

October 20, 2004

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

**C.J.E.A.B. ADVISORY OPINION 2004-02
(Finalized and effective October 20, 2004)**

ISSUE PRESENTED

“Is it appropriate for a mentee judge to discuss ‘pending or impending matters’ with a mentor judge, whether or not the two judges are from the same, or a different, judicial district within the state of Colorado?”

CONCLUSION

While a mentee judge may consult with his or her mentor judge (or any other judge) on “pending or impending matters,” the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge.

Pursuant to Canon 3 A. (4) of the Colorado Code of Judicial Conduct (Code), in the event the mentee judge believes that the advice obtained from the mentor judge has gone beyond such “aid,” the mentee judge shall give notice to the parties of the person consulted, the substance of the advice, and afford the parties reasonable opportunity to respond.

FACTS

In 2001, the Colorado Supreme Court created a “Mentor Judge Program” for newly-appointed judges in Colorado. The purposes of this program were to provide new judges in Colorado “with an experienced colleague who can be a source of information, assist with trouble-shooting and someone who can serve as a role model during the stressful time of transition to the Bench.” (Colorado Judicial Department, “Mentor Judge Manuel,” 2001, page 1).

The requesting judge presented a question to the Colorado Judicial Ethics Advisory Board as to whether or not a mentor judge and that judge's mentee are permitted to discuss "pending or impending" matters that the mentee judge might be facing in the mentee judge's court regardless of whether or not the mentor judge and the mentee judge are from the same, or a different, judicial district within the state of Colorado. The requesting judge states that "Although the Mentor Judge Program does not specifically contemplate this activity, it obviously can occur."

APPLICABLE CANONS FROM THE COLORADO CODE OF JUDICIAL CONDUCT

Three (3) Canons of the Colorado Code of Judicial Conduct (Code) apply to an analysis of this issue. Canon 1 of the Code ("A Judge Should Uphold the Integrity and Independence of the Judiciary") states:

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."

Canon 2 A. of the Code ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All the Judge's Activities") states:

"A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 2 B. of the Code states:

"A judge should not allow family, social, or other relationships to influence the judge's conduct or judgment."

Canon 3 A. (4) of the Code ("A Judge Should Perform the Duties of His or Her Office Impartially and Diligently") states:

"A judge should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate or consider **ex parte** or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

The Commentary to Canon 3 A. (4) of the Code states:

“The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities.”

DISCUSSION

While advisory opinions from jurisdictions around the United States have addressed the issue of judges making public comments about “pending or impending” matters or cases, an opinion from Florida states that a judge “shall not make any public comment that might reasonably be expected to effect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing.” (Florida Committee on Standards Governing Judges, “Opinion 96-18,” September 4, 1996). In addition, an advisory opinion issued by Illinois holds that “a judge shall not initiate, permit, or consider **ex parte** communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.” (Illinois Judicial Ethics Committee, “Opinion No. 93-2”, September 21, 1993).

As noted above, in Colorado, the Commentary to Canon 3 A. (4) “does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities.” With regard to the issue set forth above, the purposes of such “consultations” are only to “aid” the mentee judge in making a final decision, not to actually influence, or appear to influence, the decision the mentee judge is responsible for making. That responsibility remains solely with the mentee-judge.

Therefore, a mentor judge, or any other judge for that matter, should be very careful to avoid providing any advice or guidance to a mentee-judge, or other judicial colleague, that might in any way actually influence, or appear to influence, the decision that the mentee-judge, or any other judge, may be about to make.

Pursuant to Canon 3 A. (4) of the Code, in the event the mentee judge believes that the advice obtained from the mentor judge has gone beyond such “aid,” the mentee judge shall give notice to the parties of the person consulted, the substance of the advice, and afford the parties reasonable opportunity to respond.

In this way, the mentee-judge also meets the standards set forth in Canons 1 and 2 of the Code. That is, by avoiding placing a mentee-judge in the position of either actually being influenced, or appearing to be influenced, in that judge's decision-making capacity, both the mentor judge and the mentee judge meet the standards set forth by Canons 1 and 2. Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2 A. and Canon 2 B. require that a "judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;" and, that a "judge should not allow family, social, or other relationships to influence the judge's conduct or judgment."

RESOLUTION AND OPINION

Therefore, with regard to the issue: "Is it appropriate for a mentee judge to discuss 'pending or impending matters' with a mentor judge, whether or not the two judges are from the same, or a different, judicial district within the state of Colorado?", while a mentee judge may consult with his or her mentor judge on "pending or impending matters," the extent of those consultations should be to "aid" the mentee judge in making a final decision, not to actually influence, or appear to influence, the decision the mentee judge is responsible for making. The final adjudicative responsibility for any decision resides solely with the mentee-judge.

Pursuant to Canon 3 A. (4) of the Code, in the event the mentee judge believes that the advice obtained from the mentor judge has gone beyond such "aid," the mentee judge shall give notice to the parties of the person consulted, the substance of the advice, and afford the parties reasonable opportunity to respond.

FORMALLY FINALIZED AND EFFECTIVE this 20th day of October, 2004, by the Colorado Judicial Ethics Advisory Board.

Eric Jorgenson, Esq. (Chairperson and attorney member)
Professor James E. Wallace (Vice-Chairperson and law professor member)
Barbara Crowfoot (citizen member)
Hon. Joseph R. Quinn (urban judge member)
Hon. Pattie P. Swift (rural judge member)

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