending or impending proceedings. Similarly, for the reasons discussed below, the judge should continue to disclose this participation even if a new district attorney takes office, as some of the staff under investigation may continue to be employed with the district attorney's office.

Comment [5] of Rule 2.11 provides that a judge "should disclose on the record information that the judge believes the parties. . . might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Because parties might reasonably consider the judge's participation as a witness in an ongoing lawyer disciplinary investigation against a district attorney's office relevant, the judge should disclose such participation whenever the elected district attorney or any attorney from the district attorney's office appears before the judge, even if the lawyers from the district attorney's office are not included in the investigation. We have recommended disclosure in similar instances when recusal is not per se necessary. *See, e.g.,* C.J.E.A.B. Ad. Op. 2021-02 (Nov. 17, 2021) (even if judge believes recusal is unnecessary, judge should disclose prior friendship with attorney whenever the attorney appears before the judge because most parties would consider the prior friendship relevant to a possible motion for disqualification).

CONCLUSION:

Despite two pending and other impending criminal cases involving the attorneys under investigation by OARC, the requesting judge may testify as a witness and discuss the character of the district attorney and other staff attorneys.

Absent personal bias, the judge does not have to disqualify per se from any cases involving the district attorney or the district attorney's staff. Assuming the judge has no personal bias, the judge must determine whether, for each of the attorneys involved in the disciplinary proceeding, the judge's impartiality could reasonably be questioned by a disinterested observer if the judge presided over pending and impending matters involving those attorneys.

If the judge does not recuse, the judge should disclose any participation as an ongoing witness in OARC's investigation because such information would be relevant to any party considering whether to file a motion for disqualification.

FINALIZED AND EFFECTIVE this 9th day of September, 2023.