

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)
C.J.E.A.B. ADVISORY OPINION 2006-05
(Finalized and effective July 12, 2006)**

ISSUE PRESENTED

The requesting judge is one of two judges in his district assigned to the domestic division. Four years before his appointment to the bench, he was a party in a dissolution action in the district; the case was settled upon a negotiated agreement. The judge drafted and filed many of the early pleadings, but retained counsel for the final portion of the case involving the drafting and negotiation of the agreement on permanent orders; his attorney performed approximately six hours of work on the judge's case. The judge's ex-wife also retained counsel. The firm of the attorney who represented the judge handles many dissolution actions in the district, and the bulk of the firm's practice is devoted to domestic relations. When either the firm that represented the judge or the firm that represented his ex-wife appears before the judge, he notifies the parties of the prior representation so that they may file a motion to disqualify the judge. The judge asks whether he should continue to disqualify himself when requested to do so in situations where the firm that formerly represented him is representing a party. He also asks whether he should disqualify himself when requested to do so by a party represented by the firm that his ex-wife retained.

CONCLUSIONS

A judge should disqualify himself or herself *sua sponte* if an attorney or firm currently representing the judge, or representing the judge's adversary in a current matter, appears before the judge. A judge should also continue to disqualify himself or herself *sua sponte* for a reasonable period of time after the representation has ended, typically one year, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge. After the expiration of a reasonable period of time, continued disqualification is not required, but may be appropriate under the facts and circumstances of the case in which the judge was represented. Here, although this reasonable period has lapsed, the judge should consider various objective and subjective factors in assessing whether continued disqualification is appropriate, and how the judge should respond to a motion to disqualify. However, the judge should continue to disclose the prior representation for an extended period, at least until the passage of time, the limited consequences of the prior matter, and the nature of his current relationship with his prior attorney have made the prior representation irrelevant.

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

In general, the question of disqualification is left to the judge's sound discretion. *See Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635 (Colo. 1987). However, courts must meticulously avoid any appearance of partiality. *See Wood Bros. Homes v. City of Fort Collins*, 670 P.2d 9 (Colo. App. 1983). Judges confronted with a motion to disqualify should decide the legal question under C.R.C.P. 97 or Crim.P. 21 and the decisions interpreting those rules. Canon 3 of the Code of Judicial Conduct, however, sets forth a number of specific circumstances under which a judge should disqualify himself or herself *sua sponte*. At issue here is the provision dealing with disqualification in proceedings in which the judge's impartiality might reasonably be questioned. *See Hammons v. Birket*, 759 P.2d 783 (Colo. App. 1988) (court erred in denying motion to disqualify based on existing professional relationship with expert witness).

As a preliminary matter, the Board determines 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 in order to avoid an appearance of impropriety. In addition, during the pendency of the representation, that disqualification should be vicarious to the attorney's whole firm. As the Florida Judicial Ethics Advisory Committee noted, "The attorney-client relationship is among the most revered professional relationships in our society. The very foundation of this relationship is based upon trust and confidentiality. It would be hard to imagine that litigants, even in uncontested matters, would not be distrustful of the impartiality of a judge in a matter in which a law firm presently representing the judge was the firm of record in a matter before that judge." Fla. Ad. Op. 99-13.; *see also* Jeffrey Shaman et al., *Judicial Conduct and Ethics*, 3d ed. 2000; Utah Ad. Op. 00-4. The Board also concludes that, while a judge is currently being represented by counsel, the judge must also disqualify himself or herself when the judge's adversary's attorney or firm appears before the judge.

