

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2016-02
(Finalized and effective November 14, 2016)

ISSUE PRESENTED:

The requesting judge first asks us to clarify whether C.J.E.A.B. Advisory Opinion 2007-07 remains effective. If so, the requesting judge also asks whether a change in the operation of the board of directors for Joint Initiatives for Youth and Families of the Pikes Peak Region (Joint Initiatives for Youth and Families) discussed in Advisory Opinion 2007-07, constitutes a change of circumstances warranting a revised opinion. We conclude that a revised opinion is necessary.

Advisory Opinion 2007-07 was decided under the previous Colorado Code of Judicial Conduct (Code). In that opinion, we determined that a judge may not serve on the board of Joint Initiatives for Youth and Families because the organization not only provided integrated services to children and families, but in doing so, it also engaged in legislative advocacy to benefit children and family services. While we recognized that, under the prior Code's Canon 5B, judges were encouraged to participate in "civic, charitable, educational, and similar organizations," we deemed that the board's involvement in legislative advocacy was a "political activity." Further, because the board's legislative advocacy work was designed to monitor and encourage legislation affecting child and family services and not to "improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government," such participation fell outside the permissible scope of Canon 7. Thus, because the board's functions included legislative advocacy beyond matters to improve the law, we determined that the requesting judge should not participate on the board either as a voting member or a non-voting member.

The requesting judge has informed us that the Joint Initiatives for Youth and Families organization is a non-profit entity whose membership consists of leaders of public agencies, not-for-profit, and for profit organizations, all of whom are involved in the child-welfare system, who "through community-wide collaboration, work to achieve positive changes in the lives of children, youth, and their families"¹ by "build[ing] an integrated network of services and [to] advocate for policies that improve the quality of life for children and their families."² Specifically, the main goals of the organization are as follows:

- To improve working relationships and communications among agencies concerned with the delivery of health, human services, and education.

¹ <http://www.jointinitiatives.org/page.asp?id=6&name=Member%20Agencies>

² <http://www.jointinitiatives.org/page.asp?id=5>

- To increase the knowledge and utilization of regional resources to ensure children, youth, and their families receive strengths-based, holistic services in the least-restrictive environment.
- To identify and reduce programmatic gaps in the continuum of care for children, youth, and their families.
- To identify barriers existing between agencies that impact children, youth, and their families and to find ways to overcome such barriers.

To achieve its goals, the board supports legislative policy providing integrated, high-quality services for children and their families. To that end, the board monitors legislation and engages in many child-related advocacy and legislative efforts. For instance, the board is the local fiscal agent and contractor for Senate Bill 94, which is a law created to enable children detained for delinquency offenses to be screened for less drastic forms of restraint than detention, pending investigation and possible trial for delinquency charges.³ Similarly, the board is also the local fiscal agent and contractor for House Bill 1451, which is a collaborative management program designed to assist youth involved with multiple agencies including mental health, medical services, and other aspects of the court system, such as truancy, dependency and neglect, and delinquency.⁴ Finally, though not active at this time, the organization has a Legislative and Public Policy Committee that pursues legislation affecting children and families. At the time we decided Advisory Opinion 2007-07, the legislative committee was active, and the board retained a lobbyist to address matters of legislative importance. The lobbyist position was dissolved three years ago.

The requesting judge asks whether (1) Advisory Opinion 2007-07 is still valid, in light of the Code's 2010 amendments and advisory opinions post-dating the amendments; and (2) if a juvenile judicial officer may serve on the board, given that the organization's Legislative and Public Policy Committee is not currently active and it no longer retains a lobbyist.

CONCLUSION:

We conclude that C.J.E.A.B. Advisory Opinion 2007-07, which was decided under the previous Code, is no longer applicable. Consequently, we withdraw the opinion.

