

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2017-01
(Finalized and effective April 4, 2017)

ISSUE PRESENTED:

The requesting judge has asked whether a judge may contact his or her federal congressional representatives to express approval or dissatisfaction with federal legislation or cabinet appointments if the judge reveals his or her name but not that he or she is a judge.

SUMMARY:

Such contact may be made only in the narrowest of circumstances. Rule 3.2 of the Code of Judicial Conduct (Code) admonishes that a judge “shall not . . . consult with . . . a legislative body or official.” However a judge is permitted to consult with government officials in connection with matters concerning the law, the legal system, or the administration of justice or in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties. Even in such limited circumstances, however, a judge must be mindful of other Code provisions, including the rules discussing impropriety, independence, integrity, and impartiality. Thus, if a judge contacts his or her federal representatives regarding matters of law, the legal system, administration of justice, or in connection with matters acquired from a judge’s personal experience in discharging his or her duties, such contact must comply with the other Code provisions.

An endorsement or a protest of a particular legislative policy would appear to implicate the judge’s personal opinion. Consequently, if a judge contacts a federal representative to discuss matters outside of the narrow scope permitted by Rule 3.2, such contact would very likely amount to an impropriety or give the appearance of impropriety, which is impermissible under Rule 1.2 of the Code. That rule requires judges to act in a matter that promotes public confidence and to avoid the appearance of impropriety both professionally and with respect to personal conduct. Similarly, Rule 3.1(C) of the Code prohibits judges from participating in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality. The proposed contact, whether or not a judge identifies himself or herself as a judge, likely meets the reasonable person standard for “appearance of impropriety.” Contacting a representative to express approval or disapproval of a legislative policy or with cabinet appointments, thus, appears to be contrary to Rules 1.2, 3.1(C) and 3.2.

Although nominees to cabinet positions are not per se candidates for public office, they are public officials closely aligned with the President and are expected to occupy an office where they are expected to provide policy expertise and partisan loyalty. Expressing support for or against their appointment is barred by Rule 4.1(A)(3) of the Code, which states that a judge may not “publicly endorse or oppose a candidate for any public office.” While a private telephone call may not constitute a public statement, a judge should refrain from expressing views because it would be contrary to a judge’s independence and impartiality.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

The Code provisions most relevant to the inquiry are the Preamble, Rules 1.2, 3.1(C), 3.2, and Canon 4.

First, 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.”

The Code defines “impropriety” as “conduct that violates the law, court rules, or provisions of this Code and conduct that undermines a judge’s independence, integrity, or impartiality.”¹

A. **Rule 1.2**

Rule 1.2 echoes the general prohibitions on impropriety set forth in the Code’s Preamble and 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.” See also C.J.C. Canon 1 (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”). Four of the comments to Rule 1.2 seem particularly applicable to the present request:

[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.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

* * *

[5] . . . Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that

¹ The Code provides the following definitions of “independence,” “integrity,” and “impartiality”:

- Independence is “a judge’s freedom from influence or controls other than those established by law.”
- Integrity means “probity, fairness, honesty, uprightness, and soundness of character.”
- Impartiality means “absence of bias or prejudice in favor of, or against particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”

the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Rule 1.2 is derived from Canon 2 of the pre-2010 Code, which required judges to act, at all times, in a manner that promoted public confidence in the independence, integrity, and impartiality of the judiciary (Canon 2). Specifically, under Canon 2 of the pre-2010 Code,

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES

- A. A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Pre-2010 Canon 1 also spoke to the integrity of the judiciary:

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

B. Rules 3.1 and 3.2

Rule 3.1 governs permissible extrajudicial activities, and provides that “[a] judge may engage in extrajudicial activities, except as prohibited by law or this Code,” but when “engaging in extrajudicial activities, a judge shall not . . . (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

Rule 3.2 provides that “[a] judge shall not appear voluntarily at a public hearing before, or *otherwise consult* with, an executive or a *legislative body* or *official*.” (Emphasis added). There are exceptions to the blanket prohibition, however, two of which may be relevant to the question before us:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties[. . .]

The commentary notes that these exceptions are permissible because “[j]udges possess special expertise in matters of law, the legal system, and the administration of justice” and that judges “may properly share this expertise with governmental bodies and executive or legislative branch officials.” C.J.C. Rule 3.2, cmt. [1]. In appearing before or consulting with government officials, however,

judges must be mindful that they remain subject to other provisions of th[e] Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance

their own or others' interests, . . . and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

C.J.C. Rule 3.2, cmt. [2].

