

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-01
(Issued April 30, 2018)

**PARTICIPATION IN RECORDED INTERVIEWS WITH NOT-FOR-PROFIT
EDUCATIONAL INSTITUTIONS**

ISSUE

May an Arizona judge participate in a recorded interview with a not-for-profit educational institute that he or she attended?

ANSWER

No, if the interview will be used for fund-raising purposes. Otherwise, yes, with qualifications.

FACTS

A judge has been asked to participate in a recorded interview about the judge's experience as a student at a not-for-profit Arizona college. The judge does not know the exact nature of the interview questions but anticipates being asked to discuss how the college played a role in the judge's professional development and career achievements. The judge will not wear a judicial robe during the interview, and the interview will not take place at the courthouse. The judge's judicial position, though, will presumably be discussed.

DISCUSSION

I. Applicable Code Provisions

Several provisions of the Arizona Code of Judicial Conduct ("Code") are relevant to this inquiry, including:

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.

Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office

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. 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 or demean the judicial office;

(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 activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

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

(A) A judge may not directly solicit funds for an organization. However, 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 organization or entity in planning related to fund-raising, volunteering services or goods at fund-raising events, 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 do so only if the event concerns the law, the legal system, or the administration of justice.

II. Analysis

This inquiry highlights the tension that can exist between the Code's exhortation that judges remain active members of and contributors to their communities, *see, e.g.* Rule 3.1, cmt 1 ("[J]udges are permitted and encouraged to engage in educational, religious, charitable, fraternal, or civic extrajudicial activities not conducted for profit"); Rule 3.1, cmt 2 ("Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system."), and the Code's sometimes-rigorous restrictions on extra-judicial activities. The Code, though, imposes "rules of reason" that are to be interpreted with "due regard for all relevant circumstances." Code, "Scope."

The committee perceives no significant ethical impediments posed by Rule 1.2. There is a theoretical possibility that questions posed (or answers given) could run afoul of Rule 1.2's mandate that judges act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. Generally speaking, however,

an interview that focuses on a judge's positive academic experiences is unlikely to prove problematic under Rule 1.2.

A more substantial question arises under Rule 1.3. Would a judge's participation in such an interview abuse the prestige of judicial office to advance the interests of a third party – here, the educational institution?

Judicial ethics committees from other jurisdictions have addressed similar questions, reaching divergent conclusions.¹ The California Judges Association, for example, has concluded it would be improper for a judge to appear in a video to be viewed by “potential students,” stating:

The request by a school to feature a judge in a video discussing the value of the education the judge received at the particular school to be shown to potential students would be a violation of [the rule prohibiting lending the prestige of judicial office to benefit others,] as the school's purpose is to encourage students to attend that school using the prestige of the judicial office and title.

California Judges Association, Judicial Ethics Committee, Opinion No. 72; *see also* Massachusetts Supreme Judicial Court Advisory Opinion 2017-02 (judge may not participate in university's video profile series featuring prominent alumni because doing so would abuse the prestige of judicial office); Supreme Court of Kansas Judicial Ethics Advisory Panel Opinion JE 159 (judge may not permit university to use his photograph in advertising campaign); Supreme Court of Wisconsin Judicial Conduct Advisory Committee Opinion 05-01 (university may not use judge's image, name, and title in advertising campaign).

Florida, on the other hand, has concluded that judges may permit educational institutions to feature them in advertising materials profiling successful alumni in an effort to inspire others to pursue higher education. *See* Florida Supreme Court Judicial Ethics Advisory Committee Opinion 97-28. Similarly, New York generally permits schools to use judges' names, photographs, and biographies in advertising campaigns for student recruitment. *See* New York Advisory Committee on Judicial Ethics, Opinion 02-21. The New York advisory committee reasoned that requiring a judge “to seek to bar his or her college or law school from pointing to the achievements of particular alumni/ae as reasons for considering enrollment” would “contravene the mandate that the Rules Governing Judicial Conduct are to be regarded as rules of reason.” *Id.*

¹ The committees have uniformly concluded, though, that judges may not permit their likeness or words to be used by educational institutions for fund-raising purposes.

