

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP18-03

Title

Proposed Amendments to Canons 2C, 3B(5), 3B(6), 3C(1), and 3C(3) and the Commentary Following Canon 2C of the Code of Judicial Ethics

Action Requested

Review and submit comments by May 31, 2018

Proposed Effective Date

August 1, 2018

Proposed by

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

Contact

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Date

March 20, 2018

Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes amendments to canons 2C, 3B(5), 3B(6), 3C(1), and 3C(3), and to the commentary following canon 2C. These are the canons that prohibit discrimination, bias, and prejudice based on various protected categories, e.g., race, sex, gender. The proposed amendments would add gender identity and gender expression to the list of protected categories in those canons. The proposed amendments would also expand the prohibition against judges engaging in conduct that could reasonably be perceived as sexual harassment set forth in canons 3B(5) and 3C(1) by changing “sexual harassment” to harassment based on any of the protected categories listed in these canons. In addition, the amendments to canons 3B(6) and 3C(3) would specifically provide that judges must require staff and lawyers who appear in court to refrain from harassment. 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 intended to improve and to clarify the code. They address two different topics that affect multiple canons.

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 These proposals are circulated for comment purposes only.

1. Gender Identity and Gender Expression— Canons 2C, 3B(5), 3B(6), 3C(1), and 3C(3), and commentary following canon 2C

There are five canons that refer to discrimination, bias, or prejudice based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation:

- Canon 2C prohibits judges from holding membership in any organization that practices invidious discrimination based on race, sex, gender, religion, national origin, ethnicity, or sexual orientation;
- Canon 3B(5) prohibits judges from, in the performance of judicial duties, engaging in conduct that would reasonably be perceived as bias or prejudice, including bias or prejudice based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation;
- Canon 3B(6) provides that judges must require lawyers who appear before them to refrain from manifesting bias or prejudice based on the same protected categories as canon 3B(5) (with an exception for cases in which one or more of the protected categories is an issue);
- Canon 3C(1) prohibits judges from, in the performance of administrative duties, engaging in conduct that would reasonably be perceived as bias or prejudice, including bias or prejudice based on the same protected categories as canon 3B(5);
- Canon 3C(3) provides that judges must require court staff under the judge’s direction to refrain from manifesting bias or prejudice based on the same protected categories as canon 3B(5).

The concept of “gender” has been expanded in many contexts. The term is typically defined as a synonym for “sex” or “the behavioral, cultural, or psychological traits typically associated with one sex.”¹ The National Center for Transgender Equality defines “gender identity” as follows: “An individual’s internal sense of being male, female, or something else. Since gender identity is internal, one’s gender identity is not necessarily visible to others.”² It defines “gender expression” as “[h]ow a person represents or expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics.”³

The committee proposes that the terms “gender identity” and “gender expression” be added to the five canons identified above. The committee notes that proposed rule 8.4.1 of the Rules of

¹ Merriam-Webster’s Collegiate Dict. (1998) p. 484, col. 2.

² Transgender Terminology (May 2009) National Center for Transgender Equality <http://www.courts.ca.gov/documents/Transgender_Terminology.pdf> (as of Feb. 28, 2018).

³ *Ibid.*

Professional Conduct, which addresses discrimination, harassment and retaliation by California attorneys, includes the terms “gender,” “gender identity,” and “gender expression.”⁴ In addition, at least five other states have added “gender identity” and/or “gender expression” to their judicial conduct codes.

2. Harassment— Canons 3B(5), 3B(6), 3C(1), and 3C(3)

The committee received a letter from a member of the public who suggested amendments to canons 3B(6) and 3C(3). Those canons provide that a judge must require court staff and lawyers who appear in court to refrain from manifesting bias or prejudice based on the protected categories described above. She noted that canons 3B(5) and 3C(1) prohibit judges from engaging in conduct that would reasonably be perceived as sexual harassment. But canons 3B(6) and 3C(3) do not include sexual harassment in the list of conduct judges must require court staff and lawyers to avoid. She proposed adding sexual harassment to those canons.

