

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-03
(Finalized and effective July 10, 2012)

ISSUE PRESENTED:

The requesting judge is a district court judge who is the liaison between the court and a non-profit organization that runs a diversion program for teen offenders based on principles of restorative justice and peer influence. One of the organization's programs is to conduct "trials" at which a jury of teen peers decides on the sentence for a first-time offender under a deferred sentence agreement. Local judges volunteer to preside over these trials, and the requesting judge coordinates the scheduling of the judges for the trials.

The organization is preparing an informational video that will be used for both educational and fund-raising purposes, and asked the judge to be interviewed on the video. The interviewer would identify the judge as a judge and ask him to provide factual information about the trials and to comment on the value and effectiveness of that portion of the organization's program. The judge "would not be asked to solicit funds," but because the video would be used for fund-raising, the judge requested an advisory opinion addressing whether his participation in the interview would violate the fund-raising prohibition of Rule 3.7 of the Colorado Code of Judicial Conduct (Code).

CONCLUSION:

Because the organization and the event are law-related, the judge may be interviewed on the video without running afoul of Rule 3.7, provided he does not directly solicit funds on behalf of the organization.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 3 of the Code provides that "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."

Rule 3.1 lists restrictions on a judge's extrajudicial activities and provides in pertinent part that:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

* * *

- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality; [or]
- (D) engage in conduct that would appear to a reasonable person to be coercive. . . .

Rule 3.7 lists extrajudicial activities a judge is permitted to engage in on behalf of non-profit educational, religious, charitable, fraternal, or civic organizations. As pertinent here, Rule 3.7 provides:

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations . . . concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

* * *

(2) soliciting contributions for such an organization or entity, but only from members of the judge’s family, or from judges over whom the judge does not exercise supervisory or appellate authority;

* * *

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.

DISCUSSION:

Both the current Code and the pre-2010 Code encourage judges to participate in extrajudicial activities including educational, religious, charitable, fraternal and civic activities not conducted for profit. *See* C.J.C. Rule 3.1 and cmts. [1] and [2]; C.J.C. Rule 3.7(A); Canon 5A of the pre-2010 Code and related commentary. In addition, the current Code, like the old Code, recognizes that judges are uniquely qualified to engage in extrajudicial activities concerning “the law, the legal system, and the administration of justice,” and that participation in law-related extrajudicial activities helps integrate judges into their communities and “furthers public understanding of and respect for courts and the judicial system.” C.J.C. Rule 3.1, cmts. 1 and 2; *see* Canon 4A of the pre-2010 Code and related commentary.

While judges are encouraged to participate in extrajudicial activities for non-profit organizations, the current Code, like the former Code, strictly limits the fund-raising efforts judges may engage in on behalf of such organizations. Specifically, Canons 4C and 5B(2) of the old Code provided that “[a] judge shall not personally solicit funds” or “permit the use of the

prestige of the judge's office for that purpose," and Rule 3.7(A)(2) of the current Code similarly prohibits judges from soliciting contributions (other than from family members or other judges over whom the judge does not exercise supervisory or appellate authority) or directly engaging in fund-raising for any organization. Following the clear command of these provisions, the Board has consistently advised judges against direct personal involvement in fundraising for charitable and civic organizations. *See* CJEAB Adv. Op. No. 2012-01 and earlier opinions cited therein.

The 2010 Code, however, significantly changes the rules for a judge's involvement in fund-raising on behalf of law-related organizations. *See* Ray McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Conduct*, 2008 Mich. St. L. Rev. 769, 816. "From both a theoretical and practical standpoint, the new Code's greatest impact on fund-raising is its retreat from the rule absolutely forbidding judicial participation as a speaker or honored guest at a fund-raising event." *Id.*; *see also* Charles E. Geyh & W. William Hodes, *Reporters' Notes to the Model Code of Judicial Conduct* 68-71 (2009). Under the old Code, although judges were permitted to assist law-related organizations in their fundraising efforts, they were prohibited from being "placed in the position of directly soliciting funds" by serving as the "featured speaker" at any fundraising events, including law-related events. Canons 4C and 5B(2) of the pre-2010 Code. In contrast, the current Code expressly permits judges to participate in fund-raising events of law-related organizations if the participation is limited to "speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with [the] event." C.J.C. Rule 3.7(A)(4).

Thus, the 2010 Code permits the requesting judge to be interviewed for a video concerning the diversion program for teen offenders to be used in both informational and fund-raising situations. The diversion program for teen offenders is a law-related activity and the judge is doing no more than he would if he spoke at a fund-raising event sponsored by the organization that runs the program. In fact, by being interviewed on video the judge is further removed from any actual fund-raising than he would be if he spoke at a live fund-raising event, because, presumably, he will not be present when the video is played for the potential donors.

In reaching this conclusion, the Board is mindful that Rule 1.3 provides that judges should not "abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Although this rule seems to prohibit the conduct which the Board approves, the Board believes that the general prohibition in Rule 1.3 should not be read to invalidate the more specific permission granted in Rule 3.7(A)(4).

Similarly, the Board has reviewed judicial ethics advisory opinions from other jurisdictions which have advised judges against being interviewed in videos that will be used by non-profit organizations for fundraising purposes. *See, e.g.*, Fla. Jud. Ethics Adv. Comm. Op. No. 2006-14 (a judge may not be interviewed in a documentary film about a reading instruction program when the film will be marketed commercially and used to raise money for the program). Those opinions, however, were written under the pre-2010 Code and frequently concerned organizations that were not law-related. Accordingly, the Board does not find them persuasive in resolving the current request.

Finally, although it is appropriate for the requesting judge to participate in the video interview, the judge should avoid making any statements that would be or would appear to be a solicitation of funds on behalf of the organization. The judge should only provide information about the workings of the program and the benefits of which he has knowledge. The judge should also be mindful that such indirect participation in fund-raising events of law-related organizations is subject to the requirements of Rule 3.1(D), which prohibits a judge from engaging in any conduct “that would appear to a reasonable person to be coercive.” Furthermore, the judge should exercise caution if it appears that the organization actively advocates positions or files amicus briefs on disputed legal issues before his court, and should avoid giving the appearance that he is lending the prestige of his judicial office to support a position that would impair his impartiality or give rise to the appearance of impropriety. *See* C.J.C. Rule 3.7, cmt. 2 (“Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.”).

FINALIZED AND EFFECTIVE this 10th day of July, 2012.