

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP18-04

Title

Proposed Amendments to Canon 3B(7)(a) and
Commentary 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

Date

March 20, 2018

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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes amendments to canon 3B(7)(a) and its commentary to clarify that a judge who will not be hearing a given matter may communicate with a judge who was disqualified from hearing that matter. Currently, the prohibition against a judge communicating with a disqualified judge is written so broadly that it affects even a judge who will not be presiding over the matter. That would include a presiding judge who wants to discuss with a frequently disqualified judge the issues forming the basis of the disqualifications. 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. Canon 3B(7)(a) states that a judge “may consult with other judges,” except that a judge “shall not engage