

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2019-01
(Finalized and effective February 27, 2019)

BACKGROUND:

The Colorado District Judges' Association ("Association") is a non-profit organization that has existed for nearly thirty years and is composed of current and retired district court judges. It has elected officers, and its members pay dues to the organization. The Association's primary mission is to improve trial courts in Colorado. The Association is governed by its "Constitution and By-laws," which require the Association to promote public education concerning the judicial system, create training and educational opportunities for trial judges, improve the working conditions of trial judges and staff, and develop communication channels between the trial and appellate courts and between trial courts and other branches of government.

To help achieve its purpose, the Association is considering whether to hire a public information officer ("PIO"). The PIO would play many roles; he or she would convey general educational information to the public—like how the courts operate and judges are appointed and retained—as well as discrete information to news media outlets on issues that impact trial judges and the district courts.

In addition to providing information to the public and news organizations, the PIO would act as a liaison between the Association and deliberative bodies, such as the Board of Trustees of the Public Employees Retirement Association ("PERA") or regulatory bodies charged with authority to make decisions impacting judges and courts. In this capacity, the PIO might advocate on behalf of the Association's members to improve their working and retirement conditions.

Finally, the PIO would be available to help any Association member faced with "unwarranted public criticism" devise a public response plan. A response plan might include a response directly from the PIO or a coordinated response between the PIO and a group, such as a bar association.

ISSUES PRESENTED:

The President of the Association has asked the CJEAB to determine if the PIO's actions, as described above, are permissible under the Code of Judicial Conduct ("Code"), and, if not, whether they could be imputed to the Associations' Officers or its members, when the PIO is acting on behalf of the Association to:

1. Disseminate general educational information to the public concerning the law and legal system.
2. Share facts with relevant decision-makers, news outlets, bar associations, and others about how certain actions or decisions may impact the Association and its members.
3. Advocate before deliberative bodies to improve the interests of the Association's members and trial courts.

4. Assist individual judges to develop a response plan when a judge is subject to “unwarranted public criticism.”

SUMMARY:

Even if the PIO is not subject to the provisions of the Code, the ethical responsibility for a PIO hired by the Association lies with its members, in general, and especially with its officers. Thus, the Association, and particularly its officers, who will likely have direct interaction with the PIO, are responsible for the PIO’s conduct and ensuring that it complies with the Code.

The PIO may disseminate general educational information, including how courts operate, how they make decisions, and how judges are appointed and retained. The PIO may also share facts with news media, decision-makers and others about issues affecting judges, the law, and the legal system if providing the information does not violate the Code. Under certain circumstances, the PIO may also advocate on behalf of the Association and its members.

We decline to opine on whether a judge, the Association, or the PIO may respond to open-ended, hypothetical “unwarranted public criticism.” Instead, the Code and Advisory Opinion 2008-05, which we continue to endorse, permit judges to respond to active opposition only if such opposition was made during that judge’s retention period. As we did in Advisory Opinion 2008-05, however, we caution that any response remains disfavored.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

The Preamble and Rules 1.2, 1.3, and 3.7(A) of the Code apply to all the issues raised in the President’s inquiry; Canon 4 applies, and Rule 4.1 might apply, to the PIO’s advocacy role; Rules 2.4, 4.2, and 4.3 apply to the question concerning judicial response to public criticism.

1. Rules Applicable to All Issues

Section [2] of the Preamble provides that judges “should maintain the dignity of the judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”

Rule 1.2 provides that 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.” Two of the comments to Rule 1.2 seem particularly applicable:

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

Rule 1.3 plays an overarching role in this inquiry, as it provides that a judge “shall 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.”

Subject to Rule 3.1, which applies to extrajudicial activities in general, Rule 3.7 governs the extent to which judges may participate in certain extrajudicial 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, . . . fraternal, or civic organizations not conducted for profit.” As illustrated by the comments to Rule 3.1, judges are encouraged to engage in appropriate extrajudicial activities; they “are uniquely qualified to engage in . . . activities that concern the law, the legal system, and the administration of justice.” Rule 3.1, cmt. [1]. Participating in these activities helps “integrate judges into their communities, and furthers public understanding of and respect for the courts and the judicial system.” *Id.* at cmt. [2].

Rule 3.7(A)(3) permits judges to “solicit membership for such organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity is concerned with the law, the legal system, or the administration of justice.”

