

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2018-01
(Finalized and effective January 29, 2018)

ISSUE PRESENTED:

Whether a judge may help plan, play in, and invite others to play in a golf tournament designed to raise funds for an endowed scholarship honoring the judge's late son if the judge's name and title are not used to promote the tournament.

SUMMARY:

The golf tournament may bear the name of the judge's late son, and because it does not apply to others on the tournament committee, the Code of Judicial Conduct ("Code") does not prevent them from inviting family friends, lawyers, non-lawyers, and others from playing in the tournament or from soliciting funds. Subject to the applicable Code provisions discussed below, the judge may help plan the tournament, may personally solicit family members and judges not under the judge's supervision or appellate authority to participate in the tournament, and may attend and play in the tournament.

BACKGROUND:

A scholarship has been established bearing the name of and honoring the requesting judge's late son at the university he attended before his passing. The university is solely responsible for determining to whom the scholarship will be awarded to. The scholarship is endowed, but to help grow the endowment, the judge's family plans to hold an annual golf tournament, which will also bear the son's name; all proceeds will benefit the scholarship fund. A tournament committee composed of the judge's spouse and others will plan and market the tournament. The judge is not part of the tournament committee but would like to assist with planning and to play in the tournament. The tournament fee will include golf and a dinner. There will be a silent auction at the dinner. The judge's name and title will not be used in the marketing materials, but the name of the judge's son will appear. The judge does not, personally, intend to ask anyone to play in the tournament, but several members of the Colorado Bar have already indicated that they intend to play. The requesting judge asks the following:

1. Whether there can be a tournament if the judge does not lend his or her name or title to it.
2. Whether the name of the judge's son may be used in the title of the tournament, the invitation, and marketing materials.
3. Whether the tournament committee may invite friends of the family who are attorneys to play in the tournament.
4. Whether the judge may help plan the tournament.
5. Whether the judge may personally invite people to play in the tournament.

6. Whether the judge may attend the tournament, dinner, and silent auction, and whether the judge may play in tournament.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT:

The Code provisions most relevant to the inquiry are Rules 1.3, 3.1, and 3.7(A). 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.”

Rule 3.1 sets forth the extent to which judges may participate in extrajudicial activities. Subsections (B), (C), and (D) provide that when engaging in extrajudicial activities, a judge shall not (1) “participate in activities that will lead to frequent disqualification of the judge,” (2) “appear to a reasonable person to undermine the judge's independence, integrity, or impartiality,” or (3) “engage in conduct that would appear to a reasonable person to be coercive.” Comment [1] of Rule 3.1 clarifies that “[t]o the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities . . . even when the activities do not involve the law. See Rule 3.7.”

Subject to Rule 3.1, Rule 3.7 governs the extent to which judges may participate in certain extrajudicial activities “sponsored by organizations or governmental entities 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.” Rule 3.7(A)(1) permits judges to assist “in planning related to fund-raising” and to participate “in the management and investment of the organization’s or entity’s funds.” Rule 3.7(A)(2) provides that a judge may solicit contributions on behalf of “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.”¹

Rule 3.7(A)(4) allows judges to “appear[] or speak at, receiv[e] an award or other recognition at, be[] featured on the program of, and permit[] his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.”

DISCUSSION:

We begin by noting that the Code applies only to full-time and certain part-time judges and thus does not bind any of the participants in the golf tournament or restrict the tournament from happening, regardless of what the requesting judge does or does not do. Accordingly, the tournament committee may invite anyone, including friends of the family, who happen to be attorneys, to play in the tournament. Also, the name of the judge’s son may be used in the tournament marketing materials, the title of the tournament, and the invitations.

¹ The Code defines a “member of the judge’s family” as “a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.”

1. **Whether the judge may help plan the tournament.**

Subject to the requirements of Rule 3.1, Rule 3.7(A)(1) permits judges to assist charitable organizations or entities in “planning related to fundraising.” Planning a tournament to raise scholarship funds would not “interfere with proper performance of judicial activities; lead to frequent disqualification; [or] appear to undermine the judge’s independence, integrity, or impartiality”; nor would it be an activity that “would appear to a reasonable person to be coercive.” Therefore, such action would not violate Rule 3.1. Accordingly, the judge may help with the planning of tournament, and we answer question 4 affirmatively. See, e.g., NM Adv. Comm. Jud. Eth. No. 16-01 (judge may help event’s managing board organize, plan, and carry out concert benefitting marching band of local high school).

