

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2013-02
(Finalized and effective March 28, 2013)

ISSUE PRESENTED:

The requesting judge is a juvenile court judge on the Denver District Court. The judge requested an advisory opinion addressing whether judicial involvement in the court's system for the selection and oversight of attorneys who are eligible for appointment as counsel for indigent respondent parents in dependency and neglect proceedings is consistent with the Code of Judicial Conduct.

As described by the judge, the Denver Juvenile Court's system is as follows. Attorneys who seek to be appointed as respondent parents' counsel (RPC) apply annually for contracts. Attorneys who receive contracts are placed on a list kept by the Clerk of Court and are eligible to be appointed as RPC for that fiscal year. The court's judicial officers select the attorneys who are awarded contracts and appoint attorneys to represent indigent parents exclusively from the list. RPC attorneys may appear before any judge or magistrate on the court, but are primarily assigned to a courtroom presided over by a single judicial officer. While the judicial officers "work together and have candid discussions about the attorneys" in determining who will receive contracts, "traditionally it is the individual judge to whom the attorney is assigned who makes the final decision on who gets a contract." The judicial officers monitor the performance of RPC attorneys through the contract year, and periodically complete surveys evaluating their performance. The results of the surveys are available to all of the court's judicial officers.

The judge expressed concern that this system "creates an appearance of impropriety" because, while the judicial officers strive to "select only the best applications for RPC and to do so as objectively as possible, the undisputed fact is that the current system gives the judge the exclusive power to determine who will appear before that judge as [court-appointed] RPC." The judge commented that judicial officers do "not have the power to select" or "remove" other attorneys who appear before the court, and suggested that the level of control judges have over the selection and oversight of attorneys on the RPC list is particularly problematic because many of the attorneys practice exclusively in that court and therefore "rely and depend on their annual contract" in light of the "substantial commitment of time and effort" the RPC contract requires.

The judge gave two examples of situations that illustrate his concern: (1) an RPC attorney who is "afraid of aggravating a judge, and thereby risk their annual RPC contract, may hesitate to file motions or take other steps he or she legitimately believes need to be taken to represent a parent"; and (2) RPC attorneys "may hesitate to appeal the trial judge because if the judge is reversed on appeal, the attorney fears the trial judge will retaliate and not renew the attorney's contract."

CONCLUSION:

As part of their administrative duties, judicial officers may ethically select the attorneys who are eligible for appointment as counsel for respondent parents in dependency and neglect proceedings and monitor appointed attorneys' performance, provided the exercise of those duties is impartial and based on merit.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 1.2 of the Code of Judicial Conduct 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.”

Rule 2.2 provides that judges “shall perform all duties of judicial office fairly and impartially.”

The Code recognizes that a judicial officer's duties include making administrative appointments of “assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs.” C.J.C. 2.13, cmt. [1]. Rule 2.13 provides:

- (A) In making administrative appointments, a judge:
 - (1) shall exercise the power of appointment impartially and on the basis of merit; and
 - (2) shall avoid nepotism, favoritism, and unnecessary appointments.
- (B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Rule 2.5 requires judges to “perform judicial and administrative duties, competently,” and to “cooperate with other judges and court officials in the administration of court business.”

DISCUSSION:

Parents who are respondents in dependency and neglect proceedings in Colorado have a statutory right to be represented by counsel. If the parent cannot afford counsel, he or she may seek appointment of counsel at state expense. §§ 19-1-105(2), 19-3-202(1), C.R.S. (2012); *C.S. v. People*, 83 P.3d 627, 636 (Colo. 2004); *People in Interest of C.Z.*, 262 P.3d 895, 900 (Colo. App. 2010). Thus, courts have an administrative duty to appoint counsel for eligible respondent parents.¹

¹ A court's duty to appoint counsel for indigent respondent parents in dependency and neglect cases is just one example of the many administrative appointments of counsel and other representatives judicial officers are authorized or required to make on behalf of parties or non-party participants in proceedings before them. *See, e.g.*, CJD 08-01 (appointment of decision makers in domestic relations cases); CJD 04-08 (appointment of child and family investigator in domestic relations cases); CJD 04-06 (appointments through the Office of the Child

Chief Justice Directive 04-05, which establishes appointment and payment procedures for court-appointed counsel in dependency and neglect cases, provides:

Appointments may be made under flat fee or hourly contracts developed by the Judicial Department, or if necessary to meet the jurisdiction's needs, on a non-contract hourly fee basis. Any attorney not under contract with the Department who requests appointments must submit to the Chief Judge a request with an affidavit of qualifications for such appointments. The Chief Judge, in his or her discretion, may approve additions to the list of non-contract attorneys at any time. . . . The judge or magistrate shall consider the number of an attorney's active cases, the qualifications of the attorney, and the needs of the party to be represented when making appointments.

In addition to providing guidance regarding factors judges must consider in deciding which attorney to appoint in a given case, the Directive also contemplates judicial oversight over court-appointed attorneys by establishing procedures for handling complaints regarding counsel's representation, and providing that:

the appointing judge or magistrate shall, to the extent practical and subject to attorney-client privilege, monitor the actions of the appointee to ensure compliance with the duties and scope specified in the order of appointment. . . . [An appointee's] failure to comply [with this Directive] may result in termination of the current appointment and/or removal from the appointment list.

Thus, the responsibility for selecting which attorneys to appoint and monitoring appointees falls within a judicial officer's administrative duties.²

Representative); CJD 04-05 (appointment of counsel pursuant to Titles 12 through 15, 22, and 27, and in dependency and neglect cases, and of GALs, child and family investigators, and court visitors); CJD 04-04 (appointment of counsel in criminal and juvenile delinquency cases and for contempt of court); *see also* C.J.C. 2.13, cmt. [1].