2. Rules Applicable to Issue 3

Canon 4 defines the parameters within which judges must operate when engaging in political activities. Specifically, judges must not “engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” For the most part, the narrow political prohibitions of Rule 4.1(A) will not apply to the advocacy component of the present inquiry, but some of the more general provisions might. For instance, subsection (11) provides that a judge or judicial candidate shall not “knowingly, or with reckless disregard for the truth, make any false or misleading statements,” and subsection (12) prohibits judges and judicial candidates from making statements “that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”¹

Rule 4.1(B) provides that “[a] judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A), except as permitted by Rule 4.3.” Thus, any statements made by the PIO must be truthful and not misleading, and the PIO may not discuss pending or impending matters in any court.

3. Rules Applicable to Issue 4

Rule 2.4 discusses how judges should continue to conduct themselves despite external influences. Subsection (a) provides that judges “shall not be swayed by public clamor or fear of criticism,” and subsection (c) provides that a “judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.” Comment [1] to Rule 2.4 is also relevant to the inquiry:

An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

¹ A “judicial candidate” is defined as a “sitting judge who is seeking selection for judicial office by appointment or retention.”

Rule 4.2 governs the activities of a judge who is candidate for retention. Subsection (A)(1) requires judges to “act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary.” Subsection (A)(3) requires judges to “review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.3, before their dissemination.” Finally, subsection (A)(4) requires judges to “take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.3, that the candidate is prohibited from doing by Rule 4.1.”

Rule 4.3 limits activities of retention campaign committees. The Rule in its entirety seems relevant to the present inquiry:

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge’s own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

- (1) The judge may speak at public meetings;
- (2) The judge may use advertising media, provided that the advertising is within the bounds of proper judicial decorum;
- (3) a nonpartisan citizens’ committee or committees advocating a judge’s retention in office may be organized by others, either on their own initiative or at the request of the judge;
- (4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge’s campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge’s campaign expenses;
- (5) the judge should not be advised of the source of funds raised by the committee or committees;
- (6) the judge should review and approve the content of all statements and materials produced by the committee or committees before their dissemination.

DISCUSSION:

First, even though the PIO may not be a judicial officer subject to the Code, the Association’s membership is subject to the Code. Section 3 of its Constitution and By-laws provides that “[t]he Association shall. . . promote conformance with the Code of Judicial Conduct,” and Rule 1.3 of the Code prohibits judges from allowing third parties to use the prestige of judicial office to advance personal or economic interests. Though the Board has not yet addressed it, other jurisdictions have determined that judges’ associations are “held to the same standards as an individual judge,” and while judicial associations may

hire a public relations firm to improve the public’s perception of the judiciary and its function, . . . [m]embers and officers of the Association and the public relations firm acting on its behalf will be subject to the restrictions on public comment by judges contained in the Rules Governing Judicial Conduct. Therefore, the Association in general, and its officers in particular, are responsible for any

activities or statements made by the public relations firm on behalf of the Association, and should therefore review and approve, in advance, any comments made or actions taken by the firm on behalf of the Association.

N.Y. Ad. Comm. on Jud. Ethics, Op. 06-50. *See also* Neb. Ethics Ad. Op. 02-05 (if Association's public action involves media communications, the comments could "quite easily be construed as reflecting the Association's, or the members', position on such case or issue and could cast reasonable doubt on the judge's capacity to act impartially").

Given an individual judge's obligation under Rule 1.3 to prevent others from abusing the prestige of judicial office, we, too, conclude that the Association, and particularly its officers, who have been elected to represent and act on behalf of the membership and will have direct interaction with the PIO, are responsible under the Code for the actions and statements made by the PIO.²

1. Whether the PIO may disseminate educational information to the public and other groups.

Not only does the Code permit judges to engage in appropriate extrajudicial activities, the commentary to Rules 3.1 and 3.7 encourages them to engage in activities that concern the law, the legal system, and the administration of justice. Participating in educational outreach activities helps integrate judges into their communities and furthers an understanding of the judicial system. Because an individual judge would be encouraged to share information about how courts operate and how judges are appointed or retained, we think the Association and any PIO it hires would, similarly, be allowed and encouraged to disseminate such educational information to the public.

Further, if the dissemination of the information does not violate any Code provisions, the PIO may target specific members of the public—like news media or bar associations—to share facts or respond to inquiries on behalf of the Association about issues that concern or impact its members.

