

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)¹

C.J.E.A.B. Advisory Opinion 2019-02
(Finalized and effective August 23, 2019)

BACKGROUND:

The requesting judge has been invited to give a presentation on judicial disqualification to several state court judges at a judicial seminar. The judges attending the seminar are both trial court and appellate court judges. After accepting the invitation to speak, a party in a case over which the requesting judge presided filed a motion to disqualify the judge from the case because of bias and alleged impropriety. The requesting judge denied the motion. The judge's decision not to recuse is currently pending on appeal.

The requesting judge would like to know if, despite the matter pending before the appellate court, the judge may give a presentation on judicial disqualification if the judge does not specifically mention the pending case. Although the judge will not mention the case by name, the judge intends to discuss common situations occurring in trial courts, where a litigant files a separate action against a judge and claims the judge's appearance of impropriety and bias as the basis for disqualification in the original case over which the judge is presiding.

The requesting judge has asked the Judicial Ethics Advisory Board ("Board") to determine whether the judge may give a presentation on judicial disqualification under the Code of Judicial Conduct ("Code") when some of the appellate judges in the audience may sit on the panel assigned to the pending matter.

ISSUES PRESENTED:

1. Whether a trial court judge may present a seminar on disqualification to a judicial audience when a disqualification challenge concerning the judge is currently on appeal if the judge does not mention the pending matter.
2. Whether the judge presenting the seminar should ask all appellate judges to leave the session because appeals of disqualification motions are usually always "pending or impending" in the appellate courts.

SUMMARY:

As long as the requesting judge does not make statements that can reasonably be expected to affect the outcome of the pending matter or give the appearance that the judge would be biased if the case was remanded, the judge may give a general presentation on judicial disqualification. In his presentation, the judge may use hypothetical situations to illustrate the discussion even if there are similarities to the case currently pending on appeal. As long as the

¹ Alexander Rothrock, CJEAB Chair, and the Hon. Michael Berger did not participate in or contribute to this Advisory Opinion.

appellate judges in the audience feel they would not be influenced by the presenting judge's comments, they may attend the disqualification presentation.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Several general Code provisions requiring judges to act impartially and with integrity apply to the inquiry, including Canon 1 and Rules 1.1, 1.2, and 3.1. Canon 1 is broad and requires judges to “uphold and promote the independence, integrity, and impartiality of the judiciary, and . . . 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 avoid impropriety and the appearance of impropriety.” Rule 3.1 encourages judges to speak and teach on topics concerning the law, the legal system, and the administration of justice.

Rule 2.10 limits the statements a judge may make about a pending or impending case. Per the Code's terminology, a “pending matter” is a “matter that has commenced. A matter continues to be pending through any appellate process until final disposition.” An “impending matter” is a “matter that is imminent or expected to occur in the near future.” Rule 2.10 provides as follows:

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.
- (C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).
- (D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity, subject to Canon 1.

Rule 2.9(A)(3) permits judges to “consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable effort to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.”

DISCUSSION:

The issues posed by the requesting judge are interrelated—the first issue applies to the statements the judge may make while the matter is pending or impending, and the second issue applies to the care, if any, the judges in the audience should take upon hearing those statements.

1. Whether the Judge May Give a Presentation on Judicial Disqualification

In relevant part, Rule 2.10(A) prohibits judges from making any “public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.” The Rule exists to protect the fairness and integrity of the judicial process until a proceeding has reached its final disposition and to protect the appearance of impartiality of the judge making the statement if the matter is remanded back to that judge.

Rule 2.10(A) requires a two-part inquiry. The first question is whether a matter is pending or impending. If so, the second question is whether a judge’s statement may “reasonably be expected to affect the outcome or impair the fairness” of the pending or impending matter. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct*, 203 (2d ed. 2011).

As to the first question, in the requesting judge’s case, a pending matter exists because the judge’s decision not to recuse is currently on appeal. Therefore, the first prong of the Rule 2.10(A) inquiry is satisfied, and the question before us is whether a presentation on disqualification given at a judicial seminar may “reasonably be expected to affect the outcome or impair the fairness” of the pending matter.

As to the second question, Canon 3(A)(6), which was the prior version of Rule 2.10, provided that a

judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge’s direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Canon 3(A)(6) contained a blanket prohibition on judges making statements about a pending or impending matter in any court. The new Code provision contained in Rule 2.10(A), however, relaxed that prohibition to include only statements “that might reasonably be expected to affect” the outcome of a case or its fairness and not those remarks that are unlikely to affect a pending proceeding. *See* Erwin Chemerinsky, *Is it the Siren’s Call?: Judges and Free Speech While Cases are Pending*, 28 Loy. L.A. L. Rev. 831, 836 (1995) (discussing how the ABA’s prior Model Code of Judicial Conduct “contained a flat prohibition on judges making comments on pending cases,” whereas the current rule is “desirable” and distinguishes between comments reasonably expected to impair fairness and those that will not).

