Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)
C.J.E.A.B. ADVISORY OPINION 2007-01
(Finalized and effective January 9, 2007)

ISSUE PRESENTED

The requesting judge states that approximately one year ago, the judge's adult daughter was charged with a misdemeanor in one case and traffic offenses in another. The daughter was represented by a local criminal defense attorney who resolved both cases. The judge agreed to pay the attorney directly for his representation, and the judge worked out a reimbursement plan with the judge's daughter. The judge states that it was clear to all that the attorney represented the daughter and not the judge; the judge did not receive any legal advice from the attorney. The judge recently transferred to a criminal division and the attorney who represented the judge's daughter will have cases in the judge's division. The judge asks whether the same disqualification guidelines outlined in our 2006-05 opinion, which addressed situations in which an attorney represents a judge, apply where an attorney represents a family member who is an adult and not living in the same household as the judge.

CONCLUSIONS

The judge need not disqualify herself or himself on a *sua sponte* basis when the attorney who represented the judge's adult daughter appears before the judge. The judge should consult the judge's own conscience to determine whether disqualification is warranted if the judge maintains a disabling prejudice for or against the attorney. If the judge concludes that disqualification is unnecessary, disclosure of the daughter's representation still may be appropriate until the passage of time, the limited consequences of the prior matter and the nature of the judge's relationship with the attorney have made the prior representation irrelevant. In this case, the Board recommends that the judge issue a one-time disclosure letter to the district attorney's office, whose lawyers always would be opposing counsel in matters involving the private criminal defense attorney who represented the judge's daughter.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 2 directs that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities. Subsection B of the canon states that a judge should not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. It also provides that a judge should not convey or permit others to convey the impression that they are in a special position to influence him or her.

Canon 3 generally provides that a judge should perform judicial duties impartially and diligently. Subsection C governs disqualification and specifies 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 requesting judge noted, the Board recently considered the circumstances under which a judge who had been represented by an attorney in a dissolution action must disqualify himself or herself or must disclose the representation. In that opinion, 2006-05, the Board concluded that, pursuant to Canons 2 and 3, a judge must disqualify himself or herself if the representation by the judge's attorney is ongoing because the judge's impartiality might reasonably be questioned and also because a failure to disqualify would give rise to an appearance of impropriety. Disqualification is not necessary after the representation has ended where the judge has been represented in the judge's official capacity. However, where the judge has been represented in a personal matter, the Board concluded that the judge should continue to disqualify himself or herself for a period of one year in order to allow any reasonable inferences of partiality or impropriety to subside. At the end of one year, the judge should consider whether the facts and circumstances make continued disqualification appropriate. Finally, we determined that even where the judge concludes that disqualification is no longer required because the judge's impartiality might not reasonably be questioned, disclosure may be appropriate to promote public confidence in the impartiality of the judiciary and to inform the parties of any basis on which disqualification may be sought. When an attorney who previously represented the judge in a personal matter appears before the judge, the better practice is to disclose the prior representation for an extended period of time, at least until the passage of time, the limited consequences of the prior matter and the nature of the judge's relationship with the attorney have made the prior representation irrelevant.

In applying the framework we laid out in 2006-05 to this request, we first conclude that under the facts presented here, no *sua sponte* disqualification by the judge is necessary. Here, the attorney represented the judge's daughter rather than the judge. This distinction is significant. Although the judge paid for the daughter's representation (for which the daughter reimbursed the judge), the judge never received any legal advice from the attorney, it was clear to all that the attorney represented the daughter and there was no attorney-client relationship between the judge and the attorney. Under these circumstances, there can be no presumption of any personal relationship between the judge and the attorney. The lawyer had no duty to vigorously represent the judge's interests, and while some personal interest in the daughter's welfare can be presumed, the judge's interest is likely to be significantly attenuated as compared to that of the daughter. *See* NYSBA Op. 673. Further, since the prior representation is now over, the judge is in no position to confer any benefit upon the daughter through favorable treatment of the lawyer. The mere prospect that the judge may owe the attorney a debt of gratitude for assisting the judge's daughter is not enough, alone, to require disqualification.

The standard of Canon 3, however, is an objective one, based on the perceptions of a reasonable disinterested observer. The existence of a family connection anywhere in the case could reasonably affect an observer's calculation of the judge's impartiality. Therefore, the Board recommends that a judge assess the prior representation of a relative on the same basis as if the judge had been represented by the lawyer, and apply the guidelines to assessing disqualification set forth in 2006-05.

Here, these general principles should be tempered to recognize that the judge's daughter, rather than the judge, was the client. Thus, although we conclude that the judge is not required to disqualify herself or himself, we recommend that the judge consult the judge's own emotions and conscience to determine whether, based on the judge's subjective assessment, disqualification might nonetheless be appropriate because the judge believes that the judge cannot be impartial. *See* N.Y. Ad. Op. 00-68. Nothing in the facts presented by the judge gives rise to a perception that the judge maintains a disabling prejudice for or against the attorney, but only the judge can determine whether the judge can be impartial.

Finally, we reiterate that, as we determined in 2006-05, the judge should disclose that the criminal defense attorney represented the daughter until the passage of time, the limited consequences of the prior matter, and the nature of the judge's relationship with the attorney have made the prior representation irrelevant. *See also* N.Y. Ad. Op. 00-68. In this case, we recommend that the requesting judge write a letter to the district attorney's office noting that the judge recently has been rotated into the criminal division and disclosing that the particular private criminal defense attorney in question represented the judge's adult daughter in two criminal matters, and that the judge paid the attorney's fee. Under the unique circumstances of this case, in which the district attorney's office will always be the opposing party when the attorney who represented the daughter appears, the judge need make the disclosure only once. In recommending that the judge make this one-time disclosure, however, we emphasize that disclosure of the daughter's representation is not an admission of bias on the part of the judge.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 9th day of January, 2007.

Board member Daniel S. Hoffman does not participate in this opinion.