2. **Whether the judge may personally invite people to play in the tournament.**

Subject to the limitations of Rule 3.1 discussed above, Rule 3.7(A)(2) allows judges to solicit contributions for a charitable “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 restrictions on solicitation are designed to prevent coercion and impropriety. Because no concerns of coercion or impropriety arise among the judge’s family or certain judicial peers, the requesting judge may personally invite family members and judges that are not under the judge’s supervision or appellate authority to play or participate in the tournament. See Raymond McKoski, CHARITABLE FUND-RAISING BY JUDGES: THE GIVE AND TAKE OF THE 2007 ABA MODEL CODE OF JUDICIAL CONDUCT, 813-14 (“The relationship of a spouse, parent, child, brother or sister is so basic that it renders irrelevant the judge’s official status,” as such close family members would not feel pressured to donate, and where supervisory authority is not present, “[a] judge, unlike a non-judge, simply is not influenced by a soliciting judge’s official status and is also unlikely to expect a favor from a judge of equal or lower rank.”). Accordingly, we also answer question 5 affirmatively, subject to the solicitation restrictions of Rule 3.7(A)(2).

3. **Whether the judge may attend the tournament, dinner, and silent auction, and whether the judge may play in tournament.**

Whether and the extent to which a judge may participate in a charitable fundraising event that does not “concern the law, the legal system or the administration of justice” is a question judges frequently grapple with because the last clause of Rule 3.7(A)(4) restricts a judge from participating in non-legal fundraising events:

[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 . . . appearing or speaking at, receiving an award of other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system or the administration of justice.

Emphasis added. Despite the plain restriction in subsection (A)(4), Rule 3.7 Comment [3] provides that

[m]ere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph 4(A). It is also generally

permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

Comment [3] seems at odds with the clear directive in Rule 3.7(A)(4) prohibiting judges from participating in fundraisers that are not, in some way, related to the law. The confusion is compounded because the Code encourages judges “to engage in appropriate extrajudicial activities . . . even when those activities do not involve the law.” See C.J.C. Rule 3.1, Comment [1].

How is a judge supposed to resolve the confusion created by Rule 3.7 and its commentary? Under the plain language of Rule 3.7(A)(4), a judge could speak at and be featured in the program at a fundraiser for the local bar association, but that same judge could not participate in a bike ride benefitting a cancer charity even though the judge is just another anonymous rider in the crowd. The incongruity between permissible participation for law-related fundraisers and impermissible participation for non-law-related fundraisers may lead to confusion.

Accordingly, like other state judicial ethics boards that have already done so, we think it is necessary to reconcile the apparent discrepancy between Rule 3.7(A)(4) and Comment [3] and other analogous comments encouraging judges to participate in extrajudicial activities. Thus, the remainder of this opinion is intended to provide guidance to judges faced with these recurring situations.

a. Advisory Opinion 2013-04

We have discussed the restrictions on participating in charitable fundraising before. In Advisory Opinion 2013-04, the requesting judge was asked to contribute a handcrafted mask to be displayed in a shopping mall and sold in an online auction for “The Mask Project”—the annual fundraiser for the Denver Hospice. Local artists, celebrities, sports figures, and community leaders all contributed masks to The Mask Project, and the online auction identified the person who had contributed the mask.

We determined that contributing a mask to be sold at the fundraising event, which concerned a charity but did not concern the law, legal system, or the administration of justice, violated the Code for two reasons. First, it was an improper abuse of judicial prestige under Rule 1.3 because the apparent success of the fundraiser stemmed, at least in part, from the influence and prestige of the individuals who contributed masks. By participating in the fundraiser and submitting a mask that identified her by name and title, the judge would allow the Denver Hospice to use the prestige of her judicial office to encourage bids. Second, contributing a mask was the equivalent of soliciting a contribution or fundraising for the organization, which violated Rule 3.7(A)(4).² We clarified that Rule 3.7(A)(4) forbids both direct and indirect involvement in fundraising efforts on behalf of non-law-related organizations, and we concluded that “the

² We also concluded that participating in The Mask Project would violate Rule 3.7(A)(2) because, by participating in the online auction, the judge would be indirectly soliciting contributions from individuals other than the judge’s family members and judges whom the requesting judge had supervisory or appellate authority over.

prohibition against soliciting contributions on behalf of non-profit organizations prohibits both active and passive solicitation on behalf of the organizations that are not law related.” Even if the solicitation were passive, donors could feel pressured to make contributions or could feel entitled to future favors from the judge in exchange for their donations.

b. Ethics Opinions from Other Jurisdictions

We have not yet considered the extent, if any, to which a judge may attend or participate in a non-law-related fundraising activity sponsored by or on behalf of a charitable, educational, religious, or fraternal organization. But we have noticed a distinct pattern in other jurisdictions that have addressed the issue: When the element of coercion or solicitation—either direct or indirect—is present, participation is impermissible. On the other hand, when the judge’s participation is minimal or the same as that of the other participants, such participation is permissible.