The committee agreed that sexual harassment should be added to canons 3B(6) and 3C(3) so that judges would be responsible for requiring court staff and lawyers appearing before them to refrain from conduct that would reasonably be perceived as sexual harassment. The members noted, however, that harassment could be based on factors other than sex, such as harassment based on race. Therefore, the committee proposes amending and expanding canons 3B(6) and 3C(3) by adding the term “harassment” so that a judge must require court staff and lawyers “to refrain from manifesting, by words or conduct, bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”

To ensure consistency among the canons, the committee also proposes amending canons 3B(5) and 3C(1) to delete the phrase “sexual harassment” and adding “harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”

⁴ The proposed revisions to the Rules of Professional Conduct have been adopted by the State Bar Board of Trustees and are pending before the California Supreme Court.

Canon 2C and its commentary and canons 3B(5), 3B(6), 3C(1), and 3C(3) would be amended to read:

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CANON 2

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

A. – B. * * *

C. Membership in Organizations

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation.

This canon does not apply to membership in a religious organization.

ADVISORY COMMITTEE COMMENTARY: Canon 2C

Membership by a judge in an organization that practices invidious discrimination on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation gives rise to a perception that the judge’s impartiality is impaired. The code prohibits such membership by judges to preserve the fairness, impartiality, independence, and honor of the judiciary, to treat all parties equally under the law, and to avoid impropriety and the appearance of impropriety.

Previously, Canon 2C contained exceptions to this prohibition for membership in religious organizations, membership in an official military organization of the United States and, so long as membership did not violate Canon 4A, membership in a nonprofit youth organization. The exceptions for membership in an official military organization of the United States and nonprofit youth organizations have been eliminated as exceptions to the canon. The exception for membership in religious organizations has been preserved.

Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, gender, gender identity, gender expression, national origin, ethnicity, or sexual orientation persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation, a judge’s membership in an organization that

44 *engages in any discriminatory membership practices prohibited by law also violates Canon 2*
45 *and Canon 2A and gives the appearance of impropriety. In addition, it would be a violation of*
46 *Canon 2 and Canon 2A for a judge to arrange a meeting at a club that the judge knows practices*
47 *such invidious discrimination or for the judge to use such a club regularly. Moreover, public*
48 *manifestation by a judge of the judge's knowing approval of invidious discrimination on any*
49 *basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in*
50 *the integrity and impartiality of the judiciary in violation of Canon 2A.*

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CANON 3

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

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57 **A. * * ***

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B. Adjudicative Responsibilities

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61 (1) – (4) * * *

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63 (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the
64 performance of judicial duties, engage in speech, gestures, or other conduct that would
65 reasonably be perceived as ~~(a)~~ bias, ~~or~~ prejudice, or harassment, including but not limited to bias,
66 ~~or~~ prejudice, or harassment based upon race, sex, gender, gender identity, gender expression,
67 religion, national origin, ethnicity, disability, age, sexual orientation, marital status,
68 socioeconomic status, or political affiliation, ~~or (b) sexual harassment~~.

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70 (6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by
71 words or conduct, bias, ~~or~~ prejudice, or harassment based upon race, sex, gender, gender identity,
72 gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital
73 status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.
74 This canon does not preclude legitimate advocacy when race, sex, gender, gender identity,
75 gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital
76 status, socioeconomic status, political affiliation, or other similar factors are issues in the
77 proceeding.

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79 (7) – (12) * * *

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C. Administrative Responsibilities

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83 (1) A judge shall diligently discharge the judge's administrative responsibilities impartially, on
84 the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that
85 promotes public confidence in the integrity of the judiciary. A judge shall not, in the
86 performance of administrative duties, engage in speech, gestures, or other conduct that would
87 reasonably be perceived as ~~(a)~~ bias, prejudice, or harassment, including but not limited to bias,
88 prejudice, or harassment based upon race, sex, gender, gender identity, gender expression,

89 religion, national origin, ethnicity, disability, age, sexual orientation, marital status,
90 socioeconomic status, or political affiliation, ~~or (b) sexual harassment.~~

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92 (2) * * *

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94 (3) A judge shall require staff and court personnel under the judge's direction and control to
95 observe appropriate standards of conduct and to refrain from manifesting bias, ~~or prejudice,~~ or
96 harassment based upon race, sex, gender, gender identity, gender expression, religion, national
97 origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or
98 political affiliation in the performance of their official duties.

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100 (4) – (5) * * *

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102 **D. – E. * * ***