

MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey
Executive Director & CEO

DATE: October 2016

SUBJECT: **Formal Ethics Opinion No. 72**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

Opinion No. 72

“Judicial Participation in Video Presentations”

Judges may direct questions on the Code of Judicial Ethics to the current 2015/16 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

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CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 72

Judicial Participation in Video Presentations

I. Introduction

This opinion seeks to assist judges who are requested to participate in a video presentation which may be used by the producing organization for various purposes to decide if participation is appropriate under the Judicial Canons.

II. Applicable Authority

Canon 1 An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved... .

Canon 2A ...A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Canon 2B(2) A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others... .

Canon 3B(9) A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing... .

Canon 4A Extrajudicial Activities in General

A judge shall conduct all of the judge's extrajudicial activities so that they do not

- (1) Cast reasonable doubt on the judge's capacity to act impartially;
- (2) Demean the judicial office;
- (3) Interfere with the proper performance of judicial duties; or
- (4) Lead to frequent disqualification of the judge.

Canon 4B Quasi-Judicial and Avocational Activities

A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code.

Canon 4C(1) A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters

concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests.

Canon 4C3(d) A judge as an officer, director, trustee, or nonlegal advisor, or as a member or otherwise

(i) may assist such an organization in planning fundraising and may participate in the management and investment of the organization's funds. However, a judge shall not personally participate in the solicitation of funds, or other fundraising activities, except that a judge may privately solicit funds for such an organization from members of the judge's family or from other judges (excluding court commissioners, referees, retired judges,) court-appointed arbitrators, hearing officers, and temporary judges;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fundraising mechanism, except as permitted in Canon 4C(3)(d)(i);

(iv) shall not permit the use of the prestige of his or her judicial office for fundraising or membership solicitation but may be a speaker, guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds and complies with Canons 4A(1), (2), (3), and (4).

Canon 4D

- (1) A judge shall not engage in financial and business dealings that
 - (a) may reasonably be perceived to exploit the judge's judicial position...
- (2) ...A judge shall not participate in, nor permit the judge's name to be used in connection with, any business venture or commercial advertising that indicates the judge's title or affiliation with the judiciary or otherwise lend the power or prestige of his or her office to promote a business or any commercial venture.

Canon 5D A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.

CJA Formal Ethics Opinions 10, 28, 57 and 65

CJA Ethics Updates: May 2009 II A. 2 and February 2010 VII 1

CJEO Informal Opinion Summary No. 2014-004, *Judicial Appearance In An Educational Documentary*

CJEO Oral Advice Summary No. 2014-004, *Use of A Testimonial Letter To Promote a National Bar Association Program*

David M. Rothman, *California Judicial Conduct Handbook* (1999) §§ 10.15-10.18; 10.37; 10.44; 10.48

III. Discussion

A. Initial Observations

Judges are permitted to teach. So the clearest video presentation to consider is a video in which the judge is asked to teach a subject. The judge must undergo an analysis that is identical to the analysis in authoring a book. You are referred to CJA Formal Opinion 65, Judge as Author, for guidance here.

Judges have a duty to make sure that the prestige of their judicial office or their judicial title is not used to advance the personal interest of others. In addition, judges may not personally participate in general fundraising. It is quite common for alumni associations, colleges or other organizations to request that judges participate in a video presentation of some form, discussing the judge's relationship to that organization. These videos may be used to showcase the values of an education at a specific institution, to discuss the values of the activities of a particular organization and many times as a means of raising funds for the organization in question. A judge asked to participate in such a video must examine not only how the video will be put together but also must consider the ultimate purpose of the video.

The Canons are clear that a judge may not personally ask for donations to an organization but what about the situation where the video is going to be used at a fundraiser or is going to be posted to the web in conjunction with a plea for funds even though the judge makes no request for funds. Canon 4C(3)(d)(iv) specifically permits a judge to be a speaker, guest of honor or recipient of an award for public or charitable service as long as the judge does not personally solicit funds. If the judge may speak at a fundraiser, not soliciting funds, then it follows that a judge may participate in a video presentation shown at a fundraiser where the judge does not solicit funds and the video does not solicit funds. The decision to participate must take into consideration how the video is going to be used. If the judge participates in giving a factual statement only, on the video, the judge could still be in violation of the prohibition against fundraising if the organization then attaches a plea for funds directly to the video. If the video is posted to the organization's web site in which a solicitation for funds is included, this would violate the prohibition on fundraising, unless the video is part of a separate location on the web site.¹ The judge is required to make sure that the video is not used for fundraising.

