

October 20, 2004

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)**

**C.J.E.A.B. ADVISORY OPINION 2004-01
(Finalized and effective October 20, 2004)**

ISSUES PRESENTED

A judge presiding over a case determines that an attorney representing one of the parties has committed a violation of the Colorado Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. The judge reports the lawyer's misconduct to the appropriate disciplinary body. The grievated attorney does not file a motion to disqualify the judge from hearing the case. Must the judge now disqualify himself or herself in the case in which the grievated attorney is appearing? What action must the judge take in other cases in which the grievated attorney is appearing before the reporting judge?

CONCLUSIONS

A judge's report of an attorney's misconduct in a case pending before the judge does require that the judge disqualify himself or herself in the case. The judge's report of the attorney's misconduct alone may not manifest an attitude of hostility, ill will, or personal bias against the attorney. However, both the actuality of fairness and the appearance of fairness are of concern. Would the judge's report of misconduct cause that attorney's client reasonably to question the judge's impartiality? We believe that for most litigants the answer would be yes. The appearance of impartiality is an essential ingredient of a fair trial. Canon 2 requires that a judge avoid impropriety and the appearance of impropriety. The judge's actions must promote public confidence in the integrity and impartiality of the judiciary.

The litigants in other cases might also reasonably question the judge's impartiality if they knew of the report of misconduct. Therefore, the judge should disqualify himself or herself in all proceedings in which the grievated attorney is appearing. Thereafter, in any other proceeding in which the grievated attorney appears, the reporting judge should continue to consider whether he or she has any personal bias or prejudice concerning the attorney previously grievated.

APPLICABLE CANONS FROM THE COLORADO CODE OF JUDICIAL CONDUCT

Three (3) Canons of the Colorado Code of Judicial Conduct (Code) apply to an analysis of the issues presented.

Canon 3C(1) of the Code (“A Judge Should Perform the Duties of His or Her Office Impartially and Diligently”) states:

“C. Disqualification. (1) A judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, . . .”

Canon 1 of the Code (“A Judge Should Uphold the Integrity and Independence of the Judiciary”) states:

“An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

Canon 2A of the Code (“A Judge Should Avoid Impropriety and Appearance of Impropriety in All the Judge’s Activities”) states:

“A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 3B(3) of the Code (“A Judge Should Perform the Duties of His or Her Office Impartially and Diligently”) states:

“B. Administrative Responsibilities. (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.”

The Commentary to Canon 3(B)3 states: “Disciplinary measures may include reporting a lawyer’s misconduct to an appropriate disciplinary body.”

DISCUSSION

A litigant is entitled to a proceeding before a judge who does not have a bent of mind. *Johnson v. District Court*, 674 P. 2d 952, 956 (Colo. 1984). “While a judge may be convinced of his own impartiality, he nonetheless may so act as to lead a party to reasonably conclude that he is biased or prejudiced in the pending litigation. It is this

appearance of bias or prejudice which undermines not only a litigant's confidence in the fairness of the proceeding but also public confidence in the integrity and impartiality of the judicial system." *S.S. v Wakefield*, 764 P.2d 70, 73 (citing *Johnson*, 674 P.2d at 956).

The decision to grieve an attorney appearing before a judge in a case will necessarily have serious consequences for the attorney, for the reporting judge as a prospective witness in the grievance proceeding, and, most importantly, for the parties represented by the grieved attorney. That such clients might thereafter question the impartiality of the reporting judge in their case should be expected. The appearance of fairness and impartiality is critical to maintaining the integrity of the judicial process.

RESOLUTION AND OPINION

Disqualification is required when a judge reports a lawyer's misconduct to an appropriate disciplinary body.

FORMALLY FINALIZED AND EFFECTIVE this 20th day of October 2004, by the Colorado Judicial Ethics Advisory Board.

Eric Jorgenson, Esq. (Chairperson and attorney member)
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Barbara Crowfoot (citizen member)
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