

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP19-05

Title

Proposed Amendments to Canon 3B(9) and
Commentary of the Code of Judicial Ethics

Action Requested

Review and submit comments by
December 2, 2019

Proposed by

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

Proposed Effective Date

April 1, 2020

Date

October 1, 2019

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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes amendments to canon 3B(9) and its commentary that would allow a judge to comment publicly about a pending case that formed the basis of criticism of a judge during an election or recall campaign, provided the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding. The proposed commentary would advise that it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with the allegations concerning the decision. After receiving and reviewing comments on this proposal, the committee will make recommendations to the Supreme Court regarding the proposed amendments. The full text of the proposed amendments is attached.

Discussion

The proposed amendments are based on a proposal from the Judicial Fairness Coalition (the Coalition), a statewide group of active and retired judicial officers, leaders of bar associations, law school deans, and attorneys, that is part of the California Judges Association.

Canon 3B(9) prohibits judges from making public comments about pending cases. The Coalition proposed an exception to this prohibition that would allow a judge who is the subject of a recall election based on a decision by the judge to make public comments about the procedural or factual basis of the decision while the case is pending. Apparently prompted by the recall in 2018 of Judge Aaron Persky, the Coalition contends the amendment is needed “in light of the

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 These proposals are circulated for comment purposes only.

increase in attacks on judges’ judicial independence” often based on a single unpopular but lawful decision by the judge. According to the Coalition, this proposed amendment “would serve the interests of fairness and justice in those cases where a judge is subjected to recall based on making unpopular court rulings.” Further, “the public will likely get a better understanding of the legal issues involved in a case when a judge may publicly comment on the procedural or factual basis of decisions issued in the course of the judge’s official duties.”

The committee agreed with the Coalition’s proposal and its reasoning, and voted to expand the scope of the proposal in three ways. First, because there is no qualitative distinction between a recall election and any other judicial election in terms of responding to attacks, the committee’s proposal would encompass any judicial election, including recall elections. Second, the language proposed was limited to allowing a judge to comment on the procedural or factual basis of the decision that was the subject of the criticism. The committee added “legal basis” because there is no reason to limit the judge’s comments to the procedural or factual basis of the decision. Third, the committee’s proposal would allow *any* judge, not just the judge who is the subject of the criticism, to publicly comment about the procedural, factual, or legal basis of the decision. During the Judge Persky recall campaign, there were judges throughout the state who wished to comment publicly that the sentencing decision was a lawful exercise of discretion by Judge Persky. Under the current language of the canon, however, judges were prohibited from making such public statements while the case was on appeal.¹ In the committee’s view, without the proposed exception and with the increasing popularity of recall elections, judges may be reluctant to issue controversial decisions because they will be unable to defend themselves if attacked while the matter is pending.

The proposed amendment contains significant restrictions. First, any such public comments may be made only in the context of a judicial election. Second, the pending matter about which a judge would be permitted to comment must be the subject of criticism during the election campaign. Finally, the comment must not “reasonably be expected to affect the outcome or impair the fairness of the proceeding.” This last provision tracks rule 2.10(A) of the American Bar Association’s (ABA) Model Code of Judicial Conduct, which prohibits a judge from making any public comment “that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”

The committee recommends adding language to the commentary following canon 3B(9) reiterating that the exception applies to both regularly scheduled elections as well as recall elections. In addition, the proposed commentary would caution judges that even though public comment by the judge is not prohibited, the judge should consider whether it would be preferable for a third party to respond or issue statements in connection with criticisms of a ruling.²

¹ The Terminology section of the code provides that a proceeding “continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition.”

² This language tracks comment [3] of ABA model code rule 2.10.

Canon 3B(9) and its commentary would be amended to read:

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CANON 3

**A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE
IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**

A. * * *

B. Adjudicative Responsibilities

(1) – (8) * * *

(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. The judge shall require similar abstention on the part of staff and court personnel subject to the judge’s direction and control. This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. In connection with a judicial election or recall campaign, this canon does not prohibit a judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign. Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(9)

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. A judge shall make reasonable efforts to ascertain whether a case is pending or impending before commenting on it. This canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

“Making statements in the course of their official duties” and “explaining the procedures of the court” include providing an official transcript or partial official transcript of a court proceeding open to the public and explaining the rules of court and procedures related to a decision rendered by a judge.

The provision allowing a judge to make a public comment about a pending decision that is the subject of criticism during an election campaign applies to all judicial elections, including recall elections. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the decision.

44 *Although this canon does not prohibit a judge from commenting on cases that are not*
45 *pending or impending in any court, a judge must be cognizant of the general prohibition in*
46 *Canon 2 against conduct involving impropriety or the appearance of impropriety. A judge*
47 *should also be aware of the mandate in Canon 2A that a judge must act at all times in a manner*
48 *that promotes public confidence in the integrity and impartiality of the judiciary. In addition,*
49 *when commenting on a case pursuant to this canon, a judge must maintain the high standards of*
50 *conduct, as set forth in Canon 1.*

51 *Although a judge is permitted to make nonpublic comments about pending or impending*
52 *cases that will not substantially interfere with a fair trial or hearing, the judge should be*
53 *cautious when making any such comments. There is always a risk that a comment can be*
54 *misheard, misinterpreted, or repeated. A judge making such a comment must be mindful of the*
55 *judge’s obligation under Canon 2A to act at all times in a manner that promotes public*
56 *confidence in the integrity and impartiality of the judiciary. When a judge makes a nonpublic*
57 *comment about a case pending before that judge, the judge must keep an open mind and not form*
58 *an opinion prematurely or create the appearance of having formed an opinion prematurely.*

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60 (10) – (12) * * *

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62 **C. – E.** * * *