

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2020-01
(Finalized and effective February 19, 2020)

BACKGROUND:

The requesting judge has been asked to be a board member of the Colorado Women’s Leadership Foundation (“Foundation”). The Foundation is not a membership organization. It is a 501(c)(3) corporation, which recognizes that women—particularly women of racial and ethnic minorities—have been underrepresented on boards in both the corporate and the non-profit sectors. The Foundation’s mission is to address the disparity by opening more board positions to women in Colorado and beyond.¹ Its motto is “Women and men, leading side by side, lifting companies and communities to greatness.”

To accomplish its goals, the Foundation advocates for greater gender, racial, and ethnic board diversity by encouraging corporations and nonprofit organizations to fill board positions with qualified women.² The Foundation works with CEOs and board directors, most of whom are men, to create opportunities to diversify their boards. The Foundation also sponsors programs to prepare women for leadership positions by teaching them about board service and matching program participants with mentors and organizations seeking to hire qualified female board members. The Foundation recognizes that Latinas, in particular, are the least represented group on Colorado boards relative to their percentage of the population. To remedy this deficiency, the Foundation created “Latinas in the Boardroom,” which specifically recruits and prepares Latinas for board service.

ISSUE PRESENTED:

May the requesting judge serve as a board member for an organization created to help women, especially women of underrepresented minorities, attain corporate and nonprofit board positions without violating the Code of Judicial Conduct (“Code”)?

¹ Colorado Women’s Leadership Board Foundation, <https://womensleadershipfoundation.org/>.

² Based on the Foundation’s website, it appears that any “advocacy” is limited to urging corporations and nonprofit organizations to consider women for board positions rather than advocating for legislative or political change, which is discouraged by the Code. *See* C.J.C. Canon 4 (“A judge . . . shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”); *see also* C.J.E.A.B. Ad. Op. 2007-07 (judge may not participate on local community board even if it provides integrated services to children and families because the board engages in legislative advocacy to benefit children on local, state, and federal level, and judges must refrain from political activity inappropriate to their judicial office). If the Foundation later engages in legislative advocacy, the requesting judge may need to reconsider serving on the board.

SUMMARY:

Even if Rule 3.6(A) applies, the judge may serve as a board member for the Foundation because the organization does not engage in invidious discrimination. To prevent the risk of others abusing the prestige of judicial office, however, the judge should not identify as a judicial officer on the board's roster.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Rule 3.1 sets forth the extent to which judges may participate in extrajudicial activities. Subsections (B), (C), and (D) provide that when engaging in extrajudicial activities, a judge shall not (1) "participate in activities that will lead to frequent disqualification of the judge," (2) "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality," or (3) "engage in conduct that would appear to a reasonable person to be coercive." Comment [1] of Rule 3.1 clarifies that "[t]o the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities . . . even when the activities do not involve the law. *See* Rule 3.7."

Subject to Rule 3.1, Rule 3.7 governs the extent to which judges may participate in certain extrajudicial activities "sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit." Rule 3.7(A)(6) permits judges to

serv[e] as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

- (a) will be engaged in proceedings that would ordinarily come before the judge; or
- (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Rule 3.6(A) prohibits judges from holding "membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." As explained in Comment [1] to Rule 3.6, the concern is that "a judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary." To be prohibited under Rule 3.6, an organization must discriminate "invidiously," meaning that it "arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, persons who would otherwise be eligible for admission." Rule 3.6, cmt. [2]. The key test is "whether an excluded applicant (not possessing one of the listed characteristics) would otherwise be eligible for admission to membership." Arthur Garwin, *Annotated Model Code of Judicial Conduct*, 366 (2d ed. 2011). Whether an organization discriminates invidiously "cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends on how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited." Rule 3.6, cmt. [2]. As explained in the commentary, not all forms of "discrimination" are invidious or improper.

Rather, some favoritism is based on rationales that are not socially harmful and may even be beneficial, or because members of the organization have a constitutional right to associate without governmental interference. Charles G. Geyh and W. William Hodes, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 65 (2009).

ANALYSIS:

The Foundation is not a membership organization, but the judge has asked if she may serve as a member of the Foundation's Board of Directors. Thus, it is unclear if Rule 3.6(A) even applies to the inquiry because the Rule prohibits judges from "holding membership in any organization that discriminates" but does not specify whether being a board member of an organization is the same as being a member of the organization. Assuming there is no distinction, the CJEAB has not yet considered Rule 3.6(A), but other jurisdictions have.

In those jurisdictions, whether membership in an organization was prohibited hinged on whether the discrimination was invidious or was based on a non-harmful rationale. For instance, a judge could not continue his membership in an all-male private hunting and fishing club that banned women as members solely because of their sex because there was no beneficial social purpose. *See* Maryland Jud. Ethics Comm. Op. 1994-06 (1994) (membership in a social organization that practiced invidious discrimination by banning women failed to promote public confidence in the integrity and impartiality of the judiciary and instead called into question the judge's impartiality and bias against women in the court). In contrast, a judge could serve on the advisory council of the Women's Development Center at Florida International University—which sought to improve women's economic and political position—because the disparate treatment was not socially harmful and addressed gender inequality. *See* Fl. Jud. Eth. Adv. Comm. Op. 93-66 (1994); *see also* CT Comm. Jud. Eth. 2016-16 (2016) (judge may serve on board of directors of national ethnic bar association even though it supported promotional opportunities for minorities because it served a legitimate purpose).

Here, the argument could be made that only women are eligible for the Foundation's educational board service programs and that the organization thus discriminates based on gender, but such limited eligibility does not amount to invidious discrimination because it is not socially harmful. Instead, the Foundation promotes inclusivity and diversity, which is beneficial. Further, men also participate in the Foundation in different capacities; they serve on the Board, act as mentors, actively seek qualified candidates to serve on their boards, and frequently act as instructors. Thus, even if Rule 3.6(A) does apply, the judge may serve as a board member without appearing biased or diminishing public confidence by association.

Though the requesting judge may serve as board member for the Foundation, Rule 1.3 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." If the judge allows the Foundation to include her title on its website and in marketing materials, persons might think that the judiciary endorses the Foundation, or they may be prompted to donate to receive favorable treatment from the judge or in the district court. The CJEAB has cautioned judges not to allow others to use the prestige of judicial office in similar contexts. *See, e.g.,* C.J.E.A.B. Ad. Op. 2013-04 (judge could not participate in fundraising event by contributing a hand-painted mask because the success of the fundraiser stemmed from the influence and prestige of the persons who contributed masks). Instead, only the judge's name should be included on the Foundation's membership roster. *See* C.J.E.A.B. Ad. Op. 2018-01 (judge could participate in a fundraising

golf tournament if the judge did not use her title to promote the tournament); *see also* C.J.E.A.B. Ad. Op. 2005-05 (to avoid impropriety, judge could participate in family photo to be used in campaign materials for judge's spouse, but the materials could not identify judge as a judicial officer).

CONCLUSION:

The judge may serve as a member on the Foundation's Board of Directors whether or not Rule 3.6(A) applies. Assuming it does, even though the organization's mission is to promote women to leadership positions on corporate and non-profit boards, the Foundation does not engage in invidious discrimination because the Foundation promotes legitimate social goals of inclusivity and diversity, and men participate in various capacities. To prevent the risk of others abusing the prestige of judicial office, however, the judge should not identify as a judicial officer on the board's roster.

FINALIZED AND EFFECTIVE this 19th day of February, 2020.