

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2012-05
(Finalized and effective September 24, 2012)

ISSUE PRESENTED:

The requesting judge is a district court judge who regularly presides over dependency and neglect and other proceedings in which the Denver Department of Human Services (DDHS) may be a party. The judge requested an advisory opinion regarding whether she may participate on the Colorado Department of Human Services' (CDHS) newly created Child Welfare Executive Leadership Council (Council).

The Council is comprised of leaders in child abuse prevention and protective services from across the state and will provide advice and counsel to CDHS on matters related to protecting vulnerable children and advancing its child protective services system in furtherance of the state's new Child Welfare Plan, "Keeping Kids Safe and Families Healthy." More specifically, the Council's letter inviting the judge's participation indicated that the Council's role will be to: (1) advise the Executive Director and other CDHS officials on statewide issues relating to children and families; (2) review strategies and recommendations to strengthen the child protective services system, including initial assessment, permanency planning, substitute care, adoption, independent living, kinship care, prevention and post-permanency services; (3) assist CDHS in planning and preparing Colorado's efforts on the Child and Family Services Review, the Child Welfare 3-Year Master Plan, the Child Welfare Training Plan and other statewide plans, as requested; (4) coordinate and communicate with key partners; (5) propose strategies to prevent abuse and neglect, prevent re-entry, reduce disproportionality and disparities, and advance post-permanency supports for children and youth in the child welfare system; and (6) develop fiscal and organizational strategies that enhance resources available to families and children, reduce fragmentation, enhance service coordination and integration with other family service systems, and support local systems of care.

The judge requested an advisory opinion addressing (1) whether the judge may ethically participate on the Council either generally or with respect to particular activities, and (2) if the judge can ethically participate in only certain activities, is there a means to "effectively limit [the judge's] role to avoid any ethical concern," such as "having [the judge's] abstention from discussing or voting on prohibited topics noted in the minutes of any meeting."

CONCLUSION:

The judge may participate on the Child Welfare Executive Leadership Council, because it has some relationship to the law, the legal system, or the administration of justice. The judge may participate in any of the Council's activities, provided doing so would not undermine the judge's impartiality, give rise to the appearance of impropriety, or violate other provisions of the Code. Having the judge's abstention from discussing or voting on prohibited topics noted in the

minutes of any meeting is one acceptable means of reflecting limitations on the judge's role to avoid ethical concerns.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 3 requires a judge to "conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." The Rules under this Canon delineate more specifically the permissible scope of a judge's extrajudicial activities, and, because the Council was established by and serves a state agency (CDHS), the principal Rule at issue here is Rule 3.4, which 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 1 to Rule 3.4 notes that the Rule "implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice," but cautions judges to "assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary." Thus, the judge's inquiry implicates not only Rule 3.4, but also:

- Canon 1 and Rule 1.2, which require judges to promote public confidence in "the independence, integrity, and impartiality of the judiciary," and to "avoid impropriety and the appearance of impropriety";
- Canon 2, which provides that a "judge shall perform the duties of judicial office impartially, competently, and diligently";
- Rule 2.1, which provides that "the duties of judicial office . . . shall take precedence over all of a judge's personal and extrajudicial activities";
- Rule 2.2, which requires judges to "perform all duties of judicial office fairly and impartially";
- Rule 2.4(B) and (C), which provide that a judge "shall not permit . . . other interests or relationships to influence the judge's judicial conduct or judgment," and "shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge";
- Rule 2.10(B), which provides that a judge "shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office";
- Rule 3.1(A), which prohibits judges from participating in "activities that will interfere with the proper performance of the judge's judicial duties";

- Rule 3.1(B), which provides that judges may not “participate in activities that will lead to frequent disqualification of the judge”;
- Rule 3.1(C), which precludes judicial participation “in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality”;
- Rule 3.5, which provides that judges “shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties”;
- Rule 3.11, which delineates the circumstances requiring disqualification; and
- Rule 3.12, which permits judges to “accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

DISCUSSION:

The Board has issued several opinions addressing the circumstances in which a judge’s potential service on a governmental committee is consistent with the Code. Those opinions acknowledged the tension between the proscription against service on any commission that is not law-related and the Code’s encouragement of judges to actively participate in their communities, and attempted to establish a workable standard for determining when a proposed activity is sufficiently law-related to be permissible under the Code. In CJEAB Adv. Op. 2005-04, the Board adopted the rule that “there must be a close nexus between what the [governmental] commission does and improvement of the law, legal system, or the administration of justice,” and, applying that standard, concluded that a judge may not serve on a municipal crime control and prevention commission, largely because of the commission’s wide-ranging policy goals. The Board applied this "close nexus" test in several subsequent opinions. *See, e.g.,* CJEAB Adv. Ops. 2009-03, 2007-11, 2007-10, and 2006-06.

Those opinions were all decided under the pre-2010 Code, however, and when the Colorado Supreme Court adopted the new Code, it added the following comment, explicitly rejecting the "direct nexus" test the Board applied in those decisions:

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Every governmental board, committee and commission is different and must be evaluated independently to determine whether judicial participation is appropriate. In considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board or commission relates to the law, the legal system, or the administration of justice. To effectuate the Code's goal of encouraging judges to participate in their communities, the relationship between the

board's mission and the law, legal system, or the administration of justice should be construed broadly. Any judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid. . . .

