

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)
C.J.E.A.B. ADVISORY OPINION 2006-08
(Finalized and effective November 16, 2006)**

ISSUE PRESENTED

The requesting judge, who serves part-time on the county bench, has been asked to participate on a blue ribbon panel of public and private leaders, including a bipartisan coalition of mayors and other dignitaries, charged with “reducing the state’s contribution and vulnerability to a changed climate” by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. The panel’s recommendations will be presented to Colorado’s next governor, the state legislature, local governments, water districts, and other governmental bodies. Because the project is spearheaded by an organization designated as charitable under IRS 501(c)(3) regulations, the requesting judge suggests that his involvement with the group may be permitted by Canon 5(B).

However, he questions whether his participation on the panel is forbidden by Canon 5(G). He points out that the panel on which he would serve is not a “government commission” within the meaning of that Canon because the appointing authority is a private charitable organization, but he observes that his participation on the panel could be problematic under Canon 5(G) because the project is unrelated to the law, legal system, or administration of justice, and instead involves public policy issues which could result in executive or legislative agendas. Thus, he asks whether he may accept the appointment under Canon 5(B) or whether he should weigh the invitation to participate through the lens of Canon 5(G) and the Board’s ethics advisory opinion in 2005-04.

CONCLUSIONS

The judge should not accept the appointment. The judge’s work on the panel would involve consulting with or providing recommendations to the legislative and executive branches on climate control issues, which are unconnected with the law, the legal system, the administration of justice, or the role of the judiciary, and thus are prohibited under Canon 4. In addition, the blue ribbon panel’s focus on influencing legislation constitutes prohibited political activity within the meaning of Canon 7.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 4 encourages a judge to engage in quasi-judicial activities to improve the law, the legal system, or the administration of justice. Canon 4B specifies that a judge may consult with, or appear at a public hearing before an executive or legislative body or an official thereof, on matters concerning the law, the legal system, the administration of

justice, or the role of the judiciary as an independent branch within our system of government.

Canon 5 encourages judges to participate in extra-judicial activities. Canon 5B governs a judge's involvement in civic and charitable activities and provides that a judge is encouraged to participate in such activities which do not reflect adversely on the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, social, or civic organization if the organization is not conducted for the economic or political advantage of its members, and provided that the organization is not engaged in proceedings that would ordinarily come before the judge or regularly engage in adversary proceedings in any court.

Canon 5G addresses extra-judicial appointments and provides 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, the legal system, or the administration of justice.

Canon 7 directs that a judge should refrain from political activity inappropriate to his or her judicial office. The Canon enumerates several categories of political activity from which the judge should refrain and also states that a judge shall not "engage in any other political activity except on behalf of measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government."

DISCUSSION

In the Board's view, the judge's request falls within the ambit of Canons 4 and 7 rather than Canon 5. Canon 4B provides that a judge may consult with or appear at a public hearing before an executive or legislative body on matters concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government. This provision suggests that a judge should not consult with the legislature or governor on matters other than those which concern the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government. Thus, under this provision, as the Federal Committee on Codes of Conduct noted, a judge may consult with a legislative body only when "the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual." *See Fed. Op. 50.* Here, if the requesting judge were to become a member of the blue ribbon panel on climate change, he would be making recommendations to a legislative body—which is similar to, or the same as, consulting with the body—on questions about the climate, which has nothing to do with the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch within our system of government.

In addition, as noted above, Canon 7 prohibits judges from engaging in specified types of political conduct and includes a catch-all provision directing judges not to "engage in any

other political activity except on behalf of measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government.” The Canon does not define the term “political activity.”

The Board recently considered the scope and meaning of Canon 7 in opinion 2006-07. See

<http://www.courts.state.co.us/supct/committees/judicialethicsadvisoryboard/opinion2006-07.pdf>. In that opinion, the Board concluded that the requesting judge could make a monetary contribution to a group advocating for or against a proposed Amendment that would impose term limits on appellate judges so long as the donee group was not a *partisan* “political organization.” The Board further concluded that the judge could speak to civic groups and write editorials regarding the Amendment because such activity implicates the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch of government and thus was expressly permitted under Canons 7 and 4. Thus, our analysis of Canon 7 in that opinion, while providing a useful background for the instant inquiry, is inapposite here because in the prior opinion the judge wished to engage in political activity concerning a measure involving the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government which is political activity expressly permitted under Canon 7. Here, by contrast, the blue ribbon panel’s efforts to develop a climate control agenda, while certainly an issue of interest to many, is activity unrelated to these purposes.

