Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-07
(Finalized and effective October 29, 2012)

ISSUE PRESENTED:

The requesting judge is a District Court Judge whose case assignment includes a criminal docket. The judge's daughter recently became engaged to a Deputy District Attorney (DDA) who works in the District Attorney's office in the judge's district. Throughout his daughter's relationship with the DDA, the judge has recused himself from the DDA's cases, and has disclosed the relationship on the record in all matters in which other attorneys from the same DA's office has entered an appearance. The judge asks the following questions:

(1) Whether he is disqualified under Rule 2.11 from presiding over all criminal matters involving the DA's office during the engagement and/or after the marriage.

(2) Whether he may serve as the weekly "duty judge" responsible for reviewing and approving arrest and search warrants submitted bylaw enforcement after consultation with the DA's office, and conducting probable cause reviews for individuals arrested over the weekend, which typically involves reviewing a warrantless arrest affidavit prepared by a law enforcement officer.

CONCLUSION:

Both during the engagement and after the marriage, the judge must recuse from cases in which the Deputy District Attorney engaged to the judge's daughter enters an appearance or otherwise participates in the preparation or presentation of the case. The judge is not disqualified from all cases involving the District Attorney's office, provided his future son-in-law has no personal involvement with the case and has no supervisory authority over the attorneys involved in the case. The judge may ethically serve as the weekly duty judge, provided his future son-in-law is not the attorney responsible for preparing or reviewing warrants and affidavits submitted for the judge's approval.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 1 of the Code of Judicial Conduct 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."

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."

Canon 2 provides that "A judge shall perform the duties of judicial office impartially, competently, and diligently."

Rule 2.2 provides that a judge "shall perform all duties of judicial office fairly and impartially."

Rule 2.4(B) provides that "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

Rule 2.4(C) provides that "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

Rule 2.11(A) requires disqualification of a judge "in any proceeding in which the judge's impartiality might reasonably be questioned."

Rule 2.11(A)(1) requires disqualification when a judge "has a personal bias or prejudice concerning a party or a party's lawyer. . . ." *See also* Crim. P. 21(b)(1)(IV) (substitution of judge is required upon the filing of a timely motion establishing that the judge is "interested or prejudiced with respect to the case, the parties, or counsel").

Rule 2.11(A)(2) requires disqualification when "[t]he judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
> (b) acting as a lawyer in the proceeding;
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
> (d) likely to be a material witness in the proceeding."

See also Crim. P. 21(b)(1)(I) (substitution of judge is required upon the filing of a timely motion establishing that the judge "is related to the defendant or to any attorney of record or attorney otherwise engaged in the case").

The Terminology section of the Code defines "member of the judge's family" as "a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." A person within the "third degree of relationship" to the judge includes a "great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece."

DISCUSSION:

At the outset, we note that, because the judge's daughter's engagement do the DDA reflects their firm intention to become legally married in the near future, we see no meaningful distinction between the judge's relationship with the DDA during the engagement and after the

marriage. Accordingly, for purposes of this opinion, we conclude that the judge has a familial relationship with the DDA that requires the judge's disqualification regardless of whether the DDA is engaged to or is married to the judge's daughter.

The requesting judge's practice of recusing from cases in which his future son-in-law has entered an appearance is consistent with Rule 2.11(A), which requires disqualification if an objective observer might question the judge's impartiality, and he must continue to recuse from the DDA's cases after the DDA and the judge's daughter are married pursuant to the express requirements of Rules 2.11(A)(1) and (2)(b), which mandate disqualification when the judge has a personal bias or prejudice concerning a party's lawyer and when the spouse of the judge's child is acting as a lawyer in the proceeding. Recusal based on the judge's familial relationship with the DDA both before and during the marriage is also consistent with Rules 2.2, 2.4(B), and 2.4(C), which require judges to perform the duties of judicial office impartially, to not permit family relationships to influence the judge's judicial conduct or judgment, and to not convey the impression that any person is in a position to influence the judge. Thus, the judge should continue to recuse from the DDA's case during the engagement and after the marriage. For the same reasons, the judge may not serve as the duty judge responsible for reviewing and approving arrest warrants, search warrants, and warrantless arrest affidavits prepared by his future son-in-law or by law enforcement officers after consultation with him.

