

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)*

C.J.E.A.B. Advisory Opinion 2013-03
(Finalized and effective July 9, 2013)

ISSUE PRESENTED

The requesting judge is a District Court Judge to whom two related pending cases have been assigned. One case is a C.R.C.P. 120 residential foreclosure proceeding, and the second is a civil action brought by the respondent-debtors in the foreclosure proceeding against the foreclosing bank, seeking a declaratory judgment as to the rights of the parties in the subject property.

The Rule 120 proceeding was originally assigned to a different judge, but was reassigned to the requesting judge after the first judge granted the respondent-debtors' C.R.C.P. 97 motion requesting that he disqualify himself based on an alleged interest in the foreclosing bank. More specifically, the motion alleged that the judge's interest in the Public Employee Retirement Association (PERA) required his disqualification because PERA holds investments in the foreclosing bank and other financial institutions involved in the residential mortgage-backed securities market, and is either directly engaged in or has an economic interest in litigation regarding mortgage-backed securities. The respondent-debtors alleged that, by virtue of his interest in PERA, the judge had a "direct conflict of interest" in the Rule 120 proceeding, was "biased and prejudiced against" them, and that his participation would give rise to an appearance of impropriety or impartiality. The judge indicated that he "disputes the allegations that I am biased or prejudicial," but "nonetheless recuse[d] himself" and referred the case to the Chief Judge of that district for reassignment.

The Chief Judge reassigned the matter to the requesting judge, who is now presiding over both the Rule 120 proceeding and the declaratory judgment action. The respondent-debtors filed C.R.C.P. 97 motions requesting that he recuse himself from both cases on the same grounds alleged in the motion seeking the first judge's disqualification. The judge indicated that he has "neither an actual bias nor actual prejudice in presiding over the cases," but asked whether he is nevertheless disqualified based on his interest in PERA. Specifically, he asked the following three questions:

1. Am I ethically required to recuse myself from one or both or neither of the pending cases?
2. Does the prior recusal of a similarly situated judge make it necessary for me to recuse myself due to an appearance of impropriety?
3. Given that all district court judges in the State of Colorado are similarly situated with regard to [PERA] and its investments, is this a limited circumstance to which the rule of necessity applies?

CONCLUSION

The judge is not disqualified from either the Rule 120 proceeding or the declaratory judgment action because he does not have an actual bias or prejudice regarding the parties, has at most a de minimis interest in the outcome of the proceedings through PERA, and does not have a disqualifying economic interest in the foreclosing bank or in the outcome of the litigation. Moreover, to the extent his interest in PERA could give rise to an appearance of impropriety or impartiality, the rule of necessity would override any potential conflict and preclude his disqualification from either case.

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.”

Rule 1.3 provides that a judge “shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”

Rule 2.7 requires a judge to “hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”

Canon 2 requires judges to “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 . . . financial[] or other interests . . . 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 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 the judge is “interested or prejudiced” in an action).

Rule 2.11(A)(2)(c) requires disqualification when the judge has “more than a de minimis interest that could be substantially affected by the proceeding.” *See also* § 13-1-122, C.R.S. 2012 (“A judge shall not act as such in . . . an action or proceeding . . . in which he is interested . . .”). The Terminology section of the Code defines “de minimis” as “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.”

Rule 2.11(A)(3) requires disqualification when the judge has “an economic interest in the subject matter in controversy or in a party to the proceeding.” The Terminology section provides that “[o]wnership in a mutual or common investment fund that holds securities, or of securities held in a managed fund is not an ‘economic interest’ in such securities unless the judge participates in the management of the fund.” *See also* C.J.C. Rule 2.11 cmt. [6]; § 13-1-122.

Rule 2.11(D) provides that “[i]n limited circumstances, the rule of necessity applies and allows judges to hear a case in which all other judges also would have a disqualifying interest or the case could not otherwise be heard.”

DISCUSSION

Rule 2.11 provides that judges are disqualified from “any proceeding in which the judge’s impartiality might reasonably be questioned.” Of the specific situations enumerated in the rule requiring a judge’s disqualification, three are relevant here: a personal bias or prejudice (Rule 2.11(A)(1)), more than a de minimis interest that could be affected by the proceeding (Rule 2.11(A)(2)(c)), and an economic interest in the subject matter in controversy or a party to the proceeding (Rule 2.11(A)(3)). But none of these enumerated bases for disqualification requires the judge to recuse himself:

- PERA’s investments in the foreclosing bank and its interests in residential mortgage-backed securities litigation represent a very small percentage of its overall holdings, and the foreclosing bank’s interest in the subject property is an insignificant portion of its assets. Thus, the judge’s interest in PERA will not be affected by the outcome of the Rule 120 and declaratory judgment proceedings and is therefore an “insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.” *See* C.J.C. Terminology (definition of “de minimis”). Accordingly, he is not disqualified under Rule 2.11(A)(2)(c). *Cf. Zoline v. Telluride Lodge Ass’n*, 732 P.2d 635, 640 (Colo. 1987) (judge was required to recuse himself where, among other disqualifying factors, he owned a controlling interest in a bank in which a party to the lawsuit was a substantial depositor).
- The Code expressly provides that “[o]wnership in a mutual or common investment fund that holds securities, or of securities held in a managed fund is not an ‘economic interest’ in such securities unless the judge participates in the management of the fund.” C.J.C. Rule 2.11 cmt. [6]; C.J.C. Terminology. The requesting judge is not on PERA’s investment management staff and is not a member of its Board of Trustees, which determines the strategic asset allocation policy for the fund. Accordingly, he is not disqualified under Rule 2.11(A)(3).

