

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2022-04
(Finalized and effective June 29, 2022)

BACKGROUND:

The requesting judge was recently appointed as a part-time county court judge. The judge's docket mostly consists of criminal cases.¹ Prior to being appointed, the judge represented a defendant in two proceedings for which the defendant is serving a 64-year habitual criminal sentence. The defendant filed a clemency application several years ago, but the executive branch has yet to act on it. Before the judge was appointed to the bench, the judge offered to help the defendant amend his clemency application (on a pro bono basis) to include the argument that, based on recent controlling case law, the defendant's sentence is disproportionate and unconstitutional because the predicate offenses for imposing the habitual criminal sentence were not grave and serious. Given the judge's familiarity with the defendant's case and the legal argument, the judge could amend the defendant's clemency application quickly and with a minimal amount of work.

The judge has not helped or advised the defendant since being appointed to the bench but would like to know if it is possible to help the defendant present a compelling legal argument without violating the Code of Judicial Conduct ("Code") if the defendant submits his amended clemency application pro se and the judge does not appear at any clemency-related proceedings.

ISSUES PRESENTED:

1. Whether a part-time judge may assist a defendant, who was a former client of the judge, to supplement or amend a clemency application that the defendant will submit pro se.
2. If so, whether the judge should include his or her name, bar number, and identify that the judge helped prepare the clemency application.

SUMMARY:

The Code does not preclude the requesting judge from helping the defendant amend his clemency application to include a new legal argument. If the judge chooses to help amend the clemency application, the judge should not identify as a judge.

APPLICABLE PROVISIONS OF THE CODE:

The Code applies differently to part-time judges; unlike a full-time judge, a part-time judge is not required to comply with certain portions of the Code, including Rule 3.10, which provides, in relevant

¹ The judge hears misdemeanor cases, as well as felony cases at their inception until they are bound over to the district court.

part, that “[a] judge shall not practice law except as permitted by law or this Code.” Instead, Part III of the “Application” section of the Code permits part-time judges to practice law subject to the following:

A judge who serves on a part-time basis . . .

(B) shall not practice law in the court on which the judge serves or in any comparable level court in the same judicial district on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(C) shall not practice law with respect to any controversies which will or appear likely to come before the court on which the judge serves or any court of the same or comparable jurisdiction within the same judicial district on which the judge serves.

As explained in Comment [1], “[t]his Canon limits a part-time judge from practicing law in any comparable level court in the same judicial district as the judge serves.” Comment [2] goes on to say, in relevant part, that

[a] part-time judge who practices law must avoid undertaking *or continuing any relationship which precludes the judge from maintaining the integrity of the bench which he or she serves* and at the same time providing the undivided loyalty to clients which the exercise of professional judgment on behalf of a client demands.

(Emphasis added.) The italicized language of Comment 2 reflects the mandate in Rule 1.2, requiring judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”

Rule 3.3, which applies to all judges, provides that “[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.” The prohibition on character testimony exists so that judges do not voluntarily testify favorably on one’s character. As explained in the comments, “[a] judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another.” C.J.C. Rule 3.3 cmt. [1]. “Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.” *Id.*

ANALYSIS:

The first issue presented necessitates analysis of the Application section and of Rule 3.3. Based on the language of the Code’s Application section, the requesting judge may help the defendant amend or supplement his clemency application because the judge would not appear before a county court or a court within the same district the judge serves. Instead, the clemency application would be considered by an agency within the executive branch.² In C.J.E.A.B. Advisory Opinion 2007-06, we determined that a part-time judge could not both sit as a district court judge on an ongoing basis in criminal matters

² A clemency application is filed through the Director of Executive Clemency who convenes the Executive Clemency Advisory Board. The Executive Clemency Advisory Board’s recommendations are then forwarded on to the Governor, who has exclusive power to grant clemency. *See Colo. Const. art. IV, § 7.*

and appear as a lawyer in the same district for civil matters. We stated that allowing a part-time judge to preside over cases while practicing in the same court would “erode public confidence in the integrity and impartiality of the judiciary” and might “create the perception that the lawyer has . . . special stature in court, or that special advantages or preferential treatment may be conferred upon that lawyer by court employees and judicial staff.” *Id.* at 2. This concern is not present here.

Rule 3.3 prohibits judges from testifying as character witnesses in administrative or other legal proceedings or “vouch[ing] for the character of a person in a legal proceeding, except when duly summoned.” In C.J.E.A.B. Advisory Opinion 2021-01, we determined that the requesting judge, who had tried the defendant as a former prosecutor, could comment on the defendant’s clemency application and character because the Office of Executive Clemency asked the judge to do so. We reasoned that being asked to respond to a clemency application as the former prosecutor equated to being summoned and was not the same as voluntarily commenting on the applicant’s character and, thus, there was no concern of impropriety or abuse of judicial office.

Although the present situation also concerns a clemency application, the context is different, and Rule 3.3 does not apply. Unlike the judge in Advisory Opinion 2021-01 who was asked to comment in his capacity as a witness to the trial court proceedings, the requesting judge will not testify as a witness in a legal proceeding. Rather, the judge intends to help the defendant supplement his pending clemency application with a new legal argument, and there is no concern the judge will improperly use his or her position to bolster the defendant’s character before a judicial or administrative body.

As to the second issue presented, the requesting judge should not identify as a judge when preparing the clemency application for two reasons. First, the judge is not acting in a judicial capacity, but as a lawyer. Second, identifying as a judge is contrary to Rule 1.2, which requires all judges to “act at all times in a manner that promotes public confidence in the independence . . . and impartiality of the judiciary” and Rule 1.3, which prevents the judge and others from abusing the prestige of judicial office.

Finally, the CJEAB’s authority is limited to matters concerning the Code. The judge should follow the directions on the clemency application and disclose his or her name and bar number if instructed to do so.

CONCLUSION:

The requesting part-time judge may help a former client amend his clemency application to include the argument that the sentence may be unconstitutional and disproportionate based on recent case law, but the judge should not identify as a judge.

FINALIZED AND EFFECTIVE this 29th day of June, 2022.