

**Wyoming Supreme Court Judicial Ethics Advisory Committee
Advisory Opinion 2014-03**

QUESTIONS PRESENTED:

The 2014 Wyoming Legislature appropriated approximately \$280,000.00 to establish a Judicial Learning Center at the Wyoming Supreme Court. That appropriation was contingent upon being matched by an equal amount of non-appropriated funds. Raising matching funds has given rise to three questions.

1. Does the Wyoming Code of Judicial Conduct prohibit the Administrative Office of the Wyoming Supreme Court from requesting and receiving private donations to help support the development of the Judicial Learning Center?
2. May third-party entities accept private donations on behalf of the Administrative Office to match funds to support the development of the Judicial Learning Center?
3. Does the Code of Judicial Conduct allow Justices to:
 - a. Participate in meetings with potential donors to explain plans for the Center (if not directly soliciting monies) and
 - b. Give presentations about the Center (if not directly soliciting monies).

APPLICABLE PROVISIONS OF THE WYOMING CODE OF JUDICIAL CONDUCT:

Preamble.

- (1) An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.
- (2) Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.
- (3) The Wyoming Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct

by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

Scope.

(1) The Wyoming Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

(2) The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

(3) The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

(4) Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

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Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.

A judge shall uphold and promote independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

* * *

Rule 1.2. Promoting Confidence in the Judiciary.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Comment.—

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

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Canon 3. A judge shall conduct the judge's personal and extrajudicial activities.

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.1. Extrajudicial Activities in General. A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall 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, stationery, 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.

Comment.—

* * *

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

* * *

Rule 3.7. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

(A) Subject to the requirements of Rule 3.1, a judge may participate in 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, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for 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;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or 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;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor 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.

(B) A judge may encourage lawyers to provide pro bono public legal services.

* * *

Terminology.

“‘Impropriety’ includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.”

Discussion:

The Wyoming Code of Judicial Conduct (“the Code”) begins with a Preamble, which sets forth general principles for judges. The first paragraph of the Preamble lays the foundation for what is to follow, and, in the Committee’s view, establishes the framework within which questions of judicial conduct should be evaluated:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

The second paragraph of the Preamble sets forth the standard against which judicial conduct should be measured: “Judges should . . . aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” The question, therefore, is whether a judge, acting indirectly through an arm of the court, should be involved in raising funds to match those appropriated by the Legislature. Given the foregoing language of the Preamble, the question becomes whether the proposed conduct “ensures the greatest possible public confidence in [the judiciary’s] independence, impartiality, integrity, and competence.”

After the Preamble, is the section on “Scope.” As noted above, that section, “provide[s] additional guidance in interpreting and applying the Code.”

After the Preamble and Scope sections, the Code begins with Canon 1: “A Judge shall uphold and promote the independence,¹ integrity,² impartiality³ of the judiciary, and shall avoid impropriety⁴ and the appearance of impropriety.”⁵ Canon 3 then says: “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”⁶ As noted above, these Canons are not binding. Rather, Canons “state overarching principles of judicial ethics that all judges must observe. . . .”⁷

With this background, the Committee now turns to the questions presented.

1. Does the Wyoming Code of Judicial Conduct prohibit the Administrative Office of the Wyoming Supreme Court from requesting and receiving private donations to help support the development of the Judicial Learning Center? Yes, for the reasons described below.

The Rule which is most on this point is Rule 3.7, which is entitled: “Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.”⁸ Paragraph (A) of that Rule says:

Subject to the requirements of Rule 3.1, a judge may participate in 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, including but not limited to the following activities: ⁹

* * *

The question thus becomes what does Rule 3.1 require?

¹ “Independence” means “a judge’s freedom from influence or controls other than those established by law.” *Id.* At Terminology.

² “Integrity” means “probity, fairness, honesty, uprightness, and soundness of character.” *Id.* At Terminology.

³ “Impartiality” means absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. *Id.* At Terminology.

⁴ “Impropriety” includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality. See Canon 1 and Rule 1.2.” *Id.* At Terminology.

⁵ *Id.* at Canon 1.

⁶ *Id.* at Canon 3.

⁷ *Id.* at Scope (2).

⁸ *Id.* at Rule 3.7.

⁹ *Id.* at Rule 3.7(A).

No provision of the Code can be read in isolation. Rather, all must be read in context. The context for the Code is the “overarching principles” of the Canons,¹⁰ and the general principles of the Preamble. In particular, Canon 1 and paragraph (1) of the Preamble stand out. Canon 1 says: “A judge shall uphold and promote independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” The last clause, with its focus on avoiding even the “appearance of impropriety,” is significant, and signifies the Code’s intent to hold judges to a higher standard than lawyers.¹¹ Paragraph (1) of the Preamble reinforces the importance of appearances:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

The commentary that accompanies each Rule is also helpful in determining that Rule’s meaning. The Comments “provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct.”¹² Comment [4] to Rule 3.1 provides both guidance and gives an apt example:

While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge’s solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.¹³

The Comment suggests that even permitted activities should be carefully evaluated for the “reasonable” possibility of the appearance of coercion. That is the Committee’s concern. We have no doubt that the judges have no interest in finding out who has given and who has not.

¹⁰ *Id.* at Scope [2].

¹¹ Under the ABA’s Model Code of Professional Responsibility, a version of which was in effect in Wyoming until 1986, lawyers were held to that standard. It was removed from the Model Rules in the early 1980s.

¹² WYOMING CODE OF JUDICIAL CONDUCT, Scope [3] (LexisNexis 2013).

¹³ *Id.* At Rule 3.1, cmt. [4].

Non-lawyers, in particular, all of whom are potential litigants, might reasonably perceive the court's indirect involvement as coercive.

Wyoming's judiciary is held in high public esteem. One way to ensure that continues is for an arm of the judiciary to not be involved in raising funds. Thus, neither Justices of the Supreme Court nor the Administrative Office of the Supreme Court should solicit or receive donations for a judicial learning center.

2. May third-party entities accept private donations on behalf of the Administrative Office to match funds to support the development of the Judicial Learning Center?

Yes. The Committee has no concern that a perception of coercion, as discussed above, could "reasonably" arise if a third party entity is directly involved.

3. Does the Code of Judicial Conduct allow Justices to:

- a. Participate in meetings with potential donors to explain plans for the Center (if not directly soliciting monies') and
- b. Give presentations about the Center (if not directly soliciting monies).

Canon 3 provides the starting point for this discussion: "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."

Rule 3.1 is entitled "Extrajudicial Activities in General." It provides:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall 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, stationery, 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.

Comment [1] to Rule 3.1 acknowledges that to the extent time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities **“In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.”** [Emphasis added.]

The fact situation presented to the Committee describes personal or extrajudicial activities of an educational or civic nature. The proposed activities appear to be ones that will enhance public confidence in the judiciary.

It is the Committee’s opinion that judges’ participation in meetings with potential donors to the Judicial Learning Center or presentations about the Center does not violate the Wyoming Code of Judicial Conduct.

Conclusion.

Judges are in a unique position to alter public perceptions of the judiciary. Since high confidence in the judiciary is critical to public willingness to obey court orders, anything which threatens that willingness is ethically impermissible and will not improve the administration of justice.

FINALIZED AND EFFECTIVE this 25th day of August, 2014, by the Wyoming Supreme Court Judicial Ethics Advisory Committee.