2. Whether the PIO may interface with and advocate before deliberative bodies.

The President of the Association asks if the PIO could appear before deliberative bodies to communicate how the Association's members might be impacted by certain decisions and to advocate for outcomes that would improve or benefit the Association's members. The President cites two examples of potential information-sharing and advocacy. First, the President asks if the PIO could present to the PERA Board of Trustees facts about how, given their short tenure when compared to the general PERA membership, few judicial officers earn full PERA benefits but are nevertheless required to contribute the same percentage amount as all PERA beneficiaries. Could the PIO then advocate that judges should be treated differently—in the same way that a

² We are not attempting to draw judges into a false sense of security by distinguishing between the members of the Association and its officers, as all judges are required to comply with the Code. Instead, the distinction is based solely on the reality that, consistent with their station as elected representatives, officers will review materials and have discussions with the PIO that the rest of the Association's members will not. We remind judges that our opinions are not binding on the Commission on Judicial Discipline, though they are considered evidence of a good-faith effort to comply with the Code. *See* C.J.D. 94-01 § XIII.A.

judicial officer's highest average salary ("HAS") is subject to a shorter time frame than that of a regular PERA member? Second, the President asks if the PIO could share facts with relevant decision-makers and others about how the creation of a new judicial district might impact current judges and their staff, and if the PIO could advocate the Association's position on the topic.

We think that sharing facts with the PERA Board of Trustees or decision-makers or others gathering information on whether to create a new judicial district is permissible under the Code. We further conclude that, in the context of the creation of a possible new judicial district, the PIO may advocate on behalf of the Association before decision-makers and others because such matters concern the law, the legal system, and the administration of justice. Given the Association's unique expertise, it would be expected that the PIO would advocate a position before relevant decision-making bodies. *See also* Rule 3.2 (permitting judges to appear before and consult with governmental bodies to discuss matters concerning the law, the legal system, and the administration of justice as well as those about which the judge acquired knowledge or expertise while discharging judicial duties).

Because it involves advancement of judges' personal interests, the question of whether the PIO could advocate for different treatment on the Association's behalf to the PERA Board of Trustees is less clear. In Advisory Opinion 2008-06, the CJEAB was asked to determine if annual dues paid into the Association could be used, in part, to hire a lobbyist to advocate on behalf of the judges' interests. Although the opinion focused on membership fees, the CJEAB implicitly condoned the Association's use of a lobbyist. The relevant Code provision at the time—Canon 7(A)(1)(d)—broadly prohibited judges from engaging in political activities but carved out an exception for "measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government." Though the lobbyist's activities were political, the CJEAB concluded that such actions were excepted because they were designed to improve the law, legal system, and the administration of justice.

Canon 7(A)(1)(d) and its comprehensive prohibition against judges engaging in political activities no longer exists. Instead, the Code now takes a more moderate approach as evidenced by current Canon 4: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."³ Rule 4.1(A), which replaced prior Canon 7(A), prohibits specific political activities, like holding an office in a political organization, publicly endorsing candidates for public office, or using endorsements from a political organization.

Though it was based in relevant part on our interpretation of a canon that no longer exists, we conclude that Advisory Opinion 2008-06 remains valid because the restrictions on political activities by judges are more relaxed under Rule 4.1(A) than they were under prior Canon 7(A). Accordingly, just as the Association's use of a lobbyist to improve its members' interests did not violate Canon 7(A), the Association's use of a PIO to advocate certain positions to deliberative bodies would not violate Rule 4.1.

We remind the Association that while such advocacy is permissible under the Code's rules governing political activities, any position being advocated is still subject to Rule 1.3,

³ "The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules." C.J.C., Scope [2].

which prohibits judges from using, or allowing others to use, the prestige of judicial office to advance personal or economic interests. Comment [1] further provides that “[i]t is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind.” Most of the ethics opinions citing Rule 1.3, however, involve the use of judicial office to gain favorable treatment, whereas the proposed advocacy before the PERA Board of Trustees seems more like a recitation of facts to obtain a carve-out provision like the reduced time for HAS determinations, which are already used for judges. *See, e.g.*, C.J.E.A.B. Ad. Op. 07-05 (judge may not advertise availability to perform wedding ceremonies by sending fliers to wedding planners); C.J.E.A.B. Ad. Op. 05-05 (judge may not attend political events in support of spouse’s candidacy); *In re Marcuzzo*, 770 N.W.2d 591, 597 (Neb. 2009) (judge improperly used prestige of office by involving himself in his nephew’s criminal case and leaving profane messages on prosecutor’s telephone). Nevertheless, we caution the Association to be mindful of using position to gain deferential treatment whenever the PIO engages in advocacy.

