

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

**C.J.E.A.B. ADVISORY OPINION 2009-03
(Finalized and effective August 26, 2009)**

ISSUE PRESENTED

The requesting judge would like to participate on a city bicycle advisory committee. The committee will make recommendations to the city staff and council about bicycle routes, commuting, and other issues related to cycling. It will also keep the city informed of anticipated future cycling issues. The position is a volunteer one, but requires appointment by city staff. May the judge serve on the committee?

CONCLUSION

Absent a change to the Canons, the judge may not serve on the committee.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 5G states that a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, legal system, or administration of justice.

DISCUSSION

On several occasions, the Board has been asked to determine whether a judge's potential service on a governmental committee is consistent with the Code of Judicial Conduct. *See* C.J.E.A.B. Ad. Ops. 2005-05, 2006-08, 2007-03, 2007-07, 2007-08, 2007-10, and 2007-11. Beginning with our opinion in 2005-04, we struggled to reconcile Canon 5G's broad proscription against service on any commission not concerned with the law, legal system, or administration of justice, on the one hand, with the Canons' encouragement of judges to actively participate in their communities, on the other. In that opinion we adopted the "direct nexus test," concluding that for service on a governmental commission to be consistent with Canon 5G, there must be a close nexus between the work of the commission and the law, legal system, or administration of justice. Concluding that such a nexus did not exist for the commission in question there, we advised the requesting judge not to serve on it. We went on to apply the direct nexus standard to a host of other scenarios in which judges asked if service on particular commissions was permissible.

Unlike the situations we addressed in those earlier opinions, the current request does not implicate the direct nexus standard because the bicycle advisory committee's work simply bears no connection to the law, legal system, or administration of justice. Although the rationale behind the Canon's blanket exclusion of commission service outside issues related to the law is

not apparent from the face of the Code¹, the Board feels compelled to apply the clear language of the Canon. Thus, the Board reluctantly concludes that the language of Canon 5G does not permit the judge to serve on the city bicycle committee.

The Board reaches this result reluctantly because service on the bicycle committee would not seem to call into question the judge's impartiality, effectiveness, and independence, which concerned us in some of our previous opinions. Indeed, the very fact that the bicycle committee has no connection to the law, legal system, or administration of justice in and of itself seems to stand as a persuasive reason to allow the judge to serve on the committee – there seems to be little risk that service here would interfere with the judge's judicial duties or independence, assuming that the judge volunteered on his own time and not during business hours.

We note that the result would be the same under the proposed Code of Judicial Conduct that our supreme court is currently considering adopting. There, Rule 3.4 provides the same prohibition against serving on a governmental committee "unless it is one that concerns the law, legal system, or administration of justice." Although the language in proposed comment 3 attempts to soften the blanket prohibition somewhat, it still allows judges to serve only on committees having some relation to legal and judicial issues.² Thus, the requesting judge would not be allowed to serve on the committee even if the proposed Code is adopted in its current form.

Although the Board concludes that the result here is dictated by the language of the Code, it candidly expresses its concerns with that result. In the Board's view, it is unfortunate that the Code does not allow a judge to devote his or her personal, off-the-bench time to volunteering on governmental committees that do not threaten the judge's impartiality or effectiveness. The Board respectfully suggests that since the Supreme Court is currently considering revisions to the Colorado Code this might be an opportune moment to amend the language of the proposed Code to allow judges to serve on governmental committees and commissions that are similar to the one at issue in this request.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 26th day of August, 2009.

¹ The only explanation the Board has found of the rationale behind the Canon's prohibition of governmental commission work for judges is contained in the Reporter's Notes to the 1972 ABA Model Code in which the reporter states that the drafting committee "adopted the view that the time and prestige of the judicial office should not be expended on the resolution of non-judicial issues." See ABA Annotated Code of Judicial Conduct 273 (2004)(citing E. Wayne Thode, *Reporter's Notes to the Code of Judicial Conduct* 91 (1973).

² The full text of proposed Rule 3.4 and the accompanying comments is included in an appendix to this opinion.

APPENDIX

[Proposed] Rule 3.4: Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

Comment

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

[3] Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Every governmental board, committee and commission is different and must be evaluated independently to determine whether judicial participation is appropriate. In considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board or commission relates to the law, the legal system, or the administration of justice. To effectuate the Code's goal of encouraging judges to participate in their communities, the relationship between the board's mission and the law, legal system, or the administration of justice should be construed broadly. Any judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid. A judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality. The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper to continue the affiliation.