C. Canon 4

Canon 4 and its implementing rules govern the extent to which judges may participate in political and campaign activities. Specifically, Canon 4 provides that 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.” Though the rules under Canon 4 prescribe the limits on a judge's political activities, they focus on actual participation like campaigning, involvement in political organizations, fundraising, and endorsing candidates. *See, e.g.* C.J.C. Rule 4.1 (prohibiting judges from holding office in a political organization, making speeches on behalf of a political organization, soliciting funds, endorsing a candidate for public office, or making any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court); C.J.C. Rules 4.2 and 4.3 (candidates for retention and retention campaigns). Though the rules constraining judicial involvement in politics place an emphasis on active, more public participation, Canon 4 provides that “[a] judge . . . shall not engage in political . . . activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”

DISCUSSION:

The requesting judge does not reference any specific legislative issues with which she agrees or disagrees, nor does she mention her motives to contact her federal representative. Rather, she only asks if a judge may make such contact to voice “approval or dissatisfaction with legislation, cabinet appointments, etc.” if a judge uses his or her name but does not mention that he or she is a judge.

A. Rule 3.2—Consulting with Legislative Officials

Rule 3.2 permits judges to consult with legislative officials only “in connection with matters concerning the law, the legal system, or the administration of justice” or “in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties.”

The Advisory Opinions in which the CJEB has previously considered Rule 3.2 are not directly on point, but other jurisdictions have considered similar circumstances.² In those

² Colorado's Advisory Opinions discuss the limitations associated with judges participating on boards or panels under Rule 3.2. *See e.g.*, C.J.E.A.B. Ad. Op. 2016-02 (2016) (judge could serve on Board of Joint Initiatives for Youth and Families even though board engaged in legislative advocacy because such advocacy was related to the law, the legal system, or administration of justice but cautioning that such participation was still subject to other Code provisions, including Rule 3.1(C)); *but see, e.g.* C.J.E.A.B. Ad. Op. 2006-08 (2006) (judge should not accept appointment to a blue ribbon panel of public and private leaders charged with making recommendations to executive and legislative branches for “reducing the state's contribution and vulnerability to a changed climate” because climate control issues are not connected to the law, the legal system, the administration of justice, or role of the judiciary).

jurisdictions, the underlying question is whether the proposed activity concerns the law, legal system, or administration of justice. For instance, judges may discuss matters relating to court personnel, budget, equipment, and procedures necessary to ensure a functioning judiciary, but they may not consult with government regarding business closings or loss of jobs for union workers. See Mich. Comm. on Jud. Ethics Op. JI-52 (1992); Kan. Jud. Ethics Adv. Comm. Op. JE 35 (1990) (judge may not contact government officials to request increased funding for judge’s alma mater); In re Chaisson, 549 So.2d 259 (La. 1989) (judge’s involvement with legislative branch official concerning legislation necessary to effectuate settlement of action over which judge did not preside was not conduct concerning the administration of justice).

To the extent that a judge’s intended comments to his or her federal representatives concern the law, the legal system, the administration of justice, or matters about which the judge acquired an expertise in the course of his or her judicial duties, such contact may be permissible. Even if permissible under Rule 3.2, however, the judge must still be mindful that he or she remains subject to the other provisions of the Code, including Rules 1.2 and 3.1(C), which prohibit impropriety or the appearance of impropriety.

B. Impropriety, Independence, Integrity, and Impartiality

Canon 4, and Rules 1.2 and 3.1 all focus on impropriety or the appearance of impropriety. As discussed below, it matters not that a judge’s proposed message to a government official is positive or negative or that the judge’s motives were well-intentioned. Rather, under the Code, the only consideration that matters is how a reasonable person would perceive a judge engaging in such conduct. To that end, the underlying inquiry is whether the proposed conduct (1) is actually improper, (2) gives the appearance of impropriety, or (3) is inconsistent with the independence, integrity, or impartiality of the judiciary. If the answer to any of those three considerations is, “yes,” the conduct is prohibited by the Code.

1. Rule 1.2—Impropriety and the Appearance of Impropriety

By its terms, Rule 1.2 applies to actual improprieties and to conduct giving rise to the appearance of impropriety. An actual impropriety is “conduct that violates the law, court rules, or provisions of th[e] Code and conduct that undermines a judge’s independence, integrity or impartiality.” C.J.C. Rule 1.2, cmt. [5].

Even if there is no actual impropriety, the inquiry does not end there because Rule 1.2 also prohibits the *appearance* of impropriety. “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.” Id.; see also C.J.E.A.B. Ad. Op. 2012-07 (in the context of disqualification, avoiding the appearance of impropriety hinges on “whether a reasonable observer might have doubts about the judge’s impartiality.”). Other jurisdictions have interpreted this test as whether a judge “fails to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot.” See, e.g., Inquiry Concerning a Judge, 822 P.2d 1333 (Alaska 1991).