The question before the Board--whether disqualification is required after the representation has ended--presents a more difficult issue. After reviewing the authorities, the Board concludes that disqualification is not necessary after the representation has ended where the judge was represented in the judge's official capacity. *See, e.g., Utah Ad. Op. 00-4.* Where, however, the judge has been represented in a personal matter, such as the domestic case here, the Board further concludes that the judge should continue to disqualify himself or herself for a period of time in order to allow any reasonable inferences of partiality or impropriety to subside. As other jurisdictions have noted, no standard or basis exists on which to calculate a reasonable time, and any choice of time frame will be somewhat arbitrary. *See Utah Ad. Op. 00-4.* Nevertheless, some jurisdictions have concluded that a period of six months to one year is a reasonable time. We agree with the lengthier time-frame and determine that a judge should disqualify himself or herself for one year in proceedings involving an attorney who represented the judge in a personal matter. The judge should also disqualify himself or herself for the same length of time in any proceedings involving other members of the judge's attorney's law firm, the adversary's attorney, or the adversary's attorney's firm. *See id.; see also Ky. Ad. Op. JE-84.*

Although in the ordinary case the judge may cease disqualifying himself or herself after one year, the judge should consider whether, at the end of the presumptive period, the facts and circumstances make continued disqualification appropriate. The judge first should consult his or her own emotions and conscience to determine freedom from disabling prejudice. The judge also should consider whether an objective, disinterested person aware of all the circumstances would reasonably question the judge's partiality because of the past representation. Among the circumstances the judge should take into consideration are the length of time he or she was represented by the attorney, the nature and extent of the representation (e.g., was the subject of the representation a simple transactional matter or did it involve protracted litigation), the amount of money paid to the attorney, and how much time has elapsed since the representation. *See Fla. Ad. Op. 2005-05.* These factors will similarly illuminate whether disqualification is necessary, after the one-year period, as to the attorney or firm that represented the judge's adversary, because the judge maintains a particular bias or prejudice against the attorney or firm.

Further, where the judge maintains a special and close relationship with a particular attorney who represented the judge after the representation has ended, and where that relationship is qualitatively different than the judge's relationship with other attorneys, continued disqualification at the end of the one-year period would be appropriate. *See Utah Ad. Op. 004.* Disqualification as to the attorney's entire firm, however, is not necessary unless the judge's close relationship or bias extends to the firm as a whole.

Finally, 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. It should appear to the attorneys and the parties appearing before the judge that all proceedings will be heard fairly. *See Canon 3.* The Board notes that 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. If after the judge has disclosed the past representation, an attorney files a motion to disqualify the judge under C.R.C.P. 97 or Crim.P. 21, the judge can review his or her analysis of whether under all of the circumstances, taking into account the factors set forth in this opinion, an objective, disinterested person would reasonably question the judge's partiality because of the past representation. Unless some new facts or circumstances have been brought to the judge's attention that would change the judge's analysis there would appear to be no reason to grant the motion to disqualify.

In this case, the Board notes that more than four years have elapsed since the representation, the representation was of short duration, and the amount of work the attorney performed for the judge was limited, all of which support the conclusion that the judge need not continue to disqualify himself when his former attorney, the attorney's firm, his ex-wife's attorney, or the ex-wife's attorney's firm appears before him. However, the judge was represented in connection with the dissolution of his marriage, a deeply personal matter, which may weigh in favor of continued disqualification depending on the circumstances. In addition, only the judge knows whether he continues to harbor a bias or prejudice in favor of his own attorney and firm or against his ex-wife's attorney and firm, and only the judge possesses other information that would influence whether an objective observer aware of all the facts and circumstances would reasonably question his partiality. Thus, although the Board finds that the objective facts of this case do not require the requesting judge to continue to disqualify himself, it advises the requesting judge to consider the subjective factors discussed above to determine whether he should continue to disqualify.

The Board recommends that even though disqualification is not required, in order to promote public confidence in the impartiality of the judiciary and to inform the parties of any basis on which disqualification may be sought, the judge should continue to disclose the prior representation until the passage of time, the limited consequences of the prior matter, and the nature of the judge's current relationship with his prior attorney have made the prior representation irrelevant.

FINALIZED AND EFFECTIVE this 12th day of July, 2006, by the Colorado Judicial Ethics Advisory Board.