Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2021-02
(Finalized and effective November 17, 2021)

BACKGROUND:

The requesting judge presides over four rural counties within a judicial district. For about eleven years, the judge was very close friends with an attorney; they attended the same law school, participated in each other's weddings, and attended the birth of each other's children. For two years, the judge and the attorney worked at the same law firm, and they later decided to form their own firm. During this time, the judge considered the attorney a "member of the family." The law firm dissolved after seven years, and the judge was appointed to the bench about seven years thereafter. After the firm dissolved, the interaction between the judge and the attorney diminished significantly. They remain friendly but only get together a few times a year to exchange gifts or when their children meet periodically. When the judge and the attorney do meet, they do not discuss business or cases.

To avoid conflicts, the attorney does not practice law in the four rural counties over which the judge presides. The judge is considering whether to preside over another division within the same judicial district, but the attorney regularly practices in the division. The judge would like to know if recusal is necessary every time the attorney appears before the judge.

ISSUE PRESENTED:

Whether judges must disqualify themselves when a friend appears before the judge.

SUMMARY:

Under Rule 2.11(A) of the Code of Judicial Conduct ("Code"), a judge need not per se disqualify himself or herself merely because a friend appears as a lawyer. Whether a judge should recuse himself or herself is evaluated on a case-by-case basis; the inquiry hinges on the closeness of the relationship and its bearing on the underlying case. If the friendship is so close or unusual that it reasonably raises a question of impropriety, the judge should consider recusing, but the decision is within the judge's discretion.

The requesting judge should examine the friendship to determine whether the relationship might give a reasonable appearance of impropriety. If so, the judge should consider recusing. Even if the judge believes recusal is unnecessary, the judge should disclose the relationship to the parties because there might exist information that the parties could reasonably consider relevant to a motion for disqualification.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT[1]:

Several rules apply to the judge's inquiry. Rule 1.2 requires judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." As explained in Comment [1], the rule exists because "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety." The "principle applies to both the professional and personal conduct of a judge." C.J.C. Rule 1.2, cmt. [1].

Rule 2.4(B) provides, in relevant part, that judges "shall not permit . . . social . . . or other interests or relationships to influence the judge's judicial conduct or judgment." Likewise, Rule 2.4(C) provides that a "judge shall not convey or permit others to convey the impression that a person . . . is in a position to influence the judge."

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. . ..

ANALYSIS:

Rule 2.11 identifies situations in which judges must disqualify themselves because their impartiality might be reasonably questioned—including cases implicating a familial or personal relationship—but it does not discuss disqualification in the context of friendships. In *Schupper v. People*, 157 P.3d516, 520 (Colo. 2007), the supreme court recognized that a rule requiring a judge to disqualify himself or herself whenever a friend appeared before the judge would be

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[1] Colorado 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 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 CJEAB'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.").

[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."

"unnecessarily restrictive in a community where friendships among judges and lawyers are common." The court held that the mere existence of a trial judge's friendship with an attorney, by itself, did not create actual bias or the appearance of impropriety. Instead, the court concluded that determining whether a judge should disqualify himself or herself because of friendship was a case-by-case inquiry requiring the judge to examine the "closeness of the relationship and its bearing on the underlying case." *Id.* If the "friendship is so close or unusual that a question of partiality might reasonably be raised," the judge should consider recusing. *Id.*

Several other jurisdictions have similarly concluded that "a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer." *E.g., United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985). Instead, many jurisdictions apply a two-part test with subjective and objective components to determine if disqualification is necessary. *See* Cynthia Gray, *Judicial Disqualification and Friendship with Attorneys*, 52 No. 3 JUDGE J. 20, 22-23 (Summer 2013). The first step is a subjective examination of conscience and emotion by the judge in which the judge must ask if he or she would be biased in favor of the attorney. Even if the judge believes that he or she is unbiased, the "public and litigants are not privy to the judge's subjective feelings," and thus the judge "must step back and try to evaluate the relationship objectively through others' perspectives." *Id.* at 23. While there is no single determining factor, other jurisdictions have identified the following considerations when applying the objective test:

- Whether the families of the judge and attorney are included in their socializing.
- Whether their family members have interrelationships.
- Whether the judge and attorney or their family members share confidences.
- Whether the judge and attorney or their families celebrate significant events in each other's lives.
- Whether the judge and attorney or their families share important personal interests.
- Whether the judge and attorney or their families vacation together.
- Whether the judge and attorney or their families visit each other's homes.
- Whether the judge and attorney socialize in public or private settings.
- Whether the judge and attorney initiate social contact or their interactions result from coincidence.
- Whether the judge and attorney have plans for future get-togethers.
- The frequency of their social contacts.
- The length of the relationship.
- Whether the relationship is continuing.
- Whether there are additional circumstances like current or past financial, political, partnership, or amorous relationships.
- Whether the judge has received gifts or hospitality from the attorney.
- The frequency with which the attorney appears before the judge.
- The culture and size of the legal community
- The number of attorneys who practice in the judge's court.
- Whether other local practitioners know that the judge and the attorney socialize.
- Whether the judge's relationship with the attorney differs significantly from the judge's relationship with other attorneys.

- Whether other people commonly identify the judge and the attorney as being closely associated.

See id.; *see also* Mass. Comm'n. on Jud. Ethics, Ad. Op. 04-09 (2004) (there is "no easy litmus test" for judicial disqualification based on friendship; judges must consider many factors, including the frequency with which the attorney appears before the judge, the nature and degree of social interaction, and the culture of the legal community).

Recognizing that relationships vary, change over time, and are unique to the people involved, the ABA issued an ethics opinion discussing disqualification based on friendship. ABA Comm'n on Ethics & Prof. Responsibility, Formal Op. 19-488 (Sept. 5, 2019) ("Opinion 488"). Opinion 488 provides guidance to judges when determining whether their relationships with lawyers or parties require disqualification or disclosure to the parties. *See id.* at 2. The opinion categorizes a judge's relationships into three categories: (1) acquaintances, (2) friendships, and (3) close personal relationships.[4]

An acquaintance exists when the judge and lawyer's "interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship." *Id.* at 4. Because the judge and attorney do not actively seek each other out, Opinion 488 concludes that there is no reasonable basis to question a judge's impartiality and, thus, there is no need for the judge to recuse or even disclose the acquaintance to other parties in a proceeding.

A friendship implies a greater degree of affinity than an acquaintance, but a friendship is nebulous; some friendships are closer than others, and some relationships that were once very close wane over time. The relationship between the requesting judge and the attorney goes beyond an acquaintance because they continue to seek each other out periodically and the pair have a history of closeness, but only the judge and the attorney know the true status of their friendship. Following a subjective examination of conscience to determine whether the judge might be biased, the judge should consider the issue from an objective perspective and determine whether a question of reasonable partiality or impropriety might be raised under the circumstances; rural jurisdictions tend to be close-knit, there might be fewer attorneys appearing on a regular basis before the judge, and the legal community may be well aware of the friendship between the judge and the attorney.[5] Even outside a rural jurisdiction, there may be ample history to suggest a closeness that would reasonably raise a question of impropriety if the attorney appeared before the judge.

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[4] A personal relationship is one where a judge is or has been romantically involved with a lawyer or a party, the judge and lawyer are divorced but remain amicable, or the judge is the godparent of a lawyer's or party's child (or vice versa). Because the relationship here between the requesting judge and the attorney is not a personal relationship, it is not discussed in this advisory opinion.

[5] In Advisory Opinion 2005-02, which was decided under a prior version of the Code, the CJEAB recognized the unique considerations faced by judges presiding over rural jurisdictions. While there was no per se rule requiring disqualification when a partner or associate of a relative lawyer appeared before the judge, the CJEAB determined that disqualification was required based, in part, on the small number of judges who presided within the jurisdiction, the small size of the legal community, and the regular court appearances made by the relative lawyer and members of his firm.

If the requesting judge concludes that disqualification is unnecessary, Comment [5] of Rule 2.11 provides that 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." Because most parties would consider the friendship—both past and present—between the judge and the attorney relevant, particularly in a rural jurisdiction, if the judge elects to preside over a new district, the judge should, at a minimum, disclose the relationship to the parties any time the attorney appears before the judge.

CONCLUSION:

Standing alone, a judge's friendship with an attorney or party to the proceedings does not per se require disqualification. Even if, subjectively, the judge believes that he or she is unbiased, the judge should consider the totality of the circumstances involved in the relationship between the judge and the attorney and whether those circumstances might lead a reasonable person to believe that the judge and the attorney shared a close and unusual relationship and that recusal is necessary. This should be a case-by-case inquiry requiring the judge to examine the closeness of the relationship and its bearing on the underlying case. Even if the judge concludes that recusal is unnecessary, the judge should, at a minimum, disclose the relationship to the parties.

FINALIZED AND EFFECTIVE this 17th day of November, 2021.