

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2022-06
(Finalized and effective October 28, 2022)

BACKGROUND AND ISSUES PRESENTED:

The requesting judge presides over a criminal docket. His spouse is an attorney at a law firm who practices law in the same district. The judge recuses¹ himself from cases where his spouse enters an appearance. The judge has asked whether he must also recuse in the following situations, even if his spouse does not enter an appearance:

1. any criminal matter if the judge’s spouse obtains an alternate defense counsel contract to represent a criminal defendant in the same district where the judge presides.
2. any criminal case if his spouse is privately retained on a criminal matter within the district.
3. any case in a specific field of criminal law if his spouse practices in that particular field.

SUMMARY:

Any concern of potential bias or impropriety under the Code of Judicial Conduct (“Code”) arises because of the relationship between the judge and his spouse, not the type of law his spouse practices. Based on the questions posed, under the Code, the judge need only recuse from those cases where his spouse enters an appearance. Therefore, as long as the judge’s spouse does not enter an appearance, the judge need not recuse if his spouse is alternate defense counsel in a similar case, is retained privately on a different criminal matter, or is an expert in a particular field of criminal law.

APPLICABLE PROVISIONS OF THE CODE:

Several Code provisions apply to this inquiry. 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 2.4(B) provides that “A judge shall not permit family, social, political, financial, or other interests or relationships 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.”

¹ The term “recusal” is used interchangeably with the term “disqualification.” See C.J.C. 2.11 cmt. [1].

Rule 2.11(A)(2) sets forth the circumstances in which a judge must disqualify himself or herself from a proceeding in which the judge’s impartiality might reasonably be questioned because of a spousal relationship:

A judge shall disqualify himself or herself in any proceeding . . . including but not limited to the following circumstances:

. . . [t]he judge knows that the . . . judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

ANALYSIS:

Rule 2.11(A)(2)(b) provides, in relevant part, that a “judge shall disqualify himself or herself in any proceeding [if] . . . the judge’s spouse . . . is acting as a lawyer in the proceeding.” The requesting judge’s practice of recusing from cases in which the judge’s spouse has entered an appearance is consistent with the express requirements of Rule 2.11(A)(2)(b). The Rule does not discuss, nor have we considered, whether the judge must also disqualify himself from presiding over cases in which the judge’s spouse has not entered an appearance but that involve the same or similar subject matter.

The language of Rule 2.11(A)(2)(b) is clear, though—a judge need only disqualify himself or herself in any proceeding in which the judge’s spouse “is acting as a lawyer in the proceeding.” *See also* MD Jud. Ethics Comm. Op. 2012-05 (Feb. 27, 2012) (Rule 2.11(a)(2)’s application is limited to the judge whose spouse is acting as a lawyer in the proceeding). Likewise, the reason for disqualification is clear—any concern with impropriety or the appearance of impropriety stems from the marital relationship between the judge and the judge’s spouse, not from the type of law the attorney-spouse practices, the subject matter before a judge, or the composition of the judge’s docket. Thus, no concern of impropriety arises if the judge’s spouse is awarded an alternate defense counsel contract, is retained privately to represent a defendant in a criminal proceeding or is considered an expert in a particular area of criminal law. As long as the spouse is not acting as an attorney in a proceeding before the judge, the judge need not recuse.

CONCLUSION:

Based on the specific questions posed, unless the judge’s spouse is acting as an attorney in a proceeding before the judge, the requesting judge need not recuse from presiding over cases involving the same or similar subject matter as the spouse’s case.

FINALIZED AND EFFECTIVE this 28th day of October, 2022.