Rule 1.3 prohibits “abuse” of the prestige of judicial office, not simply “use.” The Code does not define “abuse.” Common definitions include “a departure from legal or reasonable use,” *Black’s Law Dictionary* (9th ed. 2009) and “a corrupt practice or custom; improper or excessive use or treatment,” *Merriam-Webster Dictionary*, <http://merriamwebster.com/dictionary/abuse> (last visited March 22, 2018).

In several contexts, the Code permits judges to “use” the prestige of judicial office in extra-judicial activities. *See, e.g.*, Rule 1.3, cmt 2 (judges may write letters of recommendation using judicial letterhead in certain circumstances); Rule 3.7(A)(4) (judges may use judicial titles at fund-raising events concerning the law, the legal system, or the administration of justice); Rule 3.7(C)(2) (judges may endorse projects and programs related to the law, the legal system, and the administration of justice and “may actively support the need for funding of such projects and programs.”); Rule 3.7, cmt 4 (judge’s title or judicial office may be included on letterhead for educational, religious, charitable, fraternal, or civic organizations “if comparable designations are used for other persons.”). The Code implicitly deems such extra-judicial activities proper “uses” of the prestige of judicial office, as opposed to “abuses.”

If a judge is one of several graduates interviewed, the risk that the school is attempting to capitalize on the prestige of judicial office or that the judge’s interview will be perceived in that fashion is minimal. The inquiring judge will not wear a judicial robe, and the interview will not occur at the courthouse. Such factors are relevant in assessing whether the prestige of judicial office is being abused. Unless other participants are interviewed at their workplaces or wearing their professional garb – be it a construction hard-hat, medical scrubs, or a police uniform – a judge should not, through attire or location, be depicted as having any different or special status from other featured graduates.

The judge cannot solicit funds for the school. *See* Rule 3.7(A). Given that prohibition, the judge must take steps to ensure that what cannot be done directly is not achieved indirectly by others. *See* Rule 1.3 (judge may not “allow others” to abuse the prestige of judicial office for personal or economic reasons). As such, the judge should instruct the school that it may not use the interview as part of any fund-raising effort.

CONCLUSION

Interpreting Rule 1.3 as a “rule of reason,” focusing on “abuse” of the prestige of judicial office, and giving meaning to the Code’s encouragement of community involvement, the committee concludes that Arizona judges may participate in recorded interviews with not-for-profit educational institutions they attended, subject to the following qualifications:

1. The judge should inquire about the purpose of the interview and its contemplated use(s).
2. The judge should determine whether he or she is being singled out for participation based on his or her judicial position or whether other graduates who are not members of the judiciary will be included. Abuse of the prestige of judicial office is more likely if a judge is treated differently from other alumni.
3. The judge should instruct the school that the interview may not be used for any type of fund-raising activity. If the judge learns that this admonition has not been heeded, he or she should direct the school to cease using the recorded interview.

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-02
(Issued May 14, 2018)

JUDGE'S OPERATION OF A BUSINESS SELLING FIREARMS

ISSUE

May an Arizona judge – through the judge's own small business – engage in the lawful selling of firearms to other Arizona judicial officers, court staff, and the judge's personal friends?

ANSWER

Yes, with qualifications.

FACTS

A judge has asked whether the Arizona Code of Judicial Conduct ("Code") permits him to start a small business limited to selling firearms to other Arizona judicial officers, court staff, and the judge's personal friends. The judge states that no website would exist for the business, and the only marketing would be through "word of mouth." The business would be conducted during the evening hours and on weekends, and neither court resources nor court premises would be used. The judge would obtain all necessary licenses.

DISCUSSION

I. Applicable Code Provisions

The Code provisions relevant to this inquiry include:

Rule 1.1 Compliance with the Law.

A judge shall comply with the law, including the Code of Judicial Conduct.

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 or demean the judicial office;

(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 activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Rule 3.11. Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of the other provisions of this code.

II. Analysis

The Code allows a judge to serve as an officer, manager, partner, or employee of a lawful business that is closely held by the judge or the judge's family members. Rule 3.11(B)(1); *see also* Rule 1.1 ("A judge shall comply with the law"). The Code does not distinguish between lawful business types or the products a lawful business sells. As long as the judge does not run afoul of the applicable Code provisions, he or she may participate in lawful business activity.