First, for the same reasons we articulated in Advisory Opinion 2013-04, several other jurisdictions have concluded that it is inappropriate for judges to use their status to solicit or encourage donations at charitable events. See, e.g., PA Conf. St. Trl. Jud. Eth. Comm. Ad. Op. 2015-03 (“While celebrities and other government officials may lend their personal, professional or other forms of celebrity status to the fundraising efforts of an organization, such activity by a judge is prohibited.”); Fla. Jud. Ethics Adv. Comm. Op. 03-16 (2003) (judge’s artwork could not be used at a fund-raising event because it would be an abuse of judicial prestige); Il. Jud. Eth. Op. 99-1 (judge may not help raise funds for a charity be service as a “celebrity bagger” at fundraising event held at supermarket); Ariz. Jud. Ethics Adv. Comm. Op. 94-4 (1994) (judge could not agree to have lunch with a successful bidder at a charity auction because it was an improper use of judicial prestige). Further, at least one jurisdiction has advised that, given the Code’s directive to avoid the appearance of impropriety, a judge’s participation in fundraising activities should be evaluated under a reasonable person standard. See Arthur Garwin et al., Annotated Model Code of Judicial Conduct 378 (2d ed. 2011). Under this standard, even if the judge believes that his or her participation would not influence others to donate funds or cause them to believe a donation could curry favor with the judge, a particular activity may be prohibited. See Ariz. Jud. Ethics Adv. Comm. Op. 00-06 (2000) (omnibus opinion on judicial participation in fundraising activities).

Second, several jurisdictions have determined that lesser degrees of participation in non-law related fundraisers 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 Annotated Model Code of Judicial Conduct at 378. In these jurisdictions, the judge’s participation is permissible because it is de minimis, the judge is not being singled out for “special” treatment, or the judge’s involvement does not differ from that of other volunteers or participants. See, e.g., N.Y. Advisory Comm. on Jud. Ethics, Op. 07-17 (2007) (judge may help plan, register participants, set up for, and walk on a team for a walk-a-thon raising money for a charitable organization dedicated to fighting a serious illness); Ariz. Jud. Ethics Adv. Comm. Op. 00-06 (2000) (permitting a judge to play on a softball team in charity game and also permitting judge to serve at church car wash because “the judge’s participation is not exceptional, but, rather the same as everyone else’s involved in the event”); Ind. Judicial Qualifications Comm’n, Op. 1-96 (1996) (personal participation in non-law related fundraising events is not necessarily prohibited so long as the activity does not raise concerns about coercion or exploitation of the judicial office, and does not demean the office, cast doubt

on the judge's impartiality, or interfere with the performance of judicial duties); Ill. Jud. Ethics Comm. Op. 95-23 (1995) (approving judge's acting role in a non-profit civic organization's charity production of a play); N.Y. Advisory Comm. on Jud. Ethics, Op. 90-97 (permitting judge to participate as a player or umpire in a softball game raising funds for charity).

In sum, other jurisdictions that have addressed the issue of judicial participation in a non-law-related fundraising event have permitted participation when there is no specter of coercion or solicitation present. We think this approach is sound.

c. Rule 3.7(A)(4) of the Model Code of Judicial Conduct

The approach adopted in other jurisdictions reflects the intent of the Joint Commission that drafted Rule 3.7(A)(4) of the ABA Model Code of Judicial Conduct, as described in the Reporter's Explanation of Changes to the ABA Model Code of Judicial Conduct.³ Colorado's Rule 3.7(A)(4) is modeled after the same rule of the 2007 Model Code of Judicial Conduct. Prior to 2007, the Model Code did not carve out an exception for judges to participate in fundraising event concerning the law, the legal system, or the administration of justice. Despite the change in 2007, the "official comments to Rule 3.7 of the 2007 Code do not explain the basis for the change from previous Model Codes. One has to look to the unofficial Reporter's Explanation of Changes that accompanies Rule 3.7." Raymond McKoski, CHARITABLE FUND-RAISING BY JUDGES: THE GIVE AND TAKE OF THE 2007 ABA MODEL CODE OF JUDICIAL CONDUCT, 817.

The Reporter's commentary on Rule 3.7(A)(4) notes that the "Code of Conduct for United States Judges provides that as a general matter, judges may not participate in the fund-raising activities of charitable and other civic organizations other than by attending, which is similar to the Commentary in the 1990 Code. In context, however, the federal provision appears to be limited to non-law-related organizations and activities." The Reporter goes on to note that "[t]he Commission adopted the same general stance in Rule 3.7(A)(4), but made the implicit exception explicit: a judge *is* permitted to be a speaker or participant at an event that has a fund-raising purpose, *but only if the organization or entity is a law-related one.*" The Reporter's rationale for making the distinction is the risk that persons will feel coerced into donating or will attempt to curry favor with a sitting judge by donating. The Commission drew the distinction between law-related organizations and events and other events because

[i]t was felt that solicitation . . . in a law-related organization, such as a bar association or moot court society, would be perceived as more natural or more appropriate than . . . [for] a fine arts society or the American Red Cross. This perception is related, at least indirectly, to the thematic requirement of avoiding abuse of the prestige of judicial office.