- The judge indicated in his request that he has no “actual bias or prejudice” in favor of the foreclosing bank or against the respondent-debtors, and, other than their concerns about the judge’s interest in PERA, nothing in their C.R.C.P. 97 motion suggests that he has a personal bias or prejudice against them. Accordingly, he is not disqualified under Rule 2.11(A)(1) based on “a personal bias or prejudice concerning a party.” *See People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011) (“actual bias focuses on the subjective motivations of the judge” and is a bias “that in all probability will prevent [a judge] from dealing fairly with a party”); *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002) (same).

The specific reasons for disqualification enumerated in Rule 2.11 are not the only circumstances in which a judge may be disqualified, however, because the Rule requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to” the enumerated circumstances. In our view, a reasonable observer would not question the judge’s impartiality based on his interest in PERA. *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.”); *see also A.G.*, 262 P.3d at 650 (“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.”). But even if the judge’s interest in PERA might give rise to questions about his impartiality or otherwise implicate Rule 1.2 (requiring judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and “avoid impropriety and the appearance of impropriety.”), Rule 1.3 (requiring judges to avoid abuse of the prestige of judicial office to advance their economic interests), or Rule 2.4 (prohibiting external influences, including personal financial interests, on judicial conduct or judgment), the same concern would arise with respect to every state district court judge, because PERA is a pension fund of which all Colorado judges are members.

As the comments to Rule 2.11 make clear, under the rule of necessity, a judge’s responsibility to decide pursuant to Rule 2.7 overrides an otherwise disqualifying conflict when all other judges have the same disqualifying interest or the case could not otherwise be heard:

The rule of necessity may override the rule of disqualification. The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to disqualifications which might reasonably cause the judge’s impartiality to be questioned. The rule of necessity has been invoked for trial court and court of appeals judges where disqualifications exist as to all members of the court and there is no other judge available. . . . [T]he importance of having the court render a decision overrides the existence of the conflict, which might otherwise leave litigating parties in limbo. Under the rule of necessity, [] a judge might be required to participate in judicial review of a judicial salary statute Rather than deny a party

access to court, judicial disqualification yields to the demands of necessity.

C.J.C. Rule 2.11 cmt. [6]; *see also* C.J.C. Rule 2.7 (“A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”) and cmt. [1] (“Judges must be available to decide the matters that come before the courts. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts.”).

Thus, the answer to the judge’s first question – whether he is disqualified from either case based on his interest in PERA – is no. He has no actual personal bias against respondent-debtors or in favor of the foreclosing bank, and any interest he might have in the outcome of the proceedings based on PERA’s holdings is at most de minimis and is not a disqualifying economic interest. The answer to his second question is also no: the prior recusal of a similarly situated judge does not require the requesting judge’s disqualification to avoid the appearance of impropriety. Each judge must consult his or her own conscience to answer the subjective question of whether the judge is biased or prejudiced for or against a party, and the fact that one judge recused himself does not require another judge to make the same decision under similar circumstances when, as here, the relevant provisions of the Code do not require disqualification. Indeed, to the extent the first judge’s decision to recuse himself from the Rule 120 proceeding was based on a concern that his interest in PERA gave rise to the appearance of impropriety or impartiality, his decision illustrates why the rule of necessity applies, because the same concern would arise with respect to every state district court judge. Thus, the answer to the judge’s third question is yes: the rule of necessity, which derives from a judge’s duty to sit, overrides the rule of disqualification based on the appearance of impropriety and requires the judge to hear both cases. *See* C.J.C. Rule 2.7; C.J.C. Rule 2.11(D) and cmt. [3]; *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 931 (Colo. App. 2002) (rule of necessity required judges to sit on panel hearing appeal from trial court’s dismissal of class action antitrust suit brought against software manufacturer on behalf of users of its operating system where “each judge on this court uses” the same or a more current version of the operating system); *see also United States v. Will*, 449 U.S. 200, 213 (1980) (relying on rule of necessity to conclude that judges are not automatically disqualified from cases challenging changes to laws regarding judicial compensation); *In re Wireless Tel. Radio Frequency Emissions Products Liab. Litig.*, 170 F. Supp. 2d 1356, 1357 (J.P.M.L. 2001) (rule of necessity required participation by all members of a seven-member judicial panel on multidistrict litigation where four members held stock interests that would normally disqualify them from participating regardless of the insignificance of the financial impact any determination would likely have upon those interests).

* Hon. Charles Greenacre did not participate in this opinion.

FINALIZED AND EFFECTIVE this 9th day of July, 2013.