We also conclude that, under the provisions of the existing Code, a juvenile judicial officer may sit on the board of the Joint Initiatives for Youth and Families as long as the judge ensures that his activities as a board member do not undermine his impartiality, give rise to the appearance of impropriety, result in the judge's frequent disqualification, or violate other provisions of the Code.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 3 of the Code requires judges to conduct their "personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." Under Rule 3.1,

³ <http://www.jointinitiatives.org/page.asp?id=36&name=Senate%20Bill%2094>

⁴ <http://www.jointinitiatives.org/page.asp?id=39&name=Way%20for%20Families%20%28HB1451%29>

judges may engage in extrajudicial activities, unless prohibited by law or the Code, but they must 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, stationary, 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 relevant portions of Rule 3.2 prohibit judges from appearing voluntarily at a public hearing before, or to otherwise consult with, an executive or a legislative body or official, except:

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

Rule 3.7(A)(6) provides, in relevant part, that

[s]ubject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations . . . concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including . . . serving as an officer [or] director . . . of such an organization or entity, unless it is likely that the organization or entity:

- (a) will be engaged in proceedings that would ordinarily come before the judge; or
- (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

DISCUSSION:

At the time Advisory Opinion 2007-07 was drafted, the Joint Initiatives for Youth and Families was composed of two specific groups—the integrated services committee, which focused on integrating and efficiently providing services for children and their families, and the legislative advocacy committee, which monitored legislation and supported legislation affecting children and family services on the local, state, and federal level. The organization's board also directed the reception and distribution of funds to governmental agencies that could be servicing children or families appearing before judges in dependency and neglect cases.

When we drafted Advisory Opinion 2007-07, we were concerned with a judge's participation on the board for two reasons. First, because the board's legislative advocacy activities were not measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent government branch, those activities were deemed "political activities," which fell outside the scope of and violated Canon 7. Second, we were

concerned that the judge could be viewed as “lending the prestige of [his] judicial office to a prohibited political activity,” which violated prior Canons 1 and 2B.

Like current Rules 3.1 and 3.7(A), old Canon 5B encouraged judges to participate in “civic and charitable activities that d[id] not reflect adversely upon the judge’s impartiality or interfere with the performance of judicial duties.” Despite Canon 5B’s language encouraging extrajudicial participation, however, Canon 7.A(d) expressly warned that “[a] judge shall not . . . engage in any other political activity except on behalf of measures to improve the law, the legal system, the administration of justice, or the role of the judiciary as an independent branch of government.” In light of the Code’s express prohibition on political activities falling outside of the legal system and the organization’s active legislative advocacy committee, we determined that the judge should not serve on the board. Moreover, we determined that, given the dual purpose of providing services for children but also actively encouraging legislation on behalf of children and their families, a judge could be perceived as lending the prestige of his or her judicial office to a political activity, which also violated the Code. Finally, even if the judge served on the board in a non-voting capacity, we concluded that the mere association with a board engaged in political activities could give the appearance of impropriety.

The Code was amended in 2010, and Canons 5 and 7 were eliminated. Under the revised Code, judges are still encouraged to participate in extrajudicial activities as long as they do not interfere with the proper performance of the judge’s judicial duties, will lead to frequent disqualification, would appear to undermine the judge’s independence, integrity, or impartiality, or would appear to be coercive. See Rule 3.1. As explained further by Comments [1] and [2] to Rule 3.1, judges are “permitted and encouraged to engage in educational . . . or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law,” and “[p]articipation in both law-related and other extrajudicial activities helps integrate judges into their communities, and further public understanding of and respect for courts and the judicial system.”

Under Rule 3.7(A)(6), judges are expressly allowed to serve on boards of educational and civic non-profit organizations that are not engaged in proceedings that would ordinarily come before the judge, the court of which the judge is a member, or any court subject to the appellate jurisdiction of the judge or court he serves and also, as long as the judge’s participation on the board does not violate the limitations on extrajudicial activities prescribed in Rule 3.1. Additionally, several of our opinions have recognized that under Rule 3.7, judges may ethically serve on boards of civic non-profit organizations. See C.J.E.A.B. Adv. Op. 2013-01 (judge may serve on board of directors of Colorado Organization for Victim Assistance); C.J.E.A.B. Adv. Op. 2012-01 (judge may serve as chair of the board of directors of a non-profit organization benefitting senior citizens). The requesting judge has limited his inquiry to whether a juvenile judicial officer may serve on the board. However, we caution any judicial officer, juvenile or otherwise, to question whether participation on the board of the Joint Initiatives for Youth and Families would lead to frequent disqualification, raise impropriety concerns, or otherwise impact the judge’s ability to discharge his or her judicial duties. Assuming that no impropriety exists and that the judge’s participation will not lead to frequent disqualification, we believe such participation is permissible within the limitations of Rules 3.1 and 3.7.