Because the standard for determining the appearance of impropriety is objective, a judge’s own perception of the behavior is irrelevant to the analysis. Further, even if the judge’s intent or motives are good, the public may interpret such actions otherwise. Consequently, the focus is on perception, not intention. See, e.g., C.J.E.A.B. Ad. Op. 2006-08 (2006) (judge should

not accept appointment to a panel of public and private leaders charged with making recommendations to executive and legislative branches addressing how Colorado can mitigate and adapt to climate change).

As in Colorado, courts in other jurisdictions have found that a great variety of judicial conduct creates the appearance of impropriety, even if a judge's intent was good. See, e.g. In re Adams, 932 So. 2d 1025 (Fla. 2006) (judges must do all that is reasonably necessary to minimize the appearance of impropriety and must remain cognizant that even in situations in which they personally believe their judgment would not be colored, public perception may differ); In re Case of Snow, 674 A.2d 573 (N.H. 1996) (rejecting judge's claim that he did not intend to "fix" his brother's speeding ticket because "[t]here is no intent requirement in these canons."); In re Blackman, 591 A.2d 1339 (N.J. 1991) (judge's attendance at picnic hosted by longtime friend who was a local politician convicted on federal racketeering charges created perception of impropriety even if judge's motives were good).

An appearance of impropriety does not occur every time a judge engages in disagreeable or unpopular conduct—only when the conduct reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. See, e.g., Ariz. Jud. Ethics Ad. Comm. Op. 98-4 (1998) (judge's writing and signing publicity pamphlets supporting legislative salary increases did not violate Rule 3.1 because it did not reflect adversely on judge's impartiality or fitness to serve).

One area in which several jurisdictions have acknowledged the difficulty in applying the appearance of impropriety test is when judges express their personal opinions. The general consensus seems to be that judges may express their personal views about legal and non-legal topics as long as they do so in a manner that promotes confidence in the integrity and impartiality of the judge and when making statements, they "acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views." ABA Model Code of Judicial Conduct, Rule 4.1, cmt. [13]; see In re Miller, 664 So. 75 (Fla. 1994) (acknowledging that judges were allowed to write about activities concerning the law, legal system, and the administration of justice but reprimanding a judge for writing letters to newspaper criticizing the judicial system, in part, because it gave the appearance of impropriety); see also In re Hill, 8 S.W.3d 578 (Mo. 2000) (judge's letter imploring citizens to support police chief in struggle against mayor did not promote public confidence in the judiciary and cast doubt on impartiality).

Simply put, the language of Rule 1.2 that "a judge must act 'at all times' in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, is an exacting standard that presents a judge with the prospect of living life in a fishbowl." Arthur Garwin et al., Annotated Model Code of Judicial Conduct, 31 (2d. ed., ABA Pub. 2011). This standard applies to a judge's professional life as well as his or her personal life. Although on some level it may seem unfair to preclude judges from voicing their opinions to their federal representatives when other citizens are able to do so, judges are held to a higher standard than ordinary citizens. See C.J.C. Rule 1.2, cmt. [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.").

In our view, a judge's anonymous contact with a federal representative does not alter the fact that it is not permitted by Rule 3.2 unless it meets the very narrow confines described above.

And, too, it would be improper because it violates the requirement in Rule 1.2 that judges act at all times (both professionally and in their personal lives) in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. Judges are supposed to be independent; an anonymous call does not ameliorate this obligation. Moreover, because judges are held to a higher standard, the proposed conduct reflects adversely on the judge's honesty, temperament, and fitness to serve as a judge and could erode confidence in the judiciary. Further, even if not an actual impropriety, such conduct likely meets the "reasonable minds" test for appearance of impropriety.

2. Rule 3.1(C)

Under Rule 3.1(C), when engaging in extrajudicial activities, a judge must not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." The language of Rule 3.1(C) is similar to that of Rule 1.2, and both rules are subject to the "reasonable person" standard analyzed above.

The "high standard of conduct imposed by Rule 3.1 is not intended to proscribe a judge's extrajudicial activities so as to isolate the judge from society." Arthur Garwin et al., Annotated Model Code of Judicial Conduct, 332 (2d. ed., ABA Pub. 2011). Rather, as noted in Comment [1] to Rule 3.1, judges are "uniquely qualified to engage in extrajudicial activities concerning the law, the legal system, and the administration of justice." Such participation is permissible because it integrates judges into their communities and furthers public understanding of and respect for the courts and judicial system. See id. The commentary to the rule cautions, however, that such activities are permitted under the Code as long as "time permits, and judicial independence and impartiality are not compromised." C.J.C. Rule 3.1, cmt. [1].