In the Commission's view, there was a distinction between a judge, who happens to be a dedicated member of an environmental protection organization, using his position to coerce a donation for the environmental organization he supports and a judge using his position as a leader in the legal community to increase funds for a law-related cause.

³ The "Reporters' Explanations of Changes" were not approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They were drafted by the Commission's Reporters, based on the proceedings and record of the Commission, and are not adopted as part of the Model Code. Nevertheless, they are helpful for deciphering the intended meaning of the Commission's amendments.

The Reporter's commentary is instructive. It demonstrates that the Commission was untroubled by a judge's *attendance* at a fundraising event, whether the event related to the law or not, but it was troubled by a judge's *participation* beyond mere attendance—like recognition, speaking, or being featured in a program. Thus, it limited anything beyond attendance that could potentially present the dangers of improper use of judicial prestige or soliciting to fundraising events concerning the law, the legal system, or the administration of justice.⁴

Comment [3] to Rule 3.7 of the Model Code is the same as Comment [3] of our Code. The Reporter's Explanation of Comments of Comment [3] to Rule 3.7 is extremely helpful and further demonstrates that the rule permits a judge's attendance and even de minimis participation at a non-law related fundraising event. It explains that

[n]ew Comment [3] is designed to provide a safe harbor for certain minor and noncoercive activities undertaken in connection with an organization's or entity's fundraising efforts. When a judge donates time to serve food or serve as an usher or other facilitator at an event, the dangers associated with direct solicitation of funds are not present. It is not logical to assume that someone will make a larger donation merely because a judge is tending the barbeque pit at a charity picnic.

The Commission stopped short, however, of giving as specific examples situations involving the handling of money, such as when a judge serves as a ticket-taker or cashier (at a charity bingo night, for example, or a charity auction). At the same time, these activities were not specifically excluded either. Whether such activities are appropriate depends on the analysis of the overall event, and the significance of the judge's participation. As long as there is no coercion—even subtle and unstated coercion—and as long as the judge's position as a judge is not being exploited, the activity is permissible.

Thus, as evident from the Reporter's Explanation of Changes, though it wasn't clearly articulated in Rule 3.7(A)(4), it seems the Commission intended to permit judges to attend non-law-related fundraising events and to allow judges to participate as long as the participation was minimal, the judge was not singled out, no perception of coercion was present, and the judge's position was not misused.

d. Factors to Consider

Based on our prior fundraising opinions, the opinions from other jurisdictions, and the spirit of Rule 3.7(A)(4) as described by the Reporter's Explanation of Changes, we conclude that a judge's participation in a fundraising activity sponsored by or on behalf of a religious, charitable, fraternal, or civic organization that does not concern the law, the legal system, or the administration of justice is not necessarily prohibited as long as the activity does not raise concerns about coercion or exploitation of the judicial office, demean the office, cast doubt on the judge's impartiality, or interfere with the performance of judicial duties. The extent to which a judge may participate under Rule 3.7(A)(4) should be considered on a case-by-case basis. In making the determination, a judge should consider many factors, including but not limited to the following:

1. The type of event and who is likely to attend or participate in the event;

⁴ At least, per the Reporter, that was the Commission's intent though it is not apparent from the plain language of Rule 3.7(A)(4).

2. The organization sponsoring the event or the cause intended to benefit from the event;
3. The type of participation in the event by the judge;
4. Whether anyone at the event knows that the judge is a judicial officer;
5. Whether the judge's name and title are being used;
6. Whether the judge is singled out for special attention; and
7. Whether the judge's participation is the same as that of other participants or whether it is distinguishable.

The overall inquiry is whether the participation, regardless of how minimal, presents or could present even the slightest perception of coercion or misuse of judicial prestige by the judge or by others.

Applying these factors, we answer question 6 affirmatively and conclude that the judge may attend the tournament, dinner, and silent auction. We think the judge's mere presence at the silent auction will not make it any more likely that the attendees will enter higher bids on the auction items. Likewise, the judge may also play in the tournament because the elements of coercion and solicitation are not present. The tournament players will have already purchased their tickets in advance of the event, and the judge's presence as a player will not coerce any donations. Also, the judge, like the other attendees, will merely play golf and will not be singled out as a judge or treated differently from the other players, so there is no abuse of judicial prestige.

CONCLUSION:

In consideration of these factors and others discussed in this Opinion, we answer all questions raised in the Background section affirmatively.

FINALIZED AND EFFECTIVE this 29th day of January, 2018.