As explained in the commentary, the changes to Rule 2.10 were intended to maintain the independence, integrity, and impartiality of the judiciary, while simultaneously acknowledging that, in some instances, judges should be able to make public statements about a case even if it is pending or impending. To achieve this balance, current Rule 2.10(A) permits judges to comment even when a matter is pending or impending as long as the comments are not reasonably expected to affect the outcome of the case. Likewise, Rule 2.10(D) permits judges to make statements explaining “court procedures” or make “statements in the course of official duties,” even if a matter is pending or impending because merely explaining the court’s process will not jeopardize the outcome of the case.

In Advisory Opinion 2008-03, Colorado’s County Attorney’s Association invited a judge to speak at an educational conference for county and city attorneys focusing on dependency and neglect cases. As part of the lecture, the judge was asked to discuss evidentiary issues and trial strategy. Though the lecture was open to the public, because the audience consisted mostly of attorneys representing departments of social services, the judge asked the Board if he could present such a one-sided discussion and, if so, whether he could discuss trial tactics. The Board acknowledged that judges were encouraged to speak on topics concerning the law but cautioned the judge to be “careful that his quasi-judicial activities d[id] not compromise his capacity to decide impartially any issues that may come before the judge.” Thus, the Board concluded that the judge could discuss neutral topics like evidentiary issues but advised the judge against presenting on trial strategy because he could appear biased or could easily cross the line from giving an educational presentation to providing legal advice or commenting on a pending or impending case.

The circumstances presented in Advisory Opinion 2008-03 are like the circumstances presented by the requesting judge, but the context differs in a few ways. The primary concern in Advisory Opinion 2008-03 was that the judge might appear to be biased by offering trial tactics to county attorneys in dependency and neglect cases. These lawyers were not tasked with deciding any pending or impending cases; they were simply practitioners (some of whom may have appeared before the judge) who were interested in learning more about dependency and neglect proceedings. In the present case, the concern is not so much whether the requesting judge’s comments could appear one-sided but whether the comments the judge makes in the disqualification session could reasonably be expected to affect the outcome or impair the fairness of the pending matter, or whether the statements could call into question the judge’s impartiality if the case were remanded. Additionally, the requesting judge intends to use a hypothetical, which, even if not based on the pending matter, could be interpreted by some audience members as similar the pending matter because the recusal motion garnered much publicity. *See, e.g.*, Chemerinsky, 28 Loy. L.A. Rev. at 835 (explaining that a judge may speak generally about the law, but that the application of speech to a pending case could be obvious to all observers even if the judge does not mention the case by name if the discussed case is factually like a pending case).

We conclude that the requesting judge may present on the topic of judicial disqualification even if a matter is pending under Rule 2.10(A) because, as long as the judge discusses the topic in broad terms, such a discussion is exempted under subsection (D) as statements a judge may make in the course of discharging official duties. We also conclude that the requesting judge may use recusal hypotheticals as part of the presentation as long as the judge does not give an opinion on how the hypotheticals ought to be resolved. Rather, the judge should provide a general discussion of the various relevant considerations that any judge must consider in determining whether to recuse from a case.

2. Whether the Presenting Judge Should Request that All Appellate Judges Leave the Disqualification Session

Rule 2.9(A)(3) allows judges to “consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable effort to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the

matter.” In Advisory Opinion 2004-02, which was decided under a similar provision of the prior Code, the requesting judge asked the Board if he could discuss a pending matter with his mentor judge. We determined that the mentee judge could discuss the pending matter with his mentor if the purpose of the discussion was to help the mentee judge make a final decision on his own and was not intended to influence the mentee’s decision because the mentee judge alone was responsible for making the decision

Rule 2.9(A)(3) and Advisory Opinion 2004-02 are not directly on point because any appellate judges attending the seminar will not be consulting the presenting judge. However, both are informative because they address the responsibility of the decision-making judges when hearing statements concerning pending or impending matters. As long as the presenting judge speaks in generalities, uses hypotheticals, and only discusses the various relevant considerations that ought to be considered in determining a recusal motion, no appellate judge in attendance will receive any factual information that may become part of the record, nor will any appellate judge in attendance abrogate the responsibility personally to decide the matter. Thus, the requesting judge need not ask any appellate judge to leave the session.

CONCLUSION:

The requesting judge may give a presentation on judicial disqualification notwithstanding the pending matter on appeal as long as the judge’s statements cannot reasonably be expected to affect the pending matter’s outcome or impair its fairness. The judge may also make general comments pertaining to court procedures or actions judges undertake while performing their judicial duties.

Because it is unlikely that a general presentation by the requesting judge will affect their decision-making abilities or will give the appearance that the presenting judge is exerting undue influence over appellate judges with decision-making authority over the pending matter, appellate judges may attend the presentation, and the requesting judge need not ask them to leave.

FINALIZED AND EFFECTIVE this 23rd day of August.