

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2016-01
(Finalized and effective February 23, 2016)

ISSUE PRESENTED:

The requesting judge sits on the board of a charitable organization whose mission is to empower young women to achieve brighter futures and to build strong communities through mountain biking. The organization relies on donations to support its small staff and regularly thanks its donors with a personal note or telephone call.

As a board member, the judge would like to call or send a personal note to donors on behalf of the organization to thank them for their financial support. The requesting judge has asked the CJEAB to clarify whether such contact is permitted under the Colorado Code of Judicial Conduct (“Code”), or whether the contact could be considered fundraising, which, in most instances, is prohibited by the Code.

CONCLUSION:

The Code encourages judges to participate in charitable organizations but, except for very limited circumstances, does not permit judges to solicit funds either directly or indirectly on behalf of such organizations. However, because the judge is thanking donors for their financial contributions on behalf of the organization and is not soliciting future contributions, we conclude that the judge may thank donors for their past contributions to the organization by telephone or in writing, provided that in doing so she does not directly or indirectly solicit future donations.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

The Rules applicable to this inquiry are 1.3, “Avoiding Abuse of the Prestige of Judicial Office,” 3.1, “Extrajudicial Activities in General,” and 3.7, “Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.”

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.” Comment [1] to Rule 1.3 provides additional guidance by noting that it 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. For instance, it would be improper for a judge to use judicial letterhead to gain an advantage in conducting his or her personal business.

Rule 3.1 permits judges to engage in extrajudicial activities with the limitations that judges shall not

- (A) participate in activities that will interfere with the proper performance of the judge's judicial activities;
- (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; or
- (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.

Rule 3.7 provides, in relevant part, that

- (A) [s]ubject to the requirements of Rule 3.1, a judge may participate in activities sponsored by . . . or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
 - (1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;
 - (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

The comments to Rule 3.7 provide further illustration of the Rule's applicability. Comment [1] notes that the activities permitted under paragraph (A) generally include those "sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other non-profit organizations." Similarly, while not directly on point, Comment [4] provides that "identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule" and that the "letterhead may list the judge's title or judicial office if comparable designations are used for other persons."

DISCUSSION:

The Code broadly encourages judges to participate in civic and charitable activities as long as such participation does not adversely reflect on the judge's impartiality or interfere with a judge's ability to carry out his or her duties. In prior opinions, we have addressed the extent to which a judge may participate in fundraising activities for charitable organizations. In determining whether the proposed participation is permissible, we consider factors such as whether

- (1) the person being solicited is a member of the judge's family or a judge not under his or her immediate supervision;
- (2) the charitable organization concerns the law or the legal system;
- (3) the judge is using the prestige of his or her office to directly or indirectly solicit funds;

- (4) such contact could be considered coercive; and
- (5) a donor makes a contribution with the expectation of receiving a favor.

See e.g., CJEAB Ad. Op. 13-04; CJEAB Ad. Op. 12-03.

Rule 3.7 prohibits both active and passive participation in fundraising on behalf of charitable organizations. Such prohibition is “rooted in concerns about the misuse of the prestige of judicial office and the potentially coercive effect of a judge’s involvement in fundraising.”¹ The concern is that a judge or others might use the judge’s position improperly to encourage both direct and indirect contributions. *See*, Rules 1.3 and 3.1(D). Thus, the CJEAB has consistently cautioned judges against direct personal involvement in fundraising for charitable and civic organizations.

In Advisory Opinion 13-04, the CJEAB addressed whether a judge could contribute a handcrafted mask to be auctioned to raise funds for a charitable organization. The masks used to raise funds were created by local celebrities and community leaders, and the success of the fundraiser was attributable, in part, to the prestige of the individuals contributing the masks. The CJEAB concluded that because the charity would use the judge’s title and office to encourage the public to bid on the mask, such participation was tantamount to soliciting a contribution for the organization, which was prohibited by Rule 3.7.

Like Colorado’s Rule 3.7, the ABA’s Model Code of Judicial Conduct Rule 3.7(A)(2) permits a judge to solicit contributions for a legal, educational, religious, charitable, fraternal, or civic organization, but only from members of the judge’s family or from judges over whom the judge does not exercise supervisory or appellate authority. The restrictions on fundraising address two concerns, which were the same concerns addressed in the CJEAB’s Advisory Opinion 13-04: (1) that the person solicited will feel obligated to respond favorably because of the judge’s position of influence or control, and (2) will expect future favors because of the donation. *See*, ABA Informal Op. 603 (1962).

Most state courts and judicial ethics advisory committees have strictly applied restrictions on fundraising activities even when the participation is indirect, bears no relationship to the judicial office or is unlikely to raise impropriety concerns. *See*, S.C. Adv. Op. 22-2005 (2005) (judge’s participation as chairperson for charitable organization’s “kickoff” event prohibited because a fundraising auction followed immediately thereafter).

Conversely, a judge’s participation may be permitted if, under the circumstances, his or her participation will not be perceived as a method of enticing individuals to contribute. See ABA Model Code of Jud. Conduct Rule 3.7, cmt. [3] (permitting judges to serve as ushers, food servers, or in other similar capacities at fundraising events sponsored by educational religious,

¹ These concerns are mitigated, however, when the organization involved is law-related. Rule 3.7(A)(4) permits judges to participate in fundraising events of law-related organizations if the participation is limited to “speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with [the] event.” Because the judge’s request does not involve a law-related charitable organization, however, we do not address this exception in this opinion.

charitable, fraternal, or civic organizations because such activities are “not solicitation and do not present an element of coercion or abuse the prestige of judicial office.”). And, at least one jurisdiction has advised that lesser degrees of participation in fundraising are permissible as long as the activities do not cast doubt on the judge’s capacity to act impartially, do not demean the judicial office, and do not interfere with the proper performance of judicial duties. *See*, Ind. Comm’n on Jud. Qualifications Adv. Op. 1-96 (1996).

In this instance, as in previous instances, our determination hinges on whether the thank-you notes and calls would have the potential to encourage—either directly or indirectly—others to donate to the nonprofit organization, which invokes Rules 1.3 and 3.1(D). As one jurisdiction put it, judges may participate in charitable activities but must be sensitive to whether they are being “showcased” as a means to encourage contributions. *See*, Pa. Jud. Ethics Comm. Informal Op. 4/11/05 (2005).

The requesting judge’s situation involves a charitable organization that is unaffiliated with the law, and the judge would not solicit funds but would, instead, acknowledge persons who have already donated. The requesting judge indicated that all contact would be “limited to showing appreciation and [] NOT for soliciting future donations.”

We conclude that the requesting judge may call or send a personal note to donors of the nonprofit organization to thank them for their donation, provided that in doing so she does not directly or indirectly solicit future donations. The judge’s activities would be permissible under the Code and our prior advisory opinions.

FINALIZED AND EFFECTIVE this 23rd day of February, 2016.