Nevertheless, Canon 7 is implicated here because the blue ribbon panel’s mandate of developing a climate control agenda for presentation to the governor and legislature raises the question of whether the judge would be engaging in proscribed “political activity” within the meaning of the Canon. As noted above, Canon 7 does not provide a definition of the term, and reference to the Canons as a whole and statutes does not aid in understanding the meaning of the term. Courts and other advisory boards construing the phrase have long grappled with how to identify what sort of conduct falls within the prohibition of “political activity,” reaching a variety of disparate conclusions. These conclusions range from a broad view that any “issue activity” is “political activity,” *In re Randolph*, 502 A.2d 533, 539 (N.J. 1986), to a narrower view holding that only partisan political activity qualifies as “political activity” under the Canons. *In re Staples*, 719 P.2d 558, 561 (Wash. 1986). The intermediate view recognizes that the matter should be approached on a case by case basis. *In re Maze*, 85 S.W.2d 599, 601 & n.1 (Ky. 2002). Indeed, even the same court has been inconsistent in how it defines the term “political activity,” concluding in *Staples* that the Canon defining political activity “applies only to *partisan* political activities,” 719 P.2d at 561 (emphasis in original), but later stating in *Sanders* that “[t]he prohibition against engaging in other political activity cannot mean simply avoiding issues that divide neatly along traditional party lines.” *In re Sanders*, 955 P.2d 369, 375 (Wash. 1998). As the *Sanders* court pointed out, however, the narrow approach to identifying conduct that is “political activity” is unhelpful because it fails to take into account the goals and concerns animating other Canons, and the broad approach, which would prevent a judge from speaking on any issues that has proponents on both sides, would essentially gag judges. See *In re Sanders, supra*, 955 P.2d at 375.

We decline to adopt either categorical approach to defining “political activity” for the reasons articulated by the *Sanders* court. We agree with the Kentucky Supreme Court’s analysis that balancing the various factors used to assess whether activity is political “requires a case by case determination, a process in which the Canons of Judicial Ethics act as guideposts, not walls impervious to our better judgment and prudence.” *In re Maze, supra*, 85 S.W.3d at 600. Like the *Maze* court, we refrain from creating a hard line rule as to what makes one activity political while another is educational or charitable, and instead focus on the purpose and agenda as the two most significant factors in determining whether an activity is political within the meaning of the Canon. *See id.* at n.1.

In applying this framework to the request before us, we note that the purpose and agenda of the blue ribbon panel on climate control is to prepare a legislative agenda for action to be taken to address climate change issues. Here, the ultimate result of the judge’s participation on the panel would be recommended legislation to be presented to the governor, the legislature, water districts, and local government bodies. The panel’s purpose and agenda of seeking to influence legislation clearly makes its activities “political” within the meaning of Canon 7. Because this political activity is unconnected with measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government, it is not political activity excepted from the general prohibition under Canon 7A(1)(d). In addition, the judge’s proposed conduct raises separation of powers and appearance of impropriety concerns in that a member of the judiciary would be making legislative recommendations to the other two co-equal branches of government on matters completely unconnected with his position and experience as a judge. Thus, we conclude that the judge should not serve on the panel. This conclusion is consistent with that of our sister jurisdictions. *See Wis. Op. 00-5* (concluding that a judge could not serve as president of a civic, non-profit organization whose mission is to advocate social goals through legislative action and litigation).

In concluding that the judge’s participation on this particular panel is not permitted under Canons 4 and 7, we note that Canon 5G does not apply because the panel on which the judge has been asked to participate is being convened by a private organization, not a governmental body. *See also* the Commentary to Canon 5G. Accordingly, our analysis is not guided by our previous opinion in 2005-04, <http://www.courts.state.co.us/supct/committees/judicialethicsadvisoryboard/opinion2005-04.pdf>, which addressed a judge’s participation on a municipal commission devoted to crime control and prevention.

Similarly, although Canon 5B is relevant to our assessment of the judge’s request, it is not dispositive. As noted above, Canon 5B encourages judges to participate in civic, charitable, educational, and similar organizations, provided that such participation does not adversely reflect upon the judge’s impartiality, and provided that the organization does not engage in adversary proceedings likely to bring it before the requesting judge or any other court. In this case, the appointing organization has been designated as a

501(c)(3) charitable entity by the Internal Revenue Service. In addition, any litigation resulting from the panel's work would not come before the requesting judge, who serves in a part-time capacity as a county judge in a rural district. Both of these factors suggest, at first blush, that the judge's participation on the panel would be permissible under Canon 5B. However, any involvement by a judge in efforts to influence legislation, as the blue ribbon panel in question here would seek to do, triggers examination of the proposed conduct under other applicable provisions of the Canons. As explained above, efforts by a judge to influence legislation on matters unrelated to the law, even on behalf of a charitable organization, are not permitted under Canons 4 and 7. Thus, although the organization convening the blue ribbon panel may indeed be charitable within the meaning of both Canon 5B and the Internal Revenue Code, its focus on influencing a legislative agenda on climate change make the judge's participation inappropriate under the Canons.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 16th day of November, 2006.