Though judges can express or support their opinions or ideas, they must always keep in mind that their "extrajudicial activities reflect not only on their judicial office but also on the entire judiciary. Judges must remember that although the judicial robes remain in the courthouse, the judicial aura remains with the judge." Arthur Garwin et al., Annotated Model Code of Judicial Conduct, 332 (2d. ed., ABA Pub. 2011); see also In re Koch, 890 P.2d 1137 (Ariz. 1995) (judge's off-the-bench behavior required discipline because "although [a judge's] problems may be temporary, the harm to the public's faith in the legal institutions is not.").

One of the concerns Rule 3.1 is designed to curtail is impartiality in the form of judicial bias or the appearance of bias, as expressions of bias by a judge outside of the courtroom may cast doubt on that judge's ability to act impartially inside the courtroom. Though Comment [3] of Rule 3.1 cites judicial statements demeaning individuals on the basis of race, sex, religion, national origin or age as being biased, the same concerns extend to a judge that promotes or opposes legislation or cabinet appointees because such action is political in nature and casts doubt on the judge's ability to be an impartial figure.

Though judges may express their personal views about legal and non-legal subjects as long as they do so in a manner that promotes confidence in the integrity and impartiality of the judge and the judiciary, given the political nature of the request, it seems that the proposed actions could appear to a reasonable person to undermine judicial independence, integrity, and impartiality. Even if a judge withholds his or her judicial title and is identified in name only, the judge's status may eventually be revealed. In our view, expressing a personal opinion concerning the wisdom of a particular piece of legislation or the appointment of a cabinet secretary does not meet the narrow guideline of preserving integrity and impartiality of the

judiciary. Moreover, merely engaging in such behavior—anonously or otherwise—does not cure the concerns of impartiality or questionable integrity. Again, assuming the proposed contact with a government official does not meet one of the exceptions under Rule 3.2, such contact seems contrary to the type of extrajudicial participation Rule 3.1(C) attempts to encourage and is likely impermissible.

C. Canon 4—Endorsement or Disapproval of Cabinet Appointees

The requesting judge specifically asks whether judges may contact their federal representative to voice support or disapproval of cabinet appointees. Under Rule 4.01(A)(3), judges are prohibited from “publicly endors[ing] or oppos[ing] a candidate for any public office.” Cabinet nominees and appointees do not hold a public office per se. They are chosen based upon their executive experience, policy expertise, partisan credentials and loyalty to the President. Their confirmation is often contentious and politically charged. Once in office, they are seen as advocates for political policy. Expressing support or opposition to them, in our view, cannot avoid the appearance of political partisanship. We see no basis for distinguishing such support or opposition from the situation where a judge endorses the appointment of a federal prosecutor or federal judge. See Kan. Jud. Ethics Adv. Op. JE 45 (1993) (judge prohibited from writing letter to president or members of Congress supporting or endorsing appointment of potential nominee to position in Justice Department or for federal judiciary). As comment [4] of Rule 4.1 notes, this prohibition exists to “prevent [judges] from abusing the prestige of judicial office to advance the interests of others.” Though cabinet members do not run for office and are, instead, appointed, the element of endorsing or objecting to a public official remains and so does the threat that by doing so, a judge may be lending the prestige of judicial office to advance (or devalue) the interests of others. Even if a judge acts anonymously, the judge still acts contrary to spirit of Rule 4.1 and its limitations on judicial participation in politics, which, in turn, calls into question that judge’s integrity and impartiality.

CONCLUSION:

We conclude that under Rule 3.2, judges may contact their federal representatives if such contact concerns matters of the law, the legal system, the administration of justice, or in connection with matters about which the judge acquired knowledge by discharging her judicial duties. Even if such contact concerns such matters, however, judges remain subject to the Code’s other provisions, including those discussing impropriety, judicial independence, integrity, and impartiality. If, however, a judge contacts a federal representative to discuss a topic outside of those permitted under Rule 3.2, such contact will likely violate Rule 1.2 as an actual impropriety, and would likely give the appearance of impropriety as well under the “reasonable person” test. Such conduct might also be deemed political because it gives the appearance to a reasonable person that the judge’s independence, impartiality, or integrity has been undermined; consequently, it would likely violate Rule 3.1(C) too. Finally, voicing approval or dissatisfaction with cabinet appointees would violate Canon 4 and Rule 4.1, which limit judicial participation in politics.

FINALIZED AND EFFECTIVE this 4th day of April, 2017.