Canon 4C(3) is not the only Canon to consider. A judge requested to do a video presentation must consider Canon 2B(2), the prohibition against lending the prestige of the office or use of the judicial title to advance the personal interests (pecuniary or otherwise) of others. A judge must consider why he has been asked to be part of the video. If it appears that the judge's position or title is significant to the sponsor of the video then Canon 2 prohibits participation. If the judge's position as a judge is not a significant factor then Canon 2 does not prohibit participation.

1. CJEO Oral Advice Summary No. 2014-004

Of course a judge asked to participate in a video presentation must be cognizant of the limitations imposed by other Canons: Canon 3B(9) to not discuss any pending or impending proceedings; Canon 1 which requires a judge to establish, maintain and enforce high standards of conduct so that the integrity and independence of the judiciary will be preserved; Canon 2A which prohibits a judge from making statements that commit the judge with respect to cases, controversies or issues that are likely to come before the court; and Canon 4A which requires the judge not to engage in any conduct likely to cast a doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper performance of judicial duties or lead to frequent disqualification. The judge is required to know what the video is going to be used for, what the full video contains, whether it will be edited in the future and whether its use will change in the future.

B. Application to Various Situations

1. Judge has long history, prior to and after appointment to the bench, with an organization. This organization has decided to honor the judge for her many years of contribution to the community and to the organization. They ask the judge to participate in a video discussing the judge's history with the organization and community. No solicitations for funds will be made as part of the video but the video will be played at a ceremony honoring the judge which is also a fundraiser.

May the judge participate? Yes, since the video is used as a means of honoring the judge it is not using the office or title to advance the personal interests of either the judge or the organization and since there is no solicitation for funds by the judge this would be permitted under Canon 4C3(d)(iv). This would be no different than the judge simply attending the event and receiving the award.

2. Judge graduated from the XYZ University. The University has asked the Judge to participate in a video that is entitled "Our Successful Graduates." In the video the participants will discuss their experience at the University and how it helped them to become the person that they are now. The video will be shown on the University web page which is often viewed by potential students.

May the judge participate? No. 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 Canon 2B as the school's purpose is to encourage students to attend that school using the prestige of the judicial office and title.

3. The Gay-Straight Alliance, an organization that promotes fair treatment of gay and lesbian students, asks judge to participate in a videotaped interview that will discuss the laws affecting gay and lesbian civil rights. I would be asked to discuss the topics of gay marriage, adoption and employment issues.

J is not asked to present personal opinions but simply discuss the existing laws. The video tape will be made available to schools as an educational tool.

May the judge participate? Yes. Under Canon 4B the judge may speak on legal and non-legal subjects as long as the judge does not otherwise violate the code. Other possible violations to consider would be Canon 2A, not making statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of the judicial office, or the conduct listed in Canon 4A; cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper performance of judicial duties or lead to frequent disqualification of the judge.

4. The Children's Assessment program asks the judge to participate in a video interview that will cover the value of their program to the Court. This video will be used to educate the community on the work and value of this program. The video will be available on the program web page and will be shown at their fundraising function.

May the judge participate? The judge may participate in a video that has as its purpose education about an issue, however the prohibition on fundraising might apply if the video is done in such a way that the video itself is a solicitation for funds. If the video is simply educational and then it is played at the fundraiser, the judge is not soliciting funds. The fine line here is perhaps a distinction between boldly stating that this program is the best and you should get behind it and a statement that simply outlines what the program does and how the court uses the program.

5. The CASA program asks the judge to participate in a video that would be used to encourage citizens to become CASA volunteers. It is the intention of the producer of the video to interview the judge about how the CASA program operates and how much the judge relies on the CASA volunteers.

May the judge participate? Yes. While Canon 4C(3)(d)(iii) prohibits solicitation of membership it prohibits it only if it might reasonably be perceived as coercive or if it is essentially a fundraising mechanism. Here there is nothing to suggest that the video solicitation of volunteers would be coercive and in this scenario the video is not connected to fundraising.