C.J.C. Rule 3.4 cmt. [3]. We note that this comment is unique to the Colorado Code of Judicial Conduct, and is not included in the ABA Model Code. Accordingly, opinions issued by other state judicial ethics advisory boards applying the “direct nexus” test under the new Code cannot guide our analysis of the requesting judge’s inquiry. *See, e.g.*, Conn. Comm. on Judicial Ethics Op. 2011-02.

Instead, in light of our Supreme Court’s directive that we construe the requirement in Rule 3.4 that an extrajudicial assignment concern the law, the legal system, or the administration of justice broadly, we conclude that all that is required is that the work of the governmental committee, board, or commission bear some relationship to how courts go about performing their statutory or constitutional duties, even if its law-related work is just one aspect of a more wide-ranging policy-making mission or focus.

Applying that expansive test to the current request, we conclude that at least some of the Council’s work is related to the law, the legal system, or the administration of justice. Specifically, the Council’s work in furtherance of the state’s Child Welfare Plan, particularly its involvement in proposing “strategies to prevent abuse and neglect, prevent re-entry, reduce disproportionality and disparities, and advance post-permanency supports for children and youth in the child welfare system,” has some relationship to dependency and neglect proceedings and other aspects of the legal system. *See* Chief Justice Directive 98-02 (directive concerning permanency planning in dependency and neglect cases requiring each judicial district to adopt case processing and reporting procedures to implement the directive in collaboration with the local department of social services and attorneys involved in D&N cases, and requiring judges to implement the procedures adopted in their district). We thus conclude that the requesting judge may accept the appointment to the Council.

The Supreme Court recognized in comment 3, however, that, even if the mission and work of the extrajudicial board or commission is law-related, “[a] judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality.” The Court further cautioned 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.” *See also* C.J.C. Rule 3.2 cmts. [1] and [2] (noting that “[i]n appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code,” including those requiring judges to be impartial and avoid the appearance of impropriety); Ak. Adv. Op. 2001-01 (judge’s service on a state Children’s Justice Act task force created by federal statute and requiring state judge membership should be limited to roles permitted by ethical limitations; “whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge

would lead to an appearance of partiality in cases coming before that judge”); Md. Jud. Ethics Comm. Op. 2011-24 (judge may serve as a member of a Public Defender Regional Advisory Board, but should avoid participating in matters that are executive or legislative in nature, such as “employee and office management issues, as well as funding and budgetary issues,” because doing so “might undermine a judge’s independence and impartiality”).

Indeed, although the test for relatedness to the law or the legal system is different under the current Code than under the pre-2010 Code, the substance of these additional ethical limitations on judicial participation in extrajudicial activities is the same under both Codes, and the Board consistently noted these concerns – particularly concerns about impartiality and the appearance of impropriety – in its previous opinions regarding the propriety of judicial appointments to governmental committees. *See e.g.*, CJEAB Adv. Op. 2010-02 (Service by magistrate judge with primary responsibility for the dependency and neglect docket for his district on an interagency oversight board would reflect adversely on his impartiality and could create an appearance of impropriety after the Board signed an MOU with local Department of Social Services that would provide greater funding for the Board if fewer juveniles were ordered into out-of-home placement “[e]ven if the judge’s determinations in particular D&N cases were not in fact informed by the financial implications for the board.”); CJEAB Adv. Op. 2007-11 (Judge may ethically serve on the Colorado Child Support Commission because its work is law-related, its composition “does not suggest bias towards one side or another,” and service on the Commission “would not call into question the judge’s ‘impartiality, effectiveness, and independence.’”); CJEAB Adv. Op. 2007-10 (Judge may serve on the Justice Coordinating Committee because its work is law-related and its “general and neutral purposes” do not “cast doubt on the requesting judge’s ability to impartially decide issues before him.”).

Thus, while the requesting judge may ethically accept the appointment to the Council, she must continuously reevaluate the propriety of her affiliation with the Council in general and of participating in particular activities, and be mindful of the need to avoid involvement in activities that might lead to her frequent disqualification, call her impartiality into question, require a time commitment that would interfere with her ability to perform the obligations of judicial office, or otherwise violate the Code. *See* C.J.C. Rule 3.4, cmts. [1] and [3]. The judge should make her limitations clear to the Council, and when she concludes that she may not ethically participate in a particular activity, having her abstention from discussing or voting on prohibited topics noted in the minutes of any meeting is an acceptable means of reflecting limitations on her role to avoid ethical concerns. If, however, the nature of the Council’s activities change such that her continued affiliation with the Council would be improper (such as if her involvement leads to her frequent disqualification from D&N cases to which her local Department of Human Services is a party), her abstention from individual activities may be insufficient to alleviate the impropriety. *See* CJEAB Adv. Op. 2010-02 (where judicial involvement with a governmental board would reflect adversely on the judge’s impartiality and create an appearance of impropriety, “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” certain matters).

FINALIZED AND EFFECTIVE this 24th day of September, 2012.