

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2020-02
(Finalized and effective July 17, 2020)

BACKGROUND:

In light of recent events concerning systematic racial inequalities, the requesting judge asks to what extent law clerks and judicial externs may participate in activities to protest police misconduct and oppose racism. Specifically, the judge asks if law clerks and externs may participate in protest demonstrations and if they may use social media to make public posts condemning racism and to express general support for various reforms being discussed in the public arena.

Judicial clerks and externs are not judges and are, therefore, not directly subject to the Code of Judicial Conduct (“Code”), but Rule 2.12 of the Code outlines a judge’s supervisory duties and provides that “[a] judge shall require court staff, court officials and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” To that end, the requesting judge has asked the Judicial Ethics Advisory Board (“Board”) to consider how a judge must direct his or her law clerks and externs to act.

ISSUE PRESENTED:

Pursuant to Rule 2.12 of the Code, how must a judge advise his or her law clerks and externs to act regarding their participation in protest demonstrations, use of social media, and other public statements?¹

SUMMARY:

Judicial clerks and externs are not subject to the Code’s jurisdiction, but as supervisors, judges remain responsible for ensuring that their staff and others subject to the judge’s direction act in a manner consistent with the Code. Even though a law clerk or extern’s conduct might not violate the Code, under certain circumstances, the behavior of that clerk or extern may be imputed to the judge; thus, judges must ensure that their staff acts in a manner consistent with the Code. To comply with Rule 2.12, judges—and by extension as discussed below—their law clerks and externs may comment on matters concerning the law, the legal system, or the administration of justice but may not comment on political issues or participate in political demonstrations, rallies, or marches.

¹ Pursuant to Chief Justice Directive 94-01, the Board is only authorized to provide advisory opinions “concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct.” Accordingly, this opinion only discusses judicial compliance with the Code.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

Rule 2.12 governs a judge's supervisory duties. Subsection (A) provides that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." As explained in Comment [1] to Rule 2.12, "[a] judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control" and "[a] judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge."

Rule 2.12 of the Model Code of Judicial Conduct and its commentary are identical to Colorado's Rule. As clarified in the Reporter's Explanation of Changes to the Model Code, "Rule 2.12(A) was reworded to reflect a more comprehensive understanding of the standards required of court personnel. Judges must insist that court staff and officials act in a manner consistent with all of a judge's obligations under the Code and not simply those previously enumerated in Canon 3C(2) relating to diligence, fidelity, and lack of bias or prejudice." The Explanation of Changes also clarifies that Comment [1] to Rule 2.12 of the Model Code

was added to emphasize the critical position judicial staff occupy in the justice system—not only in terms of their relevance to the administration of justice but also in terms of their role in preserving public confidence in the system as a whole. The comment explains the black letter to underscore that a judge must never direct staff within his or her control to engage in conduct that would violate the Code if undertaken by a judge.

The shift from a more permissive standard to a more rigorous standard under Rule 2.12(A) mandating judges to require their staff to act in a way consistent with the judge's obligations under the Code evidences a higher expectation on court staff, which is consistent with the way the public views them—as an extension of their judge and the judicial system. The language of Rule 2.12(A), however, appears at odds with Comment [1]. The Rule seems to apply to employee activities conducted during and outside of working hours if those employees are subject to the judge's direction and control, whereas Comment [1] seems to limit a judge's responsibility to the conduct of staff *when* those persons are acting at the judge's direction or control, which could be interpreted as during working hours only, or pursuant to a judge's direct command. In situations when the language of the rule and its comment conflict, the language of the rule governs. C.J.C. Scope, cmt. [3] ("Comments neither add to nor subtract from the binding obligations set forth in the Rules."). The language of Rule 2.12 seems clear; — "consistent with the judge's obligations" means a judge must require staff under his or her direction and control to act as a judge would under the Code.²

² Other jurisdictions interpret Rule 2.12(A) in the same manner. *See, e.g.*, MD Jud. Eth. Comm. Ad. Op. 2010-12 (Aug. 5, 2010) (judge must deter staff member from campaigning on behalf of a political candidate, even outside of work hours, because judges "have the responsibility to ensure that employees subject to their control are made aware of the judge's ethical obligations

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.” Comment [4] of Rule 1.2 provides that “[j]udges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.” Comment [2] to Rule 2.1, which sets forth the duties of judicial office, similarly provides that “judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.”

Canon 3 requires a judge to conduct personal and extrajudicial activities in a way that minimizes the risk of conflict with the obligations of judicial office. Rule 3.1 governs extrajudicial activities in general and clarifies that “[a] judge may engage in extrajudicial activities, except as prohibited by law or this Code,” but when engaging in such extrajudicial activities, a judge shall not

- (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;
- (D) engage in conduct that would appear to a reasonable person to be coercive;
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

The commentary to Rule 3.1 further explains that “[t]o the extent that . . . judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities.” *Id.* cmt. [1]. Judges are encouraged to engage in appropriate activities because they “are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice.” *Id.* In addition, even when an activity does not involve the law, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal, or civic extrajudicial organizations not conducted for profit. *See* C.J.C. Rule 3.7(A). The rationale is that “[p]articipation in both law-related and other 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, cmt. [2].

and act accordingly.”); NV Std. Comm. Jud. Eth. Ad Op. JE17-001 (July 28, 2017) (judicial law clerk may not conduct pro bono services while serving as a law clerk to a judge because judges are prohibited from the practice of law themselves and are required to ensure that their staff likewise comply with this requirement).