² Several appellate decisions also address a judge's role in the oversight of court-appointed counsel in dependency and neglect cases when issues arise concerning the attorney's competence or other aspects of the representation. *See, e.g., A.L.L. v. People*, 226 P.3d 1054, 1062–63 (Colo. 2010) (while a respondent parent's right to counsel in a dependency and neglect case is established by statute, not constitutional mandate, once counsel has been appointed in a termination proceeding, constitutional principles developed in criminal cases define the scope of counsel's obligation to the client and the court's role in protecting the client's right to the effective assistance of counsel); *People in Interest of M.M.*, 726 P.2d 1108, 1121 (Colo. 1986) (holding, in dependency and neglect case involving court-appointed counsel, that "[i]f the trial court has a reasonable basis for concluding that the lawyer-client relationship has not deteriorated to the point that counsel is unable to give effective assistance to his client, the court is justified in denying a client's request to discharge her attorney and a lawyer's request to withdraw"); *C.Z.*, 262 P.3d at 902 (recognizing the propriety of judicial oversight of appointed counsel in dependency and neglect cases in holding that the "decision whether to grant an appointed attorney's motion to withdraw and for appointment of substitute counsel is a matter within the court's discretion"); *People in Interest of A.J.*, 143 P.3d 1143, 1148 (Colo.

The Code of Judicial Conduct expressly acknowledges that judges are required to make administrative appointments as part of their judicial duties, and provides that they may ethically do so if they “exercise the power of appointment impartially and on the basis of merit,” and “avoid nepotism, favoritism, and unnecessary appointments.” C.J.C. Rule 2.13 and cmt. [1]. The specific requirements in Rule 2.13 regarding administrative appointments echo Rules 1.2 and 2.2, which require more broadly that judges “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” “avoid impropriety and the appearance of impropriety,” and “perform all duties of judicial office fairly and impartially.” Because these requirements apply to a judge’s performance of all judicial duties, they apply not only to the act of making appointments, but also to the selection and oversight aspects of a judicial officer’s administrative appointment duties.

With respect to the requesting judge’s concern about judicial involvement in the contracting process, we perceive no meaningful ethical distinction between an individual judge deciding which attorney to appoint in a particular case and judicial involvement in the collaborative selection of attorneys who are awarded RPC contracts and are therefore eligible for appointment by judicial officers in individual cases. In either instance, a judge may ethically participate in the impartial, merit-based selection of court-appointed attorneys. *See* C.J.C. 2.2, 2.13; *see also* C.J.C. 2.5 (requiring judges to “perform judicial and administrative duties, competently,” and to “cooperate with other judges and court officials in the administration of court business”).

Thus, we conclude that the requesting judge’s participation in the Denver Juvenile Court’s system for selecting RPC attorneys eligible for appointment is within the scope of his administrative duties as a judge, and raises neither the appearance of impropriety nor any other ethical concern, provided he carries out his duties impartially and on the basis of merit.³ Likewise, in carrying out his administrative duty to oversee the attorneys he appoints, the judge may ethically monitor the appointees and share his impartial, merit-based assessment of their performance with other judicial officers.

We are not persuaded otherwise by the requesting judge’s examples of situations in which an attorney might seek to curry favor with or be afraid zealous advocacy could anger the appointing judge. Those examples raise concerns not about whether judicial participation in the appointment process is ethical, but about whether court-appointed counsel are fulfilling their

App. 2006) (the standard for determining whether an appointed attorney in a dependency and neglect case provided ineffective assistance is the same as the standard for evaluating appointed counsel’s effectiveness in criminal cases).³ Rule 2.13 specifically permits judicial officers to make judicial appointments, subject to the limitations set forth in that rule. “When two statutes attempt to regulate the same conduct, the more specific statute preempts the general statute.” *Crowe v. Tull*, 126 P.3d 196, 206 (Colo. 2006); *see also* *People v. Kadazi*, 284 P.3d 70, 78 (Colo. App. 2011) (applying rules of statutory construction to interpretation of supreme court rules); *In re Haley*, 720 N.W.2d 246, 254 (Mich. 2006) (“[t]he ‘appearance of impropriety’ standard is relevant not where there are specific court rules or canons that pertain to a subject ... but where there are no specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct. Otherwise, such specific rules and canons would be of little consequence if they could always be countermanded by the vagaries of an ‘appearance of impropriety’ standard.”) (citation omitted).

obligation to represent the best interest of their clients in a manner consistent with the Rules of Professional Conduct.⁴ See 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”). Nor does CJEAB Adv. Op. 2010-02 , which the judge cited in his request, require a different conclusion. In that case, the Board opined that a judge who presides over dependency and neglect matters should not serve on an interagency oversight board that determines how to spend certain state funds where a new memorandum of understanding with the state on dispersal of the funds creates a financial incentive for the judge to reduce certain placements in his capacity as a judge in order to provide more funds for the oversight group. That case involved the propriety of the judge’s proposed extrajudicial activities, not the performance of his administrative duties in the courtroom. Moreover, nothing in the Denver Juvenile Court’s system for selecting and appointing RPC attorneys creates a financial incentive for judges to alter how they implement that system.

FINALIZED AND EFFECTIVE this 28th day of March, 2013.

⁴ See Colo. RPC 1.7(a)(2) (lawyer has concurrent conflict of interest if “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. Rev. 1147, 1181-82 (June 2010) (when lawyer relies on court appointments for livelihood, lawyer has economic incentive to please judge by, for example, encouraging defendant to accept guilty plea rather than go to trial).