

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP16-06

Title	Action Requested
Proposed Amendments to Canon 3E and Commentary of the Code of Judicial Ethics	Review and submit comments by September 20, 2016
Proposed by	Proposed Effective Date
Supreme Court Advisory Committee on the Code of Judicial Ethics	November 1, 2016
Hon. Richard D. Fybel, Chair	Contact
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes several amendments to canon 3E of the code. Canon 3E addresses the disqualification of appellate justices and trial court judges and disclosure by trial court judges. After receiving and reviewing comments on these proposals, 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 intended to clarify, improve, or make conforming changes to the code.

1. Disqualification from a “Proceeding”—Canon 3E(1)

Canon 3E(1) states: “A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.” In *Inquiry Concerning Petrucelli* (2015) 61 Cal.4th CJP Supp. 1, the Commission on Judicial Performance (CJP) disciplined the judge for violating this canon because he called the Fresno County jail and ordered the own recognizance (OR) release of a person he knew socially. Although Judge Petrucelli acknowledged that he would have been disqualified from presiding over his friend’s criminal case, he contended that a telephonic OR release from jail is not a “proceeding” within the meaning of canon 3E(1).

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In its decision publicly censuring Judge Petrucelli, the CJP rejected this argument, finding that the term “proceeding” “encompasses prefiling judicial determinations.” (*Id.* at p. 18.) Noting that the judge did not dispute that he was taking judicial action in ordering the release, the CJP held that “the usual and ordinary meaning of ‘proceeding,’ both in a common and in a legal context, encompasses judicial action in ordering an OR release from jail.” (*Id.* at p. 17.) The commission concluded:

If “proceeding” is limited to actions pending in court, a judge with a disqualifying interest would not be disqualified from making probable cause determinations and signing search and arrest warrants. . . . A narrow interpretation of “proceeding” that excludes judicial action taken before a criminal case is filed would defeat the intent of California Code of Judicial Ethics, canon 3E(1)—to assure the public that judicial action will be exercised impartially. This purpose is best accomplished through an interpretation of “proceeding” that encompasses prefiling judicial determinations.

(*Id.* at p. 18.) The committee agrees with this conclusion and therefore proposes the adoption of new Advisory Committee Commentary following canon 3E(1) explaining that the term “proceeding” encompasses pre-filing judicial determinations.

2. Disqualification of Appellate Justice Who Has Served as an Attorney—Canon 3E(5)(a)

Canon 3E(5)(a) states that an appellate justice is disqualified if the justice “has appeared or otherwise served” as an attorney in the proceeding. By contrast, Code of Civil Procedure section 170.1, subdivision (a)(2), applicable to trial court judges, provides that a judge is disqualified if the judge “served” as a lawyer in the proceeding. It does not contain the term “appeared.” For two reasons, the committee proposes that the language of the canon applicable to appellate justices be amended to conform to the language of section 170.1, subdivision (a)(2).

First, in 2015, the Supreme Court’s Committee on Judicial Ethics Opinions (CJEO) issued a formal opinion interpreting the phrase “served as a lawyer in a proceeding” in section 170.1, subdivision (a)(2). (Cal. Com. Jud. Ethics Opns., CJEO Formal Opinion No. 2015-007.) The committee drew a distinction between a judge who previously appeared as a deputy district attorney only in a “perfunctory, nonsubstantive role, such as a brief appearance on a scheduling or uncontested matter,” and a judge who actively participated in the case previously as an attorney. (*Id.* at p. 2.) The former, according to the CJEO, has not “served as a lawyer” in the proceeding.¹

¹ The CJEO noted that the phrase “served as a lawyer in the proceeding” has been interpreted to mean that *any* appearance of *any* type by a lawyer who has become a judge disqualifies the judge who had appeared as an attorney “regardless of how significant the judge’s role was at the time.” (*Id.* at p. 7, citing Rothman, *California Judicial Conduct Handbook* (2013 supp.), § 7.37, p. 12.)

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Second, there is no justification to support different language for trial court judges and appellate justices. Indeed, the committee notes that the commentary following canon 3E(5)(a) states: “Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding.”

To avoid confusion based on divergent phrases, and to apply the concept articulated by the CJEO to appellate justices, the committee proposes the adoption of amendments to canon 3E(5)(a) that would make the canon consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), and the CJEO opinion.

3. Grounds for Disqualification of Appellate Justices—New Canon 3E(6)

Code of Civil Procedure section 170.2, which is applicable to trial court judges, sets forth what is not a ground for disqualification. It provides:

It shall not be grounds for disqualification that the judge:

- (a) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.
- (b) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1.
- (c) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.

The disqualification section for appellate justices in the Code of Judicial Ethics (canons 3E(4) and 3E(5)) does not contain a parallel provision.

The committee concluded that the canons applicable to appellate justices should contain the same provision applicable to trial court judges to make it clear that these are not grounds for disqualification. Other than replacing “judge” with “justice” and substituting canon numbers for section numbers, the proposed language is identical. The committee also proposes adding Advisory Commission Commentary noting that the canon is consistent with and substantively the same as Code of Civil Procedure section 170.2.

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Canon 3E of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A. – D. * * *

E. Disqualification and Disclosure

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.

ADVISORY COMMITTEE COMMENTARY: Canon 3E(1)

The term “proceeding” as used in this canon encompasses prefiling judicial determinations. Thus, if a judge has a disqualifying interest in a matter, the judge is disqualified from taking any action in the matter, even if it predates the actual filing of a case, such as making a probable cause determination, signing a search or arrest warrant, setting bail, or ordering an own recognizance release. Interpreting “proceeding” to include prefiling judicial determinations effectuates the intent of the canon because it assures the parties and the public of the integrity and fairness of the judicial process.

(2) – (4) * * *

(5) Disqualification of an appellate justice is also required in the following instances:

(a) The appellate justice has ~~appeared or otherwise~~ served as a lawyer in the pending proceeding, or has ~~appeared or~~ served as a lawyer in any other proceeding involving any of the same parties if that other proceeding related to the same contested issues of fact and law as the present proceeding, or has given advice to any party in the present proceeding upon any issue involved in the proceeding.

ADVISORY COMMITTEE COMMENTARY: Canon 3E(5)(a)

Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding.

(b) – (j) * * *

(6) It shall not be grounds for disqualification that the justice:

(a) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of such a group;

1 (b) Has in any capacity expressed a view on a legal or factual issue presented in
2 the proceeding, except as provided in Canon 3E(5)(a), (b), or (c);

3
4 (c) Has as a lawyer or public official participated in the drafting of laws or in the
5 effort to pass or defeat laws, the meaning, effect, or application of which is in
6 issue in the proceeding unless the judge believes that his or her prior involvement
7 was so well known as to raise a reasonable doubt in the public mind as to his or
8 her capacity to be impartial.

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10 ADVISORY COMMITTEE COMMENTARY: Canon 3E(6)

11 Canon 3E(6) is substantively the same as Code of Civil Procedure section 170.2,
12 which pertains to trial court judges.