ANALYSIS:

Because staff under the direction and control of a judge are often seen as an extension of that judge and the court by the public, lawyers, and others, pursuant to Rule 2.12(A), a judge must direct staff subject to the judge's direction and control to act as if they were subject to the Code. The relevant question thus becomes whether a judge may participate in rallies, make public statements opposing racism, and call for police reform on social media and other platforms.

A. Statements Designed to Improve the Law, Legal System, and Administration of Justice

The Board has authored several advisory opinions concerning the extent to which a judge may participate in extrajudicial or political activities, appearance of impropriety, and activities that may evidence bias or discrimination.³ The Board has never considered, however, the extent to which a judge may publicly condemn racism or police brutality. But, in response to recent events concerning racial inequality, a growing number of state courts and judges have issued recent statements opposing racism and calling for reformation of the legal system and the way in which courts administer justice.⁴

For instance, the Justices of the Washington State Supreme Court issued a signed letter to the judiciary and the state's legal community acknowledging that "injustices faced by [B]lack Americans are not relics of the past" and asking the legal community to "have the courage and the will" to address the situation collectively. Letter from WA Sup. Ct. to Members of Jud. and Leg. Comm., June 4, 2020. Similarly, Bernadette Joshua Johnson, Chief Justice of the Louisiana Supreme Court, condemned the "brazen killing of another African American, George Floyd, by police officers" and recognized that "his life is but one of countless others, including Ahmaud Arbery and Breonna Taylor, that has been senselessly taken by a system that espouses equal rights under the law." Letter from C.J. Joshua Johnson to Jud., Exec., & Legis., June 8, 2020. She urged her colleagues to "spend time reflecting on the ways in which we ask others to accept injustices that we would not" and to "engage in discussions to improve the criminal justice system." *Id.* at 3.

³ See, e.g., C.J.E.A.B. Ad. Op. 2020-01 (judge may serve on the board of a nonprofit organization promoting women in leadership positions); C.J.E.A.B. Ad. Op. 2017-01 (judge may not contact his or her federal representatives to discuss political matters such as approval of or dissatisfaction with legislative policies or cabinet appointments because such conduct exceeds the scope of matters permissible under the Code); C.J.E.A.B. Ad. Op. 2012-05 (judge may participate on Child Welfare Executive Leadership Council because it relates to the legal system and will not undermine the judge's impartiality, give rise to the appearance of impropriety, or violate the Code).

⁴ For a regularly updated list of state supreme courts and state court chief justices that have issued statements in light of recent events, visit the National Center for State Courts' website, available at <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice>.

These and other similar statements made by judges are permissible under Rules 3.1 and 3.7 of the Code because they call on judges and others to recognize that police misconduct and racial bias are problems within the legal system, and that the way in which justice is administered must change. The comments are acceptable because they call on judges and lawyers to reflect upon, reform, and improve the justice system. Such public comments are not political and do not call into question the integrity or impartiality of the judiciary; rather, they instill public confidence in the judiciary and promote ethical conduct among judges and lawyers by promoting access to justice for all.

B. Statements and Actions Giving Appearance of Impropriety

While a judge may make statements intended to improve the legal system and to promote access to justice for all, judges must take caution that their statements do not give the appearance of bias or that they are political or divisive. Section [2] of the Code's 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."

1. Participation in Protest Marches and Rallies

Colorado has not yet considered the issue, but the jurisdictions that have addressed a judge's participation in a protest march or a rally have focused on the appearance of impropriety of participation, potential bias, and the possibility that the subject matter or parties organizing the protest would appear before the judge in future litigation.

The Connecticut Committee on Judicial Ethics was recently asked if a judge could participate in a "Silent March of Black Female Attorneys" to protest police brutality if the judge did not identify himself or herself by name or title, did not wear a robe, and did not speak with media. The judge would march with protesters to the steps of the state's supreme court to read part of the state constitution, and protesters would carry signs and wear buttons reading, "We Can't Breathe." The Committee unanimously determined that the judge's participation would violate Connecticut's Code of Judicial Conduct because the judge's identity could be ascertained within the legal community and possibly the greater public, and participation would give the appearance of impropriety and call into question public confidence in the judiciary. Further, the judge could appear biased against police, and the judge might be called to preside over a police brutality case in the future. *See* CT Comm. on Jud. Ethics, Inf. Op. 2020-03, June 5, 2020.

Though not in the context of the Black Lives Matter movement, other jurisdictions have similarly determined that judges should not participate in marches or political demonstrations even if they remain anonymous. *See, e.g.*, NY Comm. on Jud. Ethics, Ad. Op. 17-38, Mar. 16, 2017 (judge may not participate in "March for Science" because even though it purported to be a non-partisan gathering, it could quickly turn into a political platform to protest climate change); *Id.* (judge should not to participate in a local rally opposing the "Trump Muslim Ban" because the issue involved "great public controversy, which [wa]s also the subject of litigation."); MA Sup. Jud. Ct. Comm. Jud. Eth., CJE Op. 2016-10 (judge could not participate in the "Women's

March on Washington” the day after the presidential inauguration because the organizer’s intent was to “send a message to the new President on his first day in office.”); AZ Sup. Ct. Jud. Eth. Ad. Op. 18-06 (even though it concerned the legal system and administration of justice, judge should not participate in “Immigration March” because one of the organizers frequently appeared in court litigation and, at times, state court judges were called upon to resolve immigration issues).

Regardless of non-partisan aspirations or a judge’s subjective belief that he or she is “doing the right thing,” the Code provides that judges should not be swayed by public clamor or fear of criticism and must not permit social, political, or other interests to influence the judge’s conduct or judgment. *See* C.J.C. Rule 2.4. Judges should anticipate that their participation will be scrutinized and publicized if they are depicted in reports of the event, including press coverage and social media. *See* AZ Sup. Ct. Jud. Eth. Ad. Op. 18-06. Marching in support of the Black Lives Matter movement or the Blue Lives Matter movement gives the appearance of impropriety and bias and questions a judge’s impartiality and independence. Moreover, a case involving the subject matter of the protest could come before the judge. Because such actions violate several Code provisions, judges should not participate in such protests, marches, or rallies, and by extension, should inform staff under their direction and control of the same constraints.

2. Judge’s Use of Social Media

The Board has not yet specifically considered a judge’s use of social media. The judicial ethics committees of several jurisdictions have considered the use of social media in a generic context, but all have concluded that the same precautions a judge must take in making statements or public appearances apply, perhaps to a greater degree, to social media because such comments and images could be disseminated widely. *See, e.g.,* MA Sup. Jud. Ct. Comm. Jud. Eth., CJE Op. 2016-09, Nov. 22, 2016 (judges are not prohibited from using social media, but their use must comply with the Judicial Code of Conduct’s requirements to uphold and promote independence, integrity, and impartiality of the judiciary and avoid impropriety both professionally and personally); NM Ad. Comm. Jud. Eth. Op., Feb. 15, 2016 (providing guidance on a judge’s use of social media and advising judges to be circumspect and vigilant with their use because the Code of Judicial Conduct applies to a judge’s use of social media in the same way it applies to other activities); AZ Sup. Ct. Jud. Eth. Adv. Comm., Ad. Op. 14-01 (providing general guidance on judges’ use of social media).

The use of social media by judges to express support for or to protest current political issues raises the same ethical considerations discussed earlier, including: (1) avoiding impropriety in all conduct; (2) not lending the prestige of judicial office; (3) not detracting from the dignity of the court or reflecting adversely on the court; (4) not engaging in prohibited political activity; and (5) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. *See* “Use of Electronic Social Media by Judges and Judicial Employees,” US Jud. Conf. Comm. Code Cond., Ad. Op. No. 112. A unique concern with social media is that it can be used not only to post statements but to validate, endorse, or “like” a person, image, or statement made by another. This concern exists even if a judge does not use his or her title. Many jurisdictions have advised judges to proceed with extreme caution when making statements or endorsements over social media, as the Code applies with equal

force to a judge's actions made over social media. Thus, the preceding analysis also applies to a judge's statements and actions made on social media.

CONCLUSION:

The Board has no jurisdiction over the actions of law clerks or externs because the Code does not apply to them. Nevertheless, because Rule 2.12(A) provides that judges must require staff under their control to act in a manner consistent with the Code, judges must direct their staff to act in a manner consistent with the judges' own obligations under the Code. In the context of the current events, judges may issue statements regarding the law and encouraging equal application of justice. Judges, however, should not make political or divisive statements, not only because of the appearance of impropriety, but because such matters may come before them. For the same reason, judges should not participate in political marches or rallies supporting the Black Lives Matter or Blue Lives Matter movements, and judges must be very cautious in their use of social media, including posts, endorsements, and validations.

Rule 2.12(A) permits judges, as supervisors, to counsel their staff that comments supporting equal justice for all are acceptable because they concern the law and the legal system and would not give the appearance of bias or impropriety, but comments that are divisive and venture into the political sphere, whether made in person, in writing, on social media, or by participating in a protest or rally, remain inappropriate. Though law clerks and externs are not subject to penalties for violating the Code, judges are, and a law clerk's actions may be imputed to his or her judge if the judge becomes aware of the staff member's behavior and does nothing, or if the judge fails to require a staff member to act in a manner consistent with the judge's obligations under the Code. Also, though outside the scope of this inquiry, law clerks and externs are subject to rules—which do carry penalties, such as termination, if violated—including the Code of Conduct for the Colorado Judicial Department, CJD 08-06, amended Apr. 2019, and the Colorado Judicial System Personnel Rules, revised July 2018.

FINALIZED AND EFFECTIVE this 17th day of July, 2020.