

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2021-03
(Finalized and effective December 21, 2021)

BACKGROUND:

In C.J.E.A.B. Advisory Opinion 2020-02, the CJEAB discussed what limits a judge should impose on law clerks and externs wanting to participate in marches and rallies or to use social media to make public posts to protest police misconduct, condemn racism, or express general support for justice reform. The CJEAB concluded that judicial law clerks and externs were not subject to the Code of Judicial Conduct (“Code”), but, as supervisors, judges remained responsible for ensuring their staff and others subject to their direction acted in a manner consistent with the Code.

The analysis of Advisory Opinion 2020-02 was based on prior Rule 2.12(A) of the Code, which obligated judges to “require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” Interpreting this rule, the CJEAB concluded in Advisory Opinion 2020-02 that judges and their staff could comment on matters concerning the law, the legal system, and the administration of justice but could not comment on political issues or participate in political demonstrations, rallies, or marches.

The Colorado Supreme Court recently amended Rule 2.12(A). The amendments narrow the application of the prior rule and clarify that judges must require court staff and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under the Code only when they engage in those acts “in the performance of their official duties or in the presence of the judge.” In light of the changes to Rule 2.12(A), the CJEAB now withdraws Advisory Opinion 2020-02 and issues this new opinion, consistent with its authority under section XII.B. of Chief Justice Directive 94-01. The CJEAB concludes that under the revised rule, in addition to commenting on matters concerning the law, the legal system, and the administration of justice, judges are not responsible under the Code for comments made by law clerks and externs on political issues or for their participation in political demonstrations, rallies, or marches, as long as the law clerks and externs do not engage in such conduct in the performance of official staff duties or in the presence of the judge.

ISSUE PRESENTED:

Under amended Rule 2.12(A) of the Code, how must a judge advise his or her law clerks and externs to act regarding their participation in protest demonstrations, use of social media, and other public statements?¹

SUMMARY:

The CJEAB withdraws Advisory Opinion 2020-02, which interpreted the prior version of Rule 2.12(A) and concluded that judges and their staff could comment on matters concerning the law, the legal system, and the administration of justice but could not comment on political issues or participate in political demonstrations, rallies, or marches. Consistent with the amendments to Rule 2.12(A), the CJEAB issues this new opinion and concludes that judges are not responsible under the Code for comments on political issues made by staff or for their participation in rallies and marches as long as the staff do not engage in such conduct in the performance of their official duties or in the judge's presence.

ANALYSIS:

A. Prior Rule 2.12(A)

The prior version of Rule 2.12(A) provided that “[a] judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” Comment [1] to Rule 2.12, which did not change, provides that “[a] judge is responsible for his or her own conduct and for the conduct of others, such as staff, *when those persons are acting at the judge’s direction or control*” and “[a] judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge” (emphasis added).²

In Advisory Opinion 2020-02, the CJEAB pointed out the discrepancy between prior Rule 2.12(A) and Comment [1]:

The Rule seems to apply to employee activities conducted during and outside of working hours if those employees are subject to the judge’s direction and control, whereas Comment [1] seems to limit a judge’s responsibility to the conduct of staff when those persons are acting at the judge’s direction or control, which

¹ Pursuant to Chief Justice Directive 94-01, the CJEAB is only authorized to provide advisory opinions “concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct.” Accordingly, this opinion only discusses compliance with the Code.

² As noted in Advisory Opinion 2020-02, Rule 2.12 of the Model Code of Judicial Conduct and its commentary are identical to Colorado’s prior Rule 2.12(A).

could be interpreted as during working hours only, or pursuant to a judge’s direct command.

C.J.E.A.B. Ad. Op., p. 4.³ The core of the discrepancy was that the rule did not qualify *when* a judge had to control his or her supervisees but the comment did, and it significantly narrowed the circumstances in which the judge was responsible for staff conduct.

Because the language of the rule was binding, in Advisory Opinion 2020-02, the CJEAAB followed the rule and not the comment. *See* C.J.C. Scope, cmt. [3] (“Comments neither add to nor subtract from the binding obligations set forth in the Rules.”). In so doing, we noted that “‘consistent with the judge’s obligations’ means a judge must require staff under his or her direction and control to act as a judge would under the Code.” C.J.E.A.B. Ad. Op., p. 2. Thus, we determined that judges had to require staff under their control to act in the same way a judge must act under the Code. Accordingly, we concluded that judges could permit staff to comment on topics designed to improve the legal system but that judges remained responsible for ensuring their staff did not participate in socially or politically motivated protests, marches or rallies, or comment on such issues in social media.

B. Amended Rule 2.12(A)

Under the new rule, “[a] judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code in the performance of their official duties or in the presence of the judge.” The amendment limits the judge’s obligation to circumstances in which a staff person is performing official duties or in the presence of a judge and is thus consistent with the qualification in the comment that staff must be “acting at the judge’s direction or control.”

Because the revisions narrow the rule and make it consistent with Comment [1], we now conclude that a judge need not require staff under the judge’s control to act as a judge would under the Code *at all times*; rather, judges must require staff under their direction and control to act in a manner consistent with the judge’s obligations under the Code only during performance of their official duties or when in the judge’s presence. Thus, under revised Rule 2.12(A), judges are not responsible if staff participate in political or social protests, rallies or marches or make political posts on social media as long as such actions are done outside of work, are not part of their official duties as staff members and are not done in the judge’s presence.

³ Other jurisdictions also recognized the inconsistency between Rule 2.12(A) and Comment [1] and have declined to interpret the text of the rule so broadly as to require a judge to “examine and approve all extrajudicial activities undertaken by any staff member, who, while at work is subject to the judge’s direction and control.” *See, e.g.*, CT Comm. Jud. Eth. Op. 2018-07, *6 (Aug. 16, 2018); *accord Allen v. Bartholomew Cnty. Ct. Serv. Dep’t*, 185 F. Supp. 3d 1075, 1084 (S.D. Ind. 2016) (Rule 2.12 is “designed to prevent a judge from indirectly violating the ICJA by instructing other to engage in prohibited conduct” and applies to “political activity only when acting on behalf of a judge.”).

CONCLUSION:

By operation of prior Rule 2.12(A), the CJEAB concluded in Advisory Opinion 2020-02 that law clerks and externs “may not comment on political issues or participate in political demonstrations, rallies, or marches” without such behavior being imputed to a supervising judge. Because Rule 2.12(A) has been amended, Advisory Opinion 2020-02 is withdrawn and replaced with Advisory Opinion 2021-03. We now conclude that judges are not responsible if their staff participate in such activities as long as staff are not undertaking such actions in performance of their official duties or in the judge’s presence.⁴

FINALIZED AND EFFECTIVE this 21st day of December, 2021.

⁴ Though outside the scope of this opinion, we remind judges and staff that, as employees of the Colorado Judicial Department, they remain subject to personnel rules that might limit or penalize their behavior.