

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP18-02

Title

Proposed Amendment to Commentary
Following Canon 2A of the Code of Judicial
Ethics

Action Requested

Review and submit comments by
May 31, 2018

Proposed by

Supreme Court Advisory Committee on the
Code of Judicial Ethics
Hon. Richard D. Fybel, Chair

Proposed Effective Date

August 1, 2018

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Date

March 20, 2018

Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes adding new commentary following canon 2A suggesting that judges exercise caution when engaging in the use of electronic communication, including social media. The proposed amendment would identify relevant canons to consider when engaging in such conduct. After receiving and reviewing comments on this proposal, the committee will make recommendations to the Supreme Court regarding the proposed amendment. The full text of the proposed amendment is attached.

Discussion

The proposed amendment to add new commentary following canon 2A is intended to improve and to clarify the code. More judges are engaging in the use of electronic communication, including social media, and judges have been disciplined by the Commission on Judicial Performance for improper use. As a result, the committee considered whether it would be advantageous to add language to the code advising judges to be aware of the pitfalls associated with the accessibility, widespread transmission, and permanence of material posted on the Internet. At least three other states include cautionary language concerning a judge's use of technology and social media in their codes of judicial conduct.

The proposals have not been approved by the Supreme Court and are not intended to represent the views of the court. These proposals are circulated for comment purposes only.

The committee concluded that it would be useful to remind judges that the same canons applicable to a judge's ability to socialize and communicate in person, on paper, or over the telephone also apply to the Internet, including social networking sites.

The proposed language would be added to the Advisory Committee Commentary following canon 2A and would include references to some of the specific canons implicated by use of the Internet and social media. Those canons are canon 2B(2) (lending the prestige of judicial office), canon 3B(7) (ex parte communications), canon 3B(9) (public comment about pending or impending proceedings), canon 3E(2) (disclosure of information relevant to disqualification), and canon 4A (conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially, demeaning the judicial office, or frequent disqualification).

In determining where to place such language, the members concluded that the commentary following canon 2A, which is one of the overarching canons in the code, would be appropriate. Canon 2A states, in part: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Advisory Committee Commentary following canon 2A would be amended to read:

CANON 2

**A JUDGE SHALL AVOID IMPROPRIETY AND THE
APPEARANCE OF IMPROPRIETY IN ALL OF THE
JUDGE’S ACTIVITIES**

A. Promoting Public Confidence

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. 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.

ADVISORY COMMITTEE COMMENTARY: Canons 2 and 2A

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.

A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.

A judge must exercise caution when communicating online or participating in online social networking sites given the accessibility, widespread transmission, and permanence of material posted on the Internet. The same canons that govern a judge's ability to socialize and communicate in person, on paper, or over the telephone apply to the Internet and social networking sites. These canons include, but are not limited to, Canons 2B(2) (lending the prestige of judicial office), 3B(7) (ex parte communications), 3B(9) (public comment about pending or impending proceedings), 3E(2) (disclosure of information relevant to disqualification), and 4A (conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially, demeaning the judicial office, or frequent disqualification).

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.

As to membership in organizations that practice invidious discrimination, see Commentary under Canon 2C.

As to judges making statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts, see Canon 3B(9) and its commentary concerning comments about a pending proceeding, Canon 3E(3)(a) concerning the disqualification of a judge who makes statements that commit the judge to a particular result, and Canon 5B(1)(a) concerning statements made during an election campaign that commit the candidate to a particular result. In addition, Code of Civil Procedure section 170.2, subdivision (b), provides that, with certain exceptions, a judge is not disqualified on the ground that the

45 *judge has, in any capacity, expressed a view on a legal or factual issue presented in the*
46 *proceeding before the judge.*

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48 **B. – C. * * ***