

Colorado Supreme Court  
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-02  
(Finalized and effective May 30, 2012)

**ISSUE PRESENTED:**

The requesting judge is a county court judge in a rural district. The judge's spouse is the managing attorney of the regional office of Colorado Legal Services (CLS), and in that capacity supervises the other attorney in the CLS office. The judge recuses from cases in which the judge's spouse enters an appearance and requested an advisory opinion regarding whether the judge must also recuse from cases in which an attorney who is supervised by the judge's spouse has entered an appearance.

**CONCLUSION:**

The judge should recuse from cases in which an attorney supervised by the judge's spouse enters an appearance.

**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 judicial disqualification when a judge “has a personal bias or prejudice concerning a party or a party's lawyer. . . .” *See also* C.R.C.P. 97 (disqualification required when judge is “interested or prejudiced” in an action).

## **DISCUSSION:**

The requesting judge’s practice of recusing from cases in which the judge’s spouse has entered an appearance is consistent with 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 judge’s spouse is acting as a lawyer in the proceeding. The Code does not specifically address the judge’s question whether disqualification is also required in cases in which an attorney supervised by the judge’s spouse is counsel of record, but the comments to Rule 2.11 are 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.

The Colorado Supreme Court has interpreted the requirement that judges recuse themselves to avoid the appearance of partiality or impropriety<sup>1</sup> as follows:

[A] judge must recuse whenever the judge's involvement with a case might create the appearance of impropriety. A judge who is disqualified based on an appearance of impropriety may be able to act impartially, but the judge is disqualified nonetheless because a reasonable observer might have doubts about the judge's impartiality. This broad standard is intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants.

*People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011) (internal citation omitted).

The “reasonable observer” standard set forth in *A.G.* is consistent with the comments to Rule 1.2, which explain that “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.” C.J.C. Rule 1.2, cmt. 5. Under this standard, a judge who subjectively believes in his or her own impartiality must nevertheless disqualify under circumstances that

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<sup>1</sup> Impartiality is defined in the Code’s terminology section 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 a judge.” The Code defines “impropriety” as including “conduct that undermines a judge’s independence, integrity, or impartiality.”

would lead a reasonable observer to question the judge's impartiality. *See also Johnson v. Dist. Court*, 674 P.2d 952, 956 (Colo. 1984) (the court's duty is to "eliminate every semblance of reasonable doubt or suspicion that a trial by a fair and impartial tribunal may be denied").

The Board has not previously considered whether the requirement that judges recuse to avoid the appearance of partiality requires disqualification from cases in which the judge's attorney-spouse is the supervisor of an attorney of record. Our analysis of this issue is informed, however, by previous Colorado appellate and CJEAB opinions that address the appearance of impropriety that arises based on the nature of the marriage relationship and other familial relationships.

In a prior opinion involving a similar situation, CJEAB Adv. Op. 2005-02, the Board concluded that the requesting judge should recuse in all cases in which an attorney with the judge's brother-in-law's law firm was counsel of record, because the judge was one of a small number of judges who presided within a small rural jurisdiction with a "close-knit" legal community, and the "involvement of the brother-in-law's partner or associate in matters before the requesting judge may give rise to an appearance of impropriety and cause objective observers to reasonably question the judge's impartiality." One of the reasons the Board reached that conclusion was that the brother-in-law, as a partner in the law firm, had a financial interest in all matters in which his firm entered an appearance. Here, however, the requesting judge's spouse is an attorney with a public interest law firm, and thus, there is no possibility that the requesting judge's spouse would have an interest in the outcome of a case before the judge "that could be substantially affected by the proceeding. . ." Rule 2.11(A)(2)(c). Even with this factual difference, however, the Board believes that the marital relationship between the requesting judge and the CLS managing attorney creates the same appearance of impropriety and partiality as was present in 2005-02.

The Colorado Court of Appeals came to the same conclusion in *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984), where the court held 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." In reaching that conclusion, the court noted that "an appearance of impropriety is created by the close nature of the marriage relationship" and that spouses "share confidences regarding their personal lives and employment situations." Ethics opinions from other states agree with this conclusion as well. *See Fla. JEAC Op. 2010-09* (judge married to the elected public defender in the judge's circuit disqualified from cases to which the public defender is assigned, even if the cases are handled by private attorneys over whom the spouse has no supervisory authority); *Fla. JEAC Op. 2001-05* (judge whose wife is the elected public defender in his circuit disqualified from cases in the criminal division to which the public defender is assigned, even if the spouse has no supervisory authority over the attorney involved in a given case); *N.Y. Adv. Comm. on Jud. Ethics Op. 10-05 (2010)* (judge whose spouse was the County Attorney was disqualified from all cases involving the County Attorney's Office). Thus, in most instances, including the circumstances of the request before the Board, 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 recusing from the case.

Although the Board believes the appearance of partiality arising from the marital relationship alone requires the judge's disqualification in cases in which counsel of record is an attorney with the regional CLS office the judge's spouse manages, the fact that the judge's spouse supervises the other attorney is another factor that could lead a reasonable observer to "have doubts about the judge's impartiality." *A.G.*, 262 P.3d at 650. Indeed, the Board has previously advised that disqualification is required when a judge's spouse has direct supervisory authority over individuals involved in litigation before the judge. *CJEAB Adv. Op.* 2005-01 (judge whose spouse was an officer with a fire protection district that assisted the local sheriff's department in conducting arson investigations was not disqualified from all cases involving the sheriff's department, but should disqualify in any case in which the judge's spouse or officers the spouse supervised participated in the investigation); *cf.* *CJEAB Adv. Op.* 2007-09 (judge whose spouse was running for the City Council was not required to disqualify from all cases charged by the police department, because the City Council "exercises no direct supervisory power over members of the police department, except through its supervision of the Chief of Police and the City Manager"). Other state judicial advisory boards that have considered this question have reached the same conclusion. *See, e.g.*, *Fla. JEAC Op.* 2011-21 (judge may not preside over felony arraignments in a county where the judge's spouse is the supervisor of the State Attorney's Office); *N.M. Adv. Comm. Op.* 07-04 (2007) (judge disqualified from all cases involving district attorney's office in which the judge's wife is the chief deputy district attorney and is responsible for supervising attorneys in the office); *N.Y. Adv. Comm. on Jud. Ethics Op.* 05-87 (2005) (judge whose spouse is the "attorney-in-charge" of the criminal practice of a legal services provider organization disqualified in criminal cases in which the defendant is represented by the organization); *Wash. Jud. Ethics Adv. Comm. Op.* 05-08 (judge may not preside over cases in which the prosecuting attorney appearing in the proceeding is supervised by the judge's spouse).

We recognize that the requesting judge's disqualification from all cases in which an attorney from the regional CLS office the judge's spouse manages may create administrative difficulties and place greater burdens on the other members of the court. We conclude, however, that those burdens are outweighed by the need to protect the integrity of the judiciary, and note that they must be borne by court administrators, not CLS or its clients. *See CJEAB Adv. Op.* 2005-02.

FINALIZED AND EFFECTIVE this 30<sup>th</sup> day of May, 2012.