The question remains, however, whether a judge may serve on a board when the board engages in legislative advocacy. Rule 3.2 prohibits a judge from appearing voluntarily at a public hearing, before or to otherwise consult with an executive or a legislative body or official, except

in connection with matters concerning the law, legal system, or the administration of justice or in connection with matters about which the judge acquired legal knowledge or expertise in the course of his or her judicial duties. Though the language of Rule 3.2 resembles old Canon 7, Canon 7 prohibited judges from engaging “in any . . . political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.” (Emphasis added). Rule 3.2 is not so expansive and, in relevant part, prohibits consultation “with an executive or a legislative body.” Comment [1] to Rule 3.2 explains that judges have “special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.” Comment [2], however, tempers the explanation in Comment [1] and cautions that “in appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code. . . [including] 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.”

While the comments to Rule 3.2 allow limited participation with government officials, as indicated in our prior opinions, a judge should still consider whether the board’s legislative advocacy activities, particularly those that do not concern the law, legal system, or the administration of justice, would be inconsistent with the independence, integrity, or impartiality of the judiciary, see C.J.C. 3.1(C) and 3.2, or would give the impression that as a board member, the judge is lending the prestige of his or her judicial office to support the board’s legislative objectives. See C.J.C. 1.3, 2.4(C), and 3.2.

We also find the language and commentary in Rule 3.4 useful, even though it applies to participation on a governmental board and is not directly applicable. Rule 3.4 provides that “[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.” Comment [3] to Rule 3.4 is particularly informative and explains that “[c]omplete separation of a judge from extracurricular activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.” Further, when “considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board . . . relates to the law, the legal system, or the administration of justice.” Comment [3] recognizes, however, that “to effectuate the goal of encouraging judges to participate in their communities, the relationship between the board’s mission and the law, legal system, or administration of justice should be construed broadly” and that “[a]ny judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid.” Finally, Comment [3] recognizes that “[t]he changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper to continue the affiliation.”

Given the amendments to the Code and its endorsement for judges to participate in extrajudicial activities within the parameters of the Code, we conclude that a judge may serve on the board of Joint Initiatives for Youth and Families, whether the board’s legislative advocacy committee is active or not, as long as the judge’s participation would not lead to an appearance of partiality in cases coming before that judge and complies with the Code’s requirements. Our decision is consistent with our recent opinions, see C.J.E.A.B. Adv. Op. 2013-01 and C.J.E.A.B. Adv. Op. 2012-01, and also with similar opinions from other jurisdictions, which have

determined that as long as the activities in which a judge participates do not cast doubt on the judge's ability to act impartially or exploit the judge's position, judges may participate in legislative activities. See e.g., Utah Jud. Ethics Adv. Comm. Informal Op. 01-1 (2001) (judge may support or oppose a bill that is pending before the state legislature); Tex. Comm. on Jud. Ethics Op. 254 (1999) (judge may publicly support new legislation creating judicial compensation commission); Ark. Jud. Ethics Adv. Comm. Op. 94-01 (1994) (judge may take public stand in favor of or opposed to, or indifferent to a proposed sales tax); but see N.Y. Adv. Comm. on Jud. Ethics Op. 06-120 (2006) (judge who presides over felony matters should not serve on local committee that will ask New York state legislature to mandate drug testing for middle and high school students as it would cause doubt on judge's independence and capacity to serve impartially).

Thus, we conclude that a judicial officer may serve on the Joint Initiatives Board for Youth and Families as long as doing so would not lead to the judge's frequent disqualification or otherwise interfere with his ability to perform judicial duties. The judge must further ensure that any activities as a board member do not undermine his impartiality, give rise to the appearance of impropriety, or violate other provisions of the Code.

We further conclude that, given Advisory Opinion 2007-07's heavy reliance on now eliminated Canon 7's broad prohibition on judges participating in "political activities," Advisory Opinion 2007-07 is no longer applicable. We, therefore, withdraw C.J.E.A.B. Advisory Opinion 2007-07.

FINALIZED AND EFFECTIVE this 14th day of November, 2016.