

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)**

**C.J.E.A.B. ADVISORY OPINION 2010-02
(Finalized and effective February 17, 2010)**

ISSUE PRESENTED

The requesting judge is a magistrate with primary responsibility for the dependency and neglect (D&N) docket for his district. The county in which his district is located has an interagency oversight board which determines how to spend certain funds received by the state to foster collaboration among county agencies dealing with children and families. The Department of Human Services (DHS), which oversees distribution of these funds, recently sought to amend the Memorandum of Understanding (MOU) governing their dispersal to include language providing that if certain residential placements are decreased, DHS would pay for a portion of the oversight agency's programs through state funding, thereby allowing the oversight group to conserve its funds. Reduction in those residential placements, then, is a potential funding source for the board. The judge believes that the new MOU language creates a direct relationship between the number of placements and funding for the oversight agency, and that it creates a conflict for him if he sits as a member of the board and also hears cases where he could potentially order such a placement. He asks whether he must resign his position on the board because it impinges on his independent judgment as a judicial officer. Alternately, may he remain on the board but simply abstain from voting?

CONCLUSION

In light of the amended MOU, continued service on the interagency oversight board would reflect adversely on the judge's impartiality and could create an appearance of impropriety, and thus he should resign.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 2 generally provides that a judge should avoid impropriety and the appearance of impropriety in all the judge's activities. Subsection A more specifically states that a judge should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 4 encourages judges to engage in quasi-judicial activities provided that in so doing the judge does not compromise his or her capacity to decide impartially any issues that may come before the judge.

DISCUSSION

Maintaining public confidence in our legal system is one of the core principles of the Code of Judicial Conduct as a whole, and this theme animates Canons 2 and 4 in particular. Those Canons urge a judge to conduct himself in a manner that promotes confidence in the integrity and impartiality of the judiciary, and to refrain from quasi-judicial service if such service compromises the judge's capacity to impartially decide issues that come before the judge.

As the requesting judge here recognizes, the recently modified MOU that governs how his local interagency oversight board disperses certain child welfare funds calls into question his ability to decide juvenile placements impartially, independently, and effectively. The MOU of which he would be a signatory in his capacity as a board member creates a financial incentive for the judge to refrain from ordering certain placements that, in his capacity as a judge, he might deem most appropriate for the juvenile in a particular case. The direct link between reduced residential placements and increased funding for the board creates a conflict of interest for the judge, making continued service on the board inappropriate. Even if the judge's determinations in particular D&N cases were not in fact informed by the financial implications for the board, service on the board would create an appearance of impropriety and reflect adversely upon the judge's impartiality, thereby undermining public confidence in the judiciary.

In our view, it would not alleviate the conflict of interest or appearance of impropriety for the judge to remain on the board and simply abstain from voting on this matter. If the judge remained on the board, he would still have an incentive, as a board member, to raise funds for the board by decreasing the number of residential placements ordered. Thus, it would be in his daily acts as a judicial officer that the conflict and appearance of impropriety would be renewed with each case he is called upon to resolve. Accordingly, the board concludes that the judge should resign from the board.

Our analysis would be the same under the proposed new Code of Judicial Conduct, which is currently being considered for adoption by our supreme court.¹ Under proposed Rule 3.1(c), a judge may engage in extrajudicial activities except, as relevant here, where such participation would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.²

We recognize that the enabling legislation requires a representative from the "local judicial district" to serve on the board. There is nothing in the statute, however, that requires this particular judge, or a judge with responsibility for the D&N docket, to participate on the board. A different representative from the district whose service on the board would create neither a conflict of interest nor an appearance of impropriety would be a more appropriate choice.

FINALIZED AND EFFECTIVE by the Colorado Judicial Ethics Advisory Board this 17th day of February, 2010.

¹ The proposed code can be found at <http://www.courts.state.co.us/userfiles/File/JudicialCodeReport.pdf>

² Proposed new Rule 3.1, as currently drafted, reads:

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in 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; 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.

Comment

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation 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.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.