6. Could the video in 5 above be used at a CASA fundraiser?

Yes as long as the video itself does not solicit funds or require the volunteers to provide funds to the program.

7. Judge is asked by MADD (Mothers Against Drunk Drivers) to participate in a video that discusses the impact of drunk driving on victims.

May the judge participate? No. While a judge may speak on any subject matter if it does not violate the code, the subject matter here would cast a reasonable doubt on the judge's capacity to act impartially in driving under

the influence cases and violate Canon 4A.

8. The Public Defender's Office is preparing a video honoring the history of the office. They ask judge, who was a deputy public defender prior to the bench, to participate in the video by describing his career with the Public Defender. The video will be shown at a function involving the legal community.

May the judge participate? Yes. As long as the judge does not cast doubt on his impartiality and does not discuss any pending or impending cases, he may participate.

9. I was a member of a public interest law firm prior to appointment to the bench. The public interest law firm is planning a gala fundraiser and celebration of 25 years of work. The organization asks the judge to participate in a video and specifically discuss a major environmental case that the judge successfully litigated prior to appointment. The case is no longer pending but legislation on the issues involved in the litigation is pending. The video will not solicit funds but will be played at the fundraiser.

May the judge participate? No. In this scenario the case is no longer pending, but there is legislation pending and the appearance in the video would be public involvement on behalf of one side in a controversial social and political arena which would cast a doubt on the judge's ability to act impartially under Canon 4A.

10. The judge is being honored at his undergraduate alma mater at its annual fundraiser. The judge has been asked to participate in a videotaped interview which will be shown at the fundraiser. There will be no solicitation of funds on the video. The interview will cover the topic of the judge's experience at the school and ask the judge to provide advice to any current students of the school.

May the judge participate? Yes. While the video will be played at the fundraiser, the video itself does not solicit funds and the purpose is to simply honor the judge.

11. The judge has been asked to participate in a video for the youth mentoring program which is used as a resource of the juvenile court. The judge has been asked to talk about the value of the program to the children that the judge sees in court. The introduction on the video states: "We need your financial support to continue this worthy program in our community."

May the judge participate? No. Because of the direct solicitation in the introduction, the video is directly linked to the speakers on the video and it would be the same as if each speaker stated support for this program which is improper fundraising.

12. The judge has been asked to participate in a video for a drug rehabilitation program which is a commercial drug program used by the court in mandated drug court cases. The video will be used to advertise this specific drug program over other drug programs.

May the judge participate? No. This would be lending the prestige of the office to this commercial venture.

13. The judge has been asked to participate in a video for a drug rehabilitation program which is a non-profit drug program used by the court in mandated drug court cases. The video will be used for both advertising of this specific drug program and for fundraising purposes.

May the judge participate? No. This would also be lending the prestige of the office to this drug program and would violate the fundraising prohibition.

14. The judge will be honored by a Youth Mentoring Program. The program has requested that she participate in a video biography to be played at the dinner /fundraiser being held in her honor. The program has not decided whether the video will be played linked to their web site fundraising efforts and if it is the video may be edited in the future.

May the judge participate? No. Since the program may in the future use the video specifically for the purpose of fundraising, even though there are no current plans to do so, places this judge in a situation in which the judge may be in violation of the Canons in the future and the judge has a duty to avoid that possibility.

15. The judge had participated in a video about the judge's work generally on juvenile cases and in the video indicates that children are referred to various programs to assist them in growing into productive adult citizens, not mentioning any program names. This video was used at a fundraising event in which the judge was honored by a youth mentoring program as "judge of the year." The judge now learns that the new Executive Officer of the mentoring program has decided to put the video online along with a plea for funds for the organization.

What action must the judge take? The use of the video online with a plea for funds is a violation of the Canons and therefore the judge must take steps to prevent the use of the video in this format.

IV. Conclusion

A judge may participate in a video presentation. In doing so, the judge must take into consideration the purpose of the video and avoid the pitfalls of the video being used for fundraising, and/ or promoting the interests of others; makes sure that he is not discussing pending or impending cases; that he is not making a statement which commits the judge with respect to controversies or issues that are likely to come before the court; makes sure that his comments do not cast reasonable doubt on his capacity to act impartially, or demean the judicial office: and that he is promoting the integrity and independence of the judiciary.

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