

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2019-03
(Finalized and effective October 11, 2019)

BACKGROUND:

Before being appointed to the bench, the requesting judge served as a public defender for eight years and qualified for the U.S. Department of Education’s Public Service Loan Forgiveness Program (“Program”). Under the terms of the Program, an applicant must make 120 monthly payments on eligible loans while being employed full-time in a qualifying public service job.¹ At the end of ten years, the loan recipient may apply to have the remaining balance of the loan forgiven. To qualify for loan forgiveness, an applicant need not work for one employer for 120 months; rather, the applicant may combine the years worked between multiple qualifying employers.² Thus, the judge would continue to qualify for the Program while serving as a judicial officer.

The requesting judge has made about ninety-six qualified payments and asks the Judicial Ethics Advisory Board (“Board”) to determine whether, once eligible, he may apply for loan forgiveness without violating Colorado’s constitutional restriction on gifts, any applicable statutes, or the Code of Judicial Conduct (“Code”).³ If the Department of Education forgives the remaining loan amount, the judge asks if he must report the forgiveness as a gift or benefit received.

ISSUES PRESENTED:

1. If the judge makes the required loan payments and becomes eligible, does the Code limit the judge from applying for loan forgiveness?
2. Must the judge report any loan forgiveness as a gift or benefit under the Code?

SUMMARY:

Because loan forgiveness is offered not only to judges but to other similarly situated persons meeting the Program’s qualification requirements, the requesting judge may apply for

¹ U.S. Dep’t of Educ., *Public Service Loan Forgiveness, Federal Student Aid*, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service#qualify> (last visited Oct. 1, 2019).

² *Id.* at <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions#qualifying-payments>.

³ The Board’s authority is limited to inquiries concerning the application of the Code; this advisory opinion does not address any prohibitions under Colorado’s constitution or statutes. See C.J.D. 94-01 (Board provides “advisory opinions . . . concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct,” and “shall address only whether an intended future court of conduct violates or does not violate the Colorado Code of Judicial Conduct.”).

loan forgiveness once he becomes eligible. The judge is not required to report any loan forgiveness under the Code.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Rule 3.13 governs acceptance and reporting of gifts, loans, benefits and other things of value. Rule 3.13(A) prohibits a judge from accepting “any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.” The general prohibition exists to avoid any impropriety or the appearance of impropriety. The Code recognizes, however, that in many instances, there is no risk of impropriety or appearance of impropriety. Thus, Rule 3.13 establishes a “tiered” system of gift acceptance for judges and allows judges to accept gifts falling into two general categories: (1) gifts or benefits covered in Rule 3.13(B) that judges may accept without reporting; and (2) gifts or benefits falling within Rule 3.13(C) that may be accepted but require reporting.

As explained in Comment [1] to Rule 3.13, when a judge accepts something of value without paying fair-market price, there is a risk that accepting such a benefit could be perceived as “influenc[ing] a judge’s decision in a case.” Rule 3.13(B) identifies circumstances in which this risk is low and allows judges to accept gifts or benefits without having to report acceptance. Subsections (B)(4) and (B)(6) are most applicable to the requesting judge’s inquiry; these subsections allow judges to accept

(4) commercial or financial opportunities and benefits, including special prices and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges; [or]

...

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria . . .

Rule 3.13(C) allows judges to accept certain gifts or benefits as long as the judge reports the gift as directed by Rule 3.15.⁴ The categories identified in subsection (C) require reporting to remove any concern with appearance of impropriety because they involve circumstances where it could be perceived that the gift or benefit offered has potential to influence the judge. For example, a judge could accept—but would have to report—gifts incident to a public testimonial, invitations to the judge and his spouse to attend without charge events associated with a bar-related function, and any gifts or loans if the source is a party or person (including a lawyer) who has come or is likely to come before the judge. *See C.J.C. Rule 3.13(C)(1)–(3).* These categories are extremely narrow and give the impression that they are being offered to exert influence on a judge’s decision-making. They do not apply to the present inquiry.

⁴ Reports are filed “as public documents in the office of the clerk of the court on which the judge serves or other office designated by law.” Rule 3.15(D).

ANALYSIS:

Loan forgiveness is a term of art made in reference to educational loans as part of the Program. The question, therefore, is whether loan forgiveness constitutes a “gift, loan . . . or other thing of value” that may be accepted under Rule 3.13(B) without having to be reported. Although we have not issued an advisory opinion on judges receiving educational loans, we have issued opinions on judges receiving gifts and benefits under Rule 3.13. *See, e.g.*, Colo. C.J.E.A.B. 2010-01 (judge may not request that CLE providers offer programs to judges on discounted or no-cost basis; judges should disclose the benefit if it is made available only to judges, but need not disclose if the discounts are available to non-judges); Colo. C.J.E.A.B. 2009-01 (judge may accept longtime friend’s invitation to attend out-of-town birthday celebration where the friend will cover all of the invitees’ expenses; judge need not report the gift).

The determining factor in our prior opinions was whether the gift or benefit was offered only to judges or was offered on the same terms and criteria to similarly situated persons who are not judges. *See* C.J.E.A.B. 2010-01, at 3 (“judge may accept a scholarship or similar benefit if it is available to similarly situated persons who are not judges, based on the same terms and criteria”). If a benefit is widely offered on the same terms and conditions to non-judges, there is no concern that a judge may receive favorable treatment to the detriment of others or that a judge may be improperly influenced if the party offering the benefit were to appear before the judge.

In the present context, loan forgiveness is available to anyone who has “made 120 qualifying payments under a qualifying repayment plan while working full-time for a qualifying employer.”⁵ Because loan forgiveness is offered on the same terms and with the same conditions to similarly situated persons who are not judges, it is a benefit the judge may accept without having to report under Rule 3.13(B)(4) or (B)(6).

CONCLUSION:

Once eligible, the requesting judge may apply for loan forgiveness under the Program without having to report any discharged debt.

FINALIZED AND EFFECTIVE this 11th day of October.

⁵ U.S. Dep’t of Educ., *Public Service Loan Forgiveness, Federal Student Aid*, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Oct. 1, 2019).