

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

**C.J.E.A.B. Advisory Opinion 2010-03
(Finalized and effective September 29, 2010).**

ISSUES PRESENTED

The requesting judges are district judges standing for retention in the November 2010 election. A committee has formed to oppose their retention.¹ The committee is organized and registered with the Secretary of State; it has collected funds and intends to distribute yard signs, bumper stickers, letters to the editor, and other paraphernalia urging voters to vote against the judges' retention. The committee intends to go door to door asking the citizens of the judicial district to vote not to retain the judges. The main thrust of the opposition is based not on discontent with the judges' performance as judges, but rather with their role as prosecutors in the prosecution and conviction of Timothy Masters in 1998-1999, before either was appointed to the bench.²

Another committee has been formed to support the judges' retention. This committee has urged the judges to accept invitations to speak publicly to service clubs and media outlets; the judges have never publicly spoken about the case due to the Code of Judicial Conduct's directive to refrain from commenting on a pending or impending proceeding in any court. The criminal case involving the underlying murder is now being handled by the Attorney General's office and is an ongoing investigation. The criminal case against Mr. Masters has been dismissed. The disciplinary proceeding against the requesting judges has been concluded.³ A civil suit filed by Mr. Masters in which the judges were named as defendants is concluded and has been dismissed. A criminal case against a lieutenant in the local police department, based upon allegations of perjury related to his role in the investigation and prosecution of Masters, remains pending.

The judges recognize that they may not speak about the pending criminal case against the police lieutenant. They note, however, that if they do accept invitations to speak in support of their retention, questions will inevitably arise as to their conduct in the areas outlined above. Thus, they ask whether, consistent with the Code of Judicial Conduct, they may speak publicly about (1) the retention election and the performance evaluation process; (2) the 35(c) proceedings in the Masters criminal case and the Special Prosecutor's Report⁴ issued at the conclusion of that

¹ The committee's website can be found at

http://judicialjustice.org/index.php?option=com_content&view=article&id=47&Itemid=54

² Timothy Masters was convicted in 1999 for the 1987 murder of Peggy Hettrick in Fort Collins. He served nearly ten years of a life sentence before his conviction was vacated in 2008 based on DNA evidence.

³ The judges were publicly censured by the Presiding Disciplinary Judge for misconduct in the Masters case. See <http://www.coloradosupremecourt.com/PDJ/ConditionalAdmissions/Blair,Conditional%20Admission,08PDJ085,09-09-08.pdf> and <http://www.coloradosupremecourt.com/PDJ/ConditionalAdmissions/Gilmore,Conditional%20Admission,08PDJ084,09-09-08.pdf>.

⁴ http://www.adamsbroomfieldda.org/pdfs/Masters_Special_Prosecutors_Report.pdf.

proceeding; (3) the disciplinary process and the stipulations both signed related to their conduct; and (4) the civil case brought by Mr. Masters in which the judges were named defendants in the case and the settlement in that case.

CONCLUSIONS

The judges, who face active opposition to their retention, may speak publicly about: (1) the retention process and performance evaluation process; (2) the 35(c) proceedings in the Masters case and the Special Prosecutor’s Report issued at the end of that proceeding; (3) the disciplinary process and stipulations signed by the judges regarding their conduct; and (4) the civil suit filed against them by Mr. Masters—provided that their statements are truthful, are consistent with Canon 1, and do not impact the fairness of the pending criminal investigation into the police lieutenant or any proceedings that may result from the ongoing investigation by the Attorney General’s Office. Although the Code allows the judges to comment on these matters, the Board cautions them to determine whether any of the stipulations they have signed prohibit them from making such comments and to carefully consider the wisdom of making any statements at all about these matters.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

As most readers of this opinion are probably aware, on July 1, 2010, the Colorado Supreme Court adopted a new Code of Judicial Conduct, modeled after the 2007 ABA Model Code of Judicial Conduct. The following provisions are from the new code of conduct.

Rule 2.10, Judicial Statements on Pending and Impending Cases, provides in pertinent part:

(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.

...

(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 4.1, Political and Campaign Activities of Judges and Judicial Candidates in General, provides in pertinent part that a judge or judicial candidate may not:

(11) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court

Rule 4.3, Retention Campaign Committees, provides in pertinent part:

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

- (1) the judge may speak at public meetings;
- (2) the judge may use advertising media, provided that the advertising is within the bounds of proper judicial decorum....

The Code of Judicial Conduct defines a "pending matter" as "a matter that has commenced. A matter continues to be pending through any appellate process until final disposition."

The Code defines an "impending matter" as "a matter that is imminent or expected to occur in the near future."

Finally, the Code defines "knowingly" as meaning "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

DISCUSSION

As the Board has previously noted, Colorado's judges are selected and retained in a non-partisan, non-political merit-selection process of which the state is quite proud and for which it has been lauded by national observers. *See* C.J.E.A.B. Ops. 08-04 and 08-05. (Although these opinions were written under the previous Code of Judicial Conduct, they continue to be equally applicable under the new Code.) One of the hallmarks of this system is that judges who are seeking to remain in office in periodic retention elections may not, as a general matter, enter the political fray in connection with their own bids to retain their judicial position. The only exception to this general policy occurs when judges standing for retention are the targets of "active opposition." In such instances, judges may engage in limited campaign activity in connection with their own candidacy. We previously defined "active opposition" to be either an orchestrated, organized campaign registered with the Secretary of State or individual statements broadcast to a public audience, such as through letters to the editor or yard signs. *See* C.J.E.A.B. Op. 08-05.

