

Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)
C.J.E.A.B. ADVISORY OPINION 2007-10
(Finalized and effective October 2, 2007)

ISSUE PRESENTED

The requesting judge has been asked to participate in a “Justice Coordinating Committee” (JCC) established by his county’s Board of County Commissioners (BOCC). According to the JCC bylaws, its purpose is to create a forum for various stakeholders in the county justice system to advise the BOCC on issues related to the system; allow for an on-going dialogue among the civil and criminal justice entities and units of government; provide for a better understanding of both criminal and civil justice problems; enhance cooperation among entities and units of government; establish clear objectives and priorities; improve planning and coordination to help individual justice agencies become more efficient, productive, and effective; and provide for more effective resource allocation and better quality justice programs and personnel. The bylaws contemplate that the JCC will be composed of a variety of government officials, including the chief judge of the district, the district attorney, the sheriff, a county citizen, an elected official from one of the municipalities within the county, and two county commissioners. The bylaws provide for other non-voting members of the JCC to include a member of the local bar association, a member of the local defense bar, administrators from the municipal court, the court’s district administrator, the court’s chief probation officer, and representatives of local mental health centers. The judge has expressed concern that service on the JCC is precluded by the Board’s opinion in 2005-04. May the judge serve on the committee?

CONCLUSION

The requesting judge may serve on the JCC. The work of the JCC has a direct nexus to the law, the legal system, and the administration of justice. The purposes of the JCC are very general and it has no objective that seems likely to call into question the judge’s impartiality, effectiveness, or independence. Thus, the concerns raised in 2005-04 by the judge’s service on a municipal crime control and prevention commission are not implicated here. However, the requesting judge should reexamine the propriety of his continued service if the scope of work changes from that set forth in the JCC’s bylaws, particularly as to objectives which could compromise the judge’s neutrality.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 4 generally encourages a judge to engage in quasi-judicial activities so long as the judge’s capacity to decide impartially any issue is not impaired by participation in those activities. Canon 4A encourages a judge to participate in activities concerning the law, the legal system, and the administration of justice, while Canon 4B permits a judge to consult with or appear at a public hearing before an executive or legislative body on such matters. Canon 4C encourages a

judge to serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice.

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

DISCUSSION

Every board, committee, and commission is different and must be evaluated carefully by the judge involved to determine whether judicial participation is ethically appropriate. Clearly, the commission at issue in this request is a government commission, as was the municipal crime control and prevention commission at issue in 2005-04. As we said in 2005-04, Canon 5G generally constrains a judge from accepting appointment to a government commission concerned with issues of fact or policy unless “the commission is considering matters related to the improvement of the law, the legal system, or the administration of justice.” To distinguish between appropriate and inappropriate participation in such commissions, a judge must analyze “the link between service on the commission and improvement of the law, legal system, and administration of justice.” We continue to adhere to our position in 2005-04 that there must be a direct link between service on a government commission and the work of the courts, because it reflects our view that Canon 4 must be interpreted narrowly to avoid eroding the prohibition in Canon 5G, which is critical to the independence of the judiciary.

Because of the requesting judge’s specific inquiry as to the application of 2005-04 and discomfort expressed by some judges about that advisory opinion, we analyze the current request by comparing the JCC with the commission at issue in 2005-04. Ultimately, we determine that the purposes and structure of the JCC are sufficiently different from those of the crime control commission at issue in 2005-04 that the concerns expressed in that opinion do not apply to the judge’s service on the JCC.

In 2005-04, we advised that there was not a direct nexus between the work of the municipal crime control and prevention commission and the improvement of the law, legal system or administration of justice, largely because of the commission’s wide-ranging policy goals. The commission’s enabling legislation charged it with reducing crime and increasing neighborhood safety, as well as with generating policy recommendations regarding offender sanctions, jail population management, and the efficient use of jail space, including encouraging alternatives to incarceration such as community corrections. The commission was required to make recommendations on the allocation of crime prevention monies and to seek funding for innovative criminal justice projects and programs. While recognizing that some of these goals broadly implicated the law and the legal system, we did not discern a direct link between other goals and how the courts go about performing their statutory and constitutional duties.

In contrast to the wide-ranging policy-making work of the municipal crime control and prevention commission, the JCC has a more limited scope, focused on facilitating how various segments of the justice system can work together. To this end, its statement of purpose provides

that the JCC was established to promote an on-going dialogue among various civil and criminal justice agencies, to provide for a better understanding of the problems these agencies face, and to enhance cooperation among entities and units of government. This coordinating function provides a direct nexus to the law, legal system, and administration of justice because it directly affects how courts go about their work. Thus, we find the direct link test satisfied in this situation and, accordingly, the encouragement of Canon 4, rather than the prohibition of Canon 5G, applies.

In 2005-04, we also advised that even if there was a direct nexus between the work of the crime control and prevention commission and the improvement of the law, the legal system or the administration of justice, nevertheless, a judge should not serve on the commission because such service could call into question the judge's "impartiality, effectiveness, and independence." The crime control and prevention commission would be making policy recommendations related to offender sanctions, incarceration alternatives, and jail management. We foresaw that "[c]oncerns about a judge's impartiality and independence invariably will arise when a judge sentences a defendant to incarceration or an alternative pursuant to policies that the judge helped to develop." Likewise, if a judge has been involved in formulating policy on the efficient use of jail space, we were concerned that the judge's "independence and impartiality will be called into question when the judge makes decisions about jail overcrowding and how to prioritize among inmates." We went on to say that "the commission's role in soliciting funds for new criminal justice programs and advising how the criminal justice system should spend its money and conduct its operations could give rise to the perception that the judge is aligned with the interests of law enforcement." Given these particular goals and tasks of the municipal crime control and prevention commission, we concluded that the judge's service on it would improperly "blur the distinction between the branches of government, simultaneously making the judge legislator, advisor to law enforcement, and neutral arbiter, and affecting the public's perception of the independence of the courts from the executive and legislative branches of government."

In contrast, because the general and neutral purposes of the JCC do not include making policy recommendations, soliciting funds, or suggesting how money should be spent, they do not cast doubt on the requesting judge's ability to impartially decide issues before him. Given the neutral nature of the objectives of the JCC, we are also less concerned about the composition of the JCC than we were in 2005-04. Although there is no defense attorney among the voting members of the JCC, it is also not weighted in favor of law enforcement interests. Rather, the voting and non-voting members of the JCC reflect a cross-section of persons involved with the courts and the justice system in general. Therefore, because the concerns raised in 2005-04 are not present here, we perceive no impediment to the judge serving on the JCC.

If, however, the work of the JCC expands beyond the purposes outlined in its bylaws, the judge should reexamine the propriety of his continued participation. The judge should be particularly wary of tasks or goals, such as those addressed in 2005-04, that could call his neutrality into question. Expansion of work beyond the JCC's current goals could be especially problematic if the judge were the committee's spokesperson.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 2nd day of October, 2007. Professor James Wallace does not participate in this opinion.