3. Whether the PIO may respond publicly to “unwarranted public criticism” of a judge.

We begin by noting that the Code applies only to full-time and certain part-time judges. Neither the Code nor this Advisory Opinion precludes any independent groups, such as a bar association, from responding at any time to public criticism of a judge.

In Ethics Opinion 2008-05, we considered, under the previous Code, whether a judge could respond to active opposition to the judge’s retention under Canon 7B(2)—the precursor to Rule 4.3. In that opinion, the requesting judge had issued a ruling that generated a great deal of controversy and media attention. Despite the Judicial Performance Committee’s recommendation that the judge be retained, several articles and comments recommended that the judge not be retained. The judge recognized that he was “ethically constrained from campaigning for his retention” under Canon 7B(2), unless there was active opposition. He therefore asked the CJEAB to determine if there was “active opposition to his retention,” and if so, if he could campaign to retain his seat on the bench.

We concluded that, for the requesting judge to respond to the challenge, there had to be “active opposition,” and the opposition had to occur during the time of the judge’s retention period.

First, we noted that the prior Code did not define “active opposition,” nor did it provide guidance on how to make such a determination. Based on the definition adopted in other jurisdictions, however, we determined that active opposition had to be “the result of an orchestrated, organized campaign or, if it consists of statements of one or a few persons in opposition to the judge’s retention, such statements must be communicated to the public through public media or through private publications that reach a large segment of the public.” Under this standard, newspaper coverage criticizing the judge alone was insufficient because judges are frequently discussed and criticized in articles; conversely, the editorial letters and comments in the local newspapers as well as paid advertisements urging that the judge not be retained amounted to active opposition.⁴

⁴ The request also asked if messages like posts on a website or blog amounted to active opposition. We clarified that these should be assessed on a case-by-case basis and that the

Second, we established that “before opposition to a judge’s retention can be classified as active opposition, it must coincide with the period of a judge’s candidacy.” In other words, “critical public commentary calling for the judge’s non-retention, if stale or remote in time to the election, c[ould] not be considered active opposition to the judge’s retention under the Code.” Thus, we clarified that the “appropriate time period should be measured from the time the judge files his or her declaration to stand for retention with the Secretary of State up to the date of the election.”

Because we determined that there was active opposition to his retention, we concluded that the judge could engage in the forms of campaign activity permitted by the Code. We cautioned, however, that “just because the judge is permitted to campaign for retention does not mean that he should” and that our “merit selection and retention system strongly disfavors judicial campaigns.”

Our position has always been that a judge may respond to criticism only if two conditions are satisfied: (1) there is active opposition, and (2) such opposition occurs during the period of a judge’s candidacy. We thus continue to endorse Advisory Opinion 2008-05, which is consistent with Rules 4.2 and 4.3, permitting judges (or their retention committees) to respond to public criticism “[i]f there is active opposition to the retention of a candidate judge.” Accordingly, if the conditions are met, the criticized judge may respond with the assistance of the PIO or the Association. Alternatively, because Rule 4.2(A)(3) requires judges to review or approve the content of all campaign statements and materials before their dissemination, the PIO or others may respond on behalf of the criticized judge if the judge reviews the information. Finally, like we did in our prior opinion, we remind judges, the Association, and the PIO to exercise caution and that sometimes no response is the best course of action, as a judge should expect to be the subject of public scrutiny. *See N.Y. Ad. Comm. on Jud. Ethics Op. 94-22* (“[I]t may be wise, in some instances, not to dignify particularly outrageous accusations or criticisms with any response at all.”).

Because the question posed by the President is a hypothetical one and asks only if the PIO may “support individual judges faced with unwarranted public criticism,” like other jurisdictions, we cannot give a categorical answer to the question. *See Neb. Ethics Ad. Op. 02-5* (Ethics Committee declining to give judges’ association definitive answer if it could “take public action in the event a district judge was unjustly criticized” because it was unclear what “unjust criticism was”). Instead, Rules 4.2 and 4.3 already permit responses when active opposition at the time of retention is present, as explained by Advisory Opinion 2008-05, and we need not extend the analysis further.

CONCLUSION:

The Association may employ a PIO to assist with general and targeted public outreach, but the Association’s members and particularly its officers are responsible for ensuring that any information provided complies with the Code.

The PIO may advocate on behalf of the Association before deliberative bodies and relevant decision-makers if the position advocated complies with the Code.

analysis would hinge on the public’s access to the information and the breadth of the audience reached by the website or blog.

The PIO may help Association members respond to active opposition when a member faces retention pursuant to Rules 4.2 and 4.3.

FINALIZED AND EFFECTIVE this 27th day of February 2019.