The Code does, however list certain circumstances that preclude a judge from participating in a lawful business or at least limit the judge's participation. In general, a judge is prohibited from participating in extrajudicial activities that "will interfere with the proper performance of the judge's judicial duties" or "that will lead to frequent disqualification of the judge." Rule 3.1(A), (B). These same prohibitions expressly apply to a judge's business activities. Rule 3.11(C)(1), (2). Likewise, a judge shall not conduct business activities if they involve the judge in frequent transactions or continuing business relationships with lawyers or litigants likely to appear before the judge's court. Rule 3.11(C)(3). In addition, a judge may not engage in business activities that result in a violation of any other provision of the Code. Rule 3.11(C)(4).

The inquiring judge has stated that any transactions would occur outside of court hours and off court premises. From the information presented, the judge's contemplated business would not appear to interfere with the proper performance of judicial duties. Selling firearms in and of itself is not likely to cause a judge to frequently be disqualified. There is, however, a potential issue if the judge engages in transactions with a lawyer or litigant likely to appear before his or her court. Rule 3.11(C)(3); Rule 2.11 (A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]"). Although not specified in the inquiry, to the extent the judge's friends include attorneys or litigants who are likely to appear before the judge's court, the judge should ensure that such transactions are not frequent or continuous, as that would violate Rule 3.11(C)(4) and possibly Rules 3.11(C)(2) and

2.11(A). Recusal or remittal of disqualification issues may also arise in that context. *See* Rule 2.11.

Under Rule 3.1(C), a judge shall not participate in an activity that would “undermine the judge’s independence, integrity, or impartiality or demean the judicial office.” The Committee has previously opined that a judge may not engage in a multi-level distribution business. Arizona Judicial Ethics Advisory Opinion 94-05. In that opinion, we advised that, “this type of selling or solicitation would involve a judge directly in a commercial activity that would invariably affect the way the public regards the judiciary in the local community.” *Id.* The opinion stated that determining whether a business activity runs the risk of undermining or demeaning a judicial office depends on the nature of the business and “the extent to which the judge personally solicits and closes sales or other transactions, such as distributorships.” *Id.*

The nature of the business here is unlike that at issue in Opinion 94-05. A small business that sells firearms through word of mouth marketing does not invoke the same activity and resulting concern that comes with soliciting distributors and sales in a multi-level distribution business. Selling a product in an arms-length transaction, based on word of mouth, in a relationship that ends after the sale is completed, is quite different from recruiting others to be in one’s distribution network. The Committee does not read Opinion 94-05 as a blanket prohibition against a judge soliciting business or closing sales -- done off court premises and outside business hours -- as long as the judge does not do so “unduly.” *See id.* Here, the inquiring judge has stated that he would not solicit business and that marketing would be strictly through word of mouth, meaning the concerns expressed in Opinion 94-05 are not implicated.

Finally, Rule 3.1(D) provides that when pursuing extrajudicial activities, a judge shall not “engage in conduct that would appear to a reasonable person to be coercive.” Sales to other judicial officers or to friends, without more, do not appear to raise any issue of coercion because the judge has no apparent position of power over the potential buyer. Sales to court staff, by contrast, are problematic because of the power differential – and the appearance of a power differential – between judges and court staff. A judge must take measures to ensure that such transactions are neither coercive nor have the appearance of being coercive.

CONCLUSION

The committee concludes that Arizona judges may operate a small business that does not advertise and that lawfully sells firearms to other judicial officers and personal friends, off court premises and outside business hours. When selling to court staff, the judge must ensure appropriate measures are taken to avoid the appearance of coercion.

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 18-03
(Issued June 12, 2018)

**ADORNMENTS ON JUDICIAL ROBES AND “SAFE PLACE” SIGNS AT
COURTHOUSES**

ISSUES

An Arizona court has established a working group to explore the extent to which the needs and concerns of lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth are being addressed in the child welfare and juvenile justice systems. The working group believes that one barrier to LGBTQ youth seeking services is their reticence to trust those involved in the systems, including attorneys, judges, guardians ad litem, court-appointed special advocates, and probation officers. The working group suggests that trust may be gained by reassuring LGBTQ youth that they are in a safe place and dealing with safe people, which may be facilitated by displaying certain symbols or messages.

A judge inquires whether judicial officers in the juvenile court may wear small rainbow-flag pins (or similar symbols) on their robes and post “safe place” placards on courtroom doors that convey acceptance to LGBTQ youth. In addressing these specific inquiries, the Judicial Ethics Advisory Committee deems it appropriate to discuss more broadly the recurring issue of adornments on judicial robes.

ANSWERS

Judicial robes should be free of adornments.

Courts may display signs stating that harassment, bias, or prejudice on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or affiliation is strictly prohibited. Courts and judicial officers should not, however, single out any particular category of citizens in offering such assurances.

DISCUSSION

I. Applicable Code Provisions

Several provisions of the Arizona Code of Judicial Conduct (“Code”) are relevant to the committee’s analysis, including:

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.

Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so.

Rule 2.3. Bias, Prejudice, and Harassment

- (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
- (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
- (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
- (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Rule 2.4. External Influences on Judicial Conduct

- (A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

II. Analysis

"An independent, fair and impartial judiciary is indispensable to our system of justice." Code, Preamble. Judicial officers must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and they must avoid both impropriety and the appearance of impropriety. Rule 1.2.

A. Judicial Robes

The judicial robe powerfully and unmistakably invokes the prestige of judicial office. Using that prestige to express support for any particular message, organization, cause, or category of citizens necessarily excludes a large universe of equally worthy messages, organizations, causes, and citizens who might feel reassured upon encountering a judge displaying symbols meaningful to them. *See* Rule 2.4, cmt ("An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family.").

In its criminal justice standards, the American Bar Association discusses the symbolism behind the judicial robe, stating:

The black garb reminds all who look at the judge – and it reminds the judge, too – that justice is the prime concern of the court. It also adds dignity to the courtroom. Indeed, the robe emphasizes the democratic ideal of impartial and equal treatment of all persons who come before the court by reminding the judge and those who view the judge in the courtroom that the judge serves as an agent of justice.

ABA Standards for Criminal Justice 6-1.4 (3rd ed. 2000).

Another commentator has observed that, by donning unadorned black robes, judges “make a visual promise that they’re leaving personal idiosyncrasies, prejudices and desires outside the courtroom.” Robin Givhan, *Trial by Attire: Supreme Court Look Should Go with Everything We Believe In*, Washington Post, October 9, 2010.

The bland robes serve as a visual reminder of the high-minded philosophy underpinning our judicial system: Under the law, everyone is equal. Gender, religion, race and economic class don’t matter. . . .

It sends a singularly powerful message: I am here to uphold the law, without prejudice. That message should stand alone. It does not need to be accessorized.

Id.

Research discloses only one published judicial ethics opinion of relevance. *See* Michigan Judicial Ethics Opinion JI-68. That opinion addressed the propriety of a judge wearing an “AIDS awareness ribbon.” It concluded that judicial officers should not wear symbols on judicial robes that suggest support for or opposition to any political, social, charitable, or civic cause.

Additionally, one state has a rule that specifically requires judges to wear black robes “with no embellishment.” *See* Florida Rule of Judicial Administration 2.340. In promulgating that rule, the Florida Supreme Court explained that uniformity in judicial attire enhances public trust and confidence and observed that citizens “should not have to question whether equal justice is being dispensed” based on the appearance of a judge’s robe.

Although Arizona has no comparable court rule, the committee reaches the same conclusion under the Code. Promoting confidence in the independence, integrity, and impartiality of the judiciary requires that judicial robes be free of symbols, pins, or messages, instead conveying the singular and uniform message that a judge’s fidelity is to the law and to equal justice for all who come before the court. No matter how worthy the cause suggested by items such as a rainbow pin, domestic violence awareness ribbon, cross, or military veteran’s insignia, the judicial robe should not serve as a platform for conveying messages or for communicating a judge’s personal beliefs or extrajudicial activities.

B. Signs or Symbols in Courthouses

Concerns regarding impartiality and avoiding the appearance of bias likewise control the question about displaying “safe place” signs or symbols in court facilities. Courthouses should be safe venues for everyone, and they should also be perceived in that fashion.

Rule 2.3 prohibits bias, prejudice, and harassment on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. Rule 2.3’s mandate extends to judges, court staff, lawyers, and “others subject to the judge’s direction and control.”

Judges may communicate the judiciary’s commitment to prohibiting bias, prejudice, and harassment by posting signs or placards in courthouses that communicate Rule 2.3’s message. But for the reasons outlined above, signs or placards should not single out a subset of the groups enumerated in Rule 2.3 when offering such assurances.