

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-04
(Finalized and effective August 9, 2012)

ISSUE PRESENTED:

The requesting judge is a district court judge who sometimes presides over C.R.C.P. 120 and other foreclosure-related proceedings. The judge requested an advisory opinion regarding whether “it is ethical for a judge to purchase real estate in the judge’s judicial district that has been the subject of a Rule 120 foreclosure proceeding.” The judge indicated that the question “only concerns the purchase of real estate after the property has been sold at the public trustee’s sale and is being [re-]sold by the purchaser.” In addition to this general question, the judge asked: (1) whether the “current foreclosure dominated market” is a factor; (2) whether “it matter[s] if the judge purchasing the real property presided over the Rule 120 proceeding,”; and (3) whether it “makes a difference if the property is listed by a realtor and thereby available for sale to the general public.”

CONCLUSION:

A judge may purchase property that was the subject of a foreclosure proceeding in the judge’s judicial district at a subsequent sale, provided the purchase does not result or appear to result from the exploitation of the judicial office or the use of information acquired by the judge in his or her judicial capacity, the judge does not receive preferential treatment in the sale based on his or her position or affiliation with any person or entity involved in the foreclosure proceedings, and the purchase does not undermine the judge's impartiality or give rise to the appearance of impropriety.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 1: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Rule 1.2: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Rule 1.3: "A judge shall not use the prestige of judicial office to advance the personal or economic interests of the judge."

Canon 2: "A judge shall perform the duties of judicial office impartially, competently, and diligently."

Rule 2.2: "A judge shall . . . perform all duties of judicial office fairly and impartially."

Rule 2.4(B): "A judge shall not permit . . . financial . . . interests . . . to influence the judge's judicial conduct or judgment."

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

Rule 3.5: "A judge shall not intentionally . . . use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties."

Rule 3.11(A): "A judge may hold and manage investments of the judge and members of the judge's family."

Rule 3.11(C): "A judge shall not engage in financial activities permitted under paragraph[] (A) . . . if they will:

- (1) interfere with the proper performance of judicial duties;
- (2) lead to frequent disqualification of the judge;
- (3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
- (4) result in violation of other provisions of this Code.

DISCUSSION:

The requesting judge asks whether the Code prohibits a judge who presides over foreclosure proceedings from ever purchasing properties that had, at some previous time, been the subject of a Rule 120 foreclosure proceeding. Because the requesting judge did not provide any facts about a specific proceeding or proposed purchase, our opinion should not be read as reaching a definitive conclusion regarding whether any particular purchase would be ethical. This opinion, however, provides general guidance and an analytical framework for judges to use in determining whether a proposed purchase of real estate that previously was the subject of foreclosure proceedings in the judge's judicial district would be consistent with the Code of Judicial Conduct.

The Code generally permits judges to engage in financial activities, including making and managing real estate investments, unless doing so would interfere with the judge's ability to fulfill his or her judicial duties or would violate another provision of the Code. *See* C.J.C. Rule 3.11 and cmt. 1. Specifically, a judge may not engage in financial transactions that might influence his or her judicial conduct or judgment or otherwise interfere with the proper performance of judicial duties. *See* C.J.C. Rules 2.4(B), 3.11(C)(1). A judge should avoid financial transactions that would result in frequent disqualification or create potential conflicts of interest. *See* C.J.C. Rule 3.11(C)(2) and (3). A judge also may not engage in financial transactions that could undermine his or her impartiality or give rise to an appearance of impropriety. *See* C.J.C. Rules 1.2 and 2.2. Nor may a judge use the prestige of the judicial office to gain personal advantage or deferential treatment in a financial transaction, *see* C.J.C. Rule 1.3 and cmt. 1, or use non-public information acquired in the judge's judicial capacity to advance his or her personal financial interests. *See* C.J.C. Rule 3.5.

Read together, these Rules do not prohibit a judge from purchasing property that had previously been the subject of a foreclosure proceeding in the judge's judicial district so long as (1) the purchase does not result or appear to result from exploitation of the judicial office or the use of information acquired by the judge in his or her judicial capacity; (2) the judge does not receive preferential treatment in the sale or otherwise have an advantage over other potential purchasers based on his or her position as a judge or affiliation with any person or entity involved in the foreclosure proceedings or sale; and (3) the purchase does not undermine the judge's impartiality or give rise to the appearance of impropriety.

Applying these rules to the current request, the fact that the foreclosure proceeding has been completed and the property is being sold by the foreclosure purchaser suggests sufficient distance from the foreclosure proceeding that there is no ethical violation for the judge to attempt to purchase the property. *See e.g.* Ala. Jud. Inquiry Comm'n Op. 02-800 (2002) (concluding that a judge may purchase real estate that was involved in a declaratory judgment action over which the judge presided several years earlier, but recognizing that "an adverse reflection on the judge's impartiality might be created" if the purchase had been "made or planned in close proximity to the hearing of the case, and the judicial office would be exploited if the judge received any preferential treatment by the seller because he had served as the judge in the prior litigation").

The requesting judge asked whether it mattered if he or she had presided over the rule 120 foreclosure proceeding that occurred prior to the current sale of the property. The answer to that question depends on whether the requesting judge acquired information during those proceedings that gave the judge an advantage in the subsequent purchase or if the judge was treated preferentially in the subsequent sale because of the judge's previous involvement in the case. If the answer to either of those questions is "yes" the judge should not engage in the purchase. The requesting judge also asked whether it mattered if the property was listed by a realtor 'and thereby available for sale to the general public.' The Board thinks the relevant factor is whether the property is available for sale to the general public. If the real estate is available for sale to any purchaser on the same terms as to the judge, then the judge's involvement in the transaction is likely ethical. Finally, the Board does not think the "current foreclosure dominated market" is a relevant factor in the analysis of whether the Code of Judicial Conduct allows a judge to purchase property that has previously been involved in a foreclosure proceeding.

Although the Board has concluded that in many circumstances it would not violate the Code for a judge to purchase real estate that had previously been involved in a foreclosure proceeding, it is important to note that the requesting judge should not attempt to purchase property that is the subject of a foreclosure proceeding over which the judge is currently presiding because the appearance that the judge is exploiting the judicial office, the appearance that the judge has an advantage over other purchasers and the appearance that the judge's impartiality might be affected would all be so strong as to prohibit the judge from engaging in the transaction. *See, e.g., In re Handy*, 867 P.2d 341 (Kan. 1994) (publicly censuring a judge who demonstrated insensitivity to the appearance of impropriety by purchasing property that was involved in a probate case over which he presided and purchasing a home that was the subject of a foreclosure action pending before him, even where there was no evidence that the judge had obtained an unfair advantage); *In re Yaccarino*, 502 A.2d 3 (N.J. 1985) (judge's attempt to purchase real estate that was an asset in a corporate dissolution action before the judge and his

agreement to conduct the proceedings by meeting with the parties ex parte were improper, reflected adversely on his impartiality, and created an appearance that the judge was exploiting his position by seeking to obtain the property at an unreasonably low price); Kan. Jud. Ethics Adv. Panel Op. JE-124 (2004) (a judge should not buy assets from an estate that is pending in a court upon which the judge is sitting at either a private sale or public auction, directly or through an agent, because doing so might “reasonably be perceived to exploit the judge’s judicial position” and would “undermine public confidence in the integrity and impartiality of the judiciary”).

FINALIZED AND EFFECTIVE this 9th day of August, 2012.