The Code does not specifically address the judge's question whether disqualification is also required in all cases in which the DA's office for which the future son-in-law works, even when he has not entered an appearance or is not otherwise involved in the case, but the following comment to Rule 2.11 is instructive:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A) . . . , the judge's disqualification is required.

C.J.C. Rule 2.11, cmt. 4.

In Opinion 2005-02, the Board relied on a nearly identical comment to the disqualification rule in the pre-2010 Code in concluding that a judge in a small, rural jurisdiction should disqualify himself from cases in which a partner or associate in his brother-in-law's firm acts as counsel. But Opinion 2005-02 is distinguishable from and is therefore not dispositive of the issue presented here, because it involved a relative-lawyer who worked for a private law firm, while this case involves a relative-lawyer who works for the government.

The rules and related commentary regarding judicial conflicts based on a relative's association with a case do not distinguish between judges' relatives who work in the private sector and judges' relatives who work in the public sector, but the potential for conflict is considerably less in the case of a relative working for a public office such as a District Attorney's office than in a private firm. Specifically, the compensation of an individual prosecutor is unaffected by whether the DA's office prevails in a particular case, and the

financial viability of the DA's office is unaffected by whether it prevails in a given case. Nor does an individual prosecutor's reputation hinge on the outcome of any particular case prosecuted by the DA's office for which he or she works. Finally, and perhaps most important, because a prosecutor represents the "sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all," the prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, courts in other states have concluded, and we agree, that a judge will generally not be required to disqualify from cases involving a government agency for which a relative-lawyer works when the relative-lawyer is not the attorney of record, does not supervise the attorney of record, or is not otherwise personally involved in the case. *See, e.g., People v. Moffat*, 560 N.E.2d 352, 361-62 (Ill. App. 1990) (rejecting a claim of unfair trial based on the fact that the judge's son was an assistant state's attorney but was not involved in the case); *State v. Logan*, 689 P.2d 778, 783-85 (Kan. 1984) (court properly denied motion to disqualify where the judge's son worked as an assistant district attorney but not on the particular case); *State v. Loera*, 530 So. 2d 1271, 1276 (La. App. 1988) (judge whose daughter was an assistant district attorney was not required to recuse from case brought by her office but in which she was not involved); *Adair v. State Dept. of Educ*., 709 N.W.2d 567, 572-77 (Mich. 2006) (employment of supreme court justices' spouses by the state Attorney General's office did not require justices' disqualification in case brought by that office but in which spouses were not involved); *People v. Dycus*, 246 N.W.2d 326, 327 (Mich. App. 1976) (judge not disqualified from cases brought by prosecutor's office in which judge's relative was an attorney where the relative-lawyer did not participate on the case); *In re Jacobs*, 802 N.W.2d 748, 751-52 (Minn. 2011) (noting that an assistant county attorney does not have a financial or reputational interest in a prosecution in which he or she is not involved, and concluding that a judge whose spouse works in the county attorney's office is not disqualified from prosecutions by that office in which the spouse is not involved); *State v. Harrell*, 662, 546 N.W.2d 115, 118 (Wis. 1996) (disqualification not required where judge's wife was an assistant district attorney in the county district attorney's office but was not involved in and therefore had no financial or reputational interest in the outcome of the case).

Indeed, the Colorado Court of Appeals recognized the distinction between private sector and public sector relative-lawyers for judicial disqualification purposes in *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984). The issue in *Beckman* was whether the judge was disqualified from a case involving the DA's office for which his wife worked but in which she was not the attorney of record and had not otherwise been involved. Interpreting the criminal rule governing the substitution of judges, the court observed:

> Generally, an attorney is said to be "engaged in the case" pursuant to Crim. P. 21 and similar rules when he has actually worked on the case in any capacity, or is in a position to gain or lose financially from its resolution. A partner in a law firm is said to be "engaged" in every case in which a member of his firm represents a party, primarily because he has a financial interest in the outcome of the case. However, this rationale does not apply to a lawyer in government service, regardless of his powers and duties, because his compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the

> outcome of a particular case. For these reasons, a government attorney is only "engaged in the case" when he has worked on it directly.

Id. at 1216 . Based on that rationale, the court concluded that, because the judge's wife was not an attorney engaged in the case, the judge was not required to disqualify himself pursuant to Crim. P. 21(b)(1)(I). *Id*. The court did not separately address the relative-lawyer disqualification provisions in the Code of Judicial Conduct, but presumably concluded that disqualification was not required under the pre-2010 Code version of Rule 2.11(A)(2).

Nevertheless, based on the rule requiring disqualification to avoid the appearance of impropriety, the *Beckman* court concluded that "the existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification" from all cases involving the district attorney's office, "even though no other facts call into question the judge's impartiality." *Id*. That determination was based on the court's conclusion that "an appearance of impropriety is created by the close nature of the marriage relationship" and the fact that spouses "share confidences regarding their personal lives and employment situations." *Id*.

In Opinion 2012-02, the Board reaffirmed the conclusion that in most instances, a marriage relationship between a judge and an attorney associated with the attorney appearing before the judge creates an appearance of partiality that can only be cured by the judge's recusal from the case. In that case, the judge's spouse was the managing attorney of the regional office of a small public interest law firm, and in that capacity supervised the other attorney in the office. Based both on the marriage relationship and the spouse's supervisory role, the Board concluded that the judge should recuse from cases in which an attorney supervised by the judge's spouse enters an appearance.

Here, however, the relative-lawyer is the judge's future son-in-law -- not his spouse -- and does not supervise the other lawyers in the DA's office for which he works. Accordingly, neither *Beckman* nor Opinion 2012-02 is dispositive of the question whether the judge is required to recuse from all cases involving that office to avoid the appearance of impropriety, and we conclude that he is not.

The standard for determining whether disqualification is required to avoid the appearance of partiality or impropriety is whether "a reasonable observer might have doubts about the judge's impartiality." *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011); s*ee also* C.J.C. Rule 1.2, cmt. 5 ("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 honesty, impartiality, temperament, or fitness to serve as a judge"). The "mere existence of a relationship -- whether personal or professional -- is insufficient grounds for disqualification. Rather, it is the closeness of the relationship and its bearing on the underlying case that determines whether disqualification is necessary." *Schupper v. People*, 157 P.3d 516, 520 (Colo. 2007) (internal citation omitted).

In our view, the same rationale that leads to the conclusion that the judge is not disqualified under Rule 2.11(A)(2) from cases brought by the DA's office for which his future son-in-law works but on which the son-in-law is not personally involved also supports the conclusion that an objective observer knowing all the facts would not believe that the judge would be prejudiced in favor of the DA's office or otherwise question the judge's impartiality in such cases. *See Schupper*, 157 P.3d at 520-21 (disqualification not required based on judge's prior employment with prosecutor's office, his personal friendship with his former supervisor who appeared at only one hearing five years before trial, and the claimed "level of animosity" between defendant and the district attorney's office); *People v. Julien*, 47 P.3d 1194, 1200 (Colo. 2002) (trial court judge's recent employment as a supervising attorney in the District Attorney's office did not require his disqualification from a criminal matter brought by that office because the judge was not involved in the investigation or prosecution of that case and there was no basis for presuming pro-prosecution bias in all criminal matters). Courts from other states that have considered this question have reached the same conclusion. *See Moffat*, 560 N.E.2d at 361-62; *Logan*, 689 P.2d at 784-85; *Loera*, 530 So. 2d at 1276; *.Adair*, 709 N.W.2d at 577-78; *Dycus*, 246 N.W.2d at 327; *In re Jacobs*, 802 N.W.2d at 752-55; *Harrell*, 662, 546 N.W.2d at 118.

Thus, the judge is not automatically disqualified from cases brought by the DA's office, provided his future son-in-law has not entered an appearance, does not supervise the attorneys handling the case, and is not otherwise personally involved. Likewise, the judge may serve as the duty judge, provided his future son-in-law was not involved in the preparation or review of warrants and affidavits submitted for the judge's consideration.

FINALIZED AND EFFECTIVE this 29th day of October, 2012.