Here, the judges clearly face opposition under both prongs of the test: an organization has been formed, and has registered with the Secretary of State, with the sole purpose of opposing the retention of the two judges, and a review of newspaper articles and commentary demonstrates that individuals contesting the judges' retention are broadcasting their opposition to a large segment of the public. Thus, the judges are permitted under Rule 4.3 to engage in a limited range of campaign activity in support of their own bids for retention. This includes leave to discuss the performance evaluation process and the retention election.

Turning to the judges' second question, i.e. whether they may speak publicly about the concluded 35(c) proceedings in the Masters case and the Special Prosecutor's Report issued at the conclusion of those proceedings, the Board finds nothing in the Code that disallows the judges from publicly addressing these issues. Rule 2.10 and Rule 4.1(12) prohibit judges from making comments that could affect any matters that are pending or impending, but the Code in general and the Rules in particular contain no constraints on a judge's latitude to comment on

matters that have been concluded and resolved, provided that in so doing a judge adheres to Canon 1's directives to uphold and promote the integrity, independence, and impartiality of the judiciary and provided that the judge's comments are true. Here, given that the Rule 35(c) proceedings and Special Prosecutor's investigation have concluded, the judges may publicly comment on them.

However, the Board notes that these matters involve a common factual background with the pending criminal investigation into the police lieutenant's conduct in the Masters case, and, as the judges themselves recognize, they may not make any public comment that might affect the outcome or impair the fairness of this pending proceeding. Recognizing how intimately the police lieutenant's criminal case is bound up with questions regarding the judges' conduct while serving as prosecutors in the Masters' case, it may be difficult for them to speak about the 35(c) proceedings and Special Prosecutor's report without straying into the prohibited territory. In light of the precarious line separating the two matters, the judges may be well advised to refrain from speaking about these issues at all. To the extent they nevertheless feel compelled to comment on the 35(c) proceedings and the Report, the Board cautions the judges to exercise great care to ensure that their comments do not implicate the pending matter concerning the police lieutenant.

In addition, the Board does not have enough information from which to determine whether there may be proceedings impending from the on-going investigation into the underlying homicide by the Attorney General's Office. Although the judges' conduct as prosecutors in the Masters' criminal case probably is not an issue in the Attorney General's investigation of the homicide, the judges must ensure that any comments they make about the Masters' case are not such as could reasonably have an effect on any proceedings the Attorney General may initiate.

The Board also finds nothing in the Code that prohibits the judges from speaking about the disciplinary process and the stipulations both judges signed regarding their conduct in the Masters case. Indeed, here, Rule 2.10(2) permits the judges, as "litigants in a personal capacity" to comment on the proceeding, subject to Canon 1. The same caveats regarding avoidance of any commentary that might violate Rule 2.10 or 4.1(12) outlined above apply with equal force here. And to the extent the stipulations contain any restrictions on what the judges may say in connection with their discipline, the judges should of course abide by such terms; absent such provisions, however, the judges are permitted to publicly comment on these questions.

Finally, the Board concludes that nothing in the Code of Judicial Conduct bars the judges from commenting on the fully-concluded civil suit brought against them by Mr. Masters, or the subsequent settlement of that case. As with the disciplinary process, the judges as defendants in the civil suit were litigants in their personal capacity and thus specifically permitted by Rule 2.10(2) to offer truthful commentary on the proceedings so long as their statements do not detract from the dignity, independence, and impartiality of the judiciary pursuant to Canon 1, and so long as nothing they say could reasonably affect the outcome of the pending matter concerning the police lieutenant or impact the fairness of that proceeding. Considering that this is a fine line to walk, as noted above, the wisdom of commenting on the civil suit is open to question, and we urge the requesting judges to give sober consideration to the implications of their statements before deciding to speak on the issue. Moreover, our conclusion concerns only the Code of

Judicial Conduct. We have not reviewed the terms of the civil settlement and do not opine on whether it permits or prohibits the judges from speaking about these issues. In addition, the judges should consult the Rules of Professional Conduct before speaking about the suit.

Although the Board concludes that the judges may, under the Code, speak publicly as to all four issues the judges raise, the Board remains concerned with the advisability of doing so given the ongoing criminal investigation into the police lieutenant's conduct, the ongoing Attorney General's investigation, and in light of Colorado's efforts to remove the judicial selection and retention process from the political arena. Comments to Rule 4.1 make clear that it is appropriate for judicial candidates to correct false or misleading statements that have been made about them, so long as they do so in a dignified manner appropriate to judicial office.⁵ However, to the extent that judicial candidates go further to address the contentions of detractors and to attempt to respond to those who are critical of their conduct, they may undermine the goals of Colorado's merit selection system. In this regard, it is instructive that Colorado chose not to adopt subsection (E) of Rule 2.10 as contained in the 2007 ABA Model Code of Judicial Conduct. Model Code Rule 2.10 (E) provides:

Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

In its Report to the Colorado Supreme Court, the Colorado Committee explained that it eliminated Subsection (E) because

. . . it runs counter to [then-]current Canon 3A(6), and the committee agreed that judges in Colorado should continue to be prohibited from allowing a third party to do indirectly what a judge may not do directly. **Moreover, the committee concluded that the provision is not appropriate in a merit selection system.** (Emphasis added).

Although this commentary is not binding, it demonstrates the Committee's conviction that under our merit selection system, the kind of response a judicial candidate may make to a critic is limited to stating the truth and correcting misleading or false statements. Finally, as we said in C.J.E.A.B. Op. 08-05: "a judge should be mindful of the fact that [retention campaigns] often are ill-advised, and frequently serve to focus attention on the bases for the public criticism of the judge."

Finalized and effective by the Colorado Judicial Ethics Advisory Board this 29th day of September, 2010.

⁵ "Judicial candidates are sometimes the subject of false, misleading, or unfair allegations. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In making any such response, the judge should maintain the dignity appropriate to judicial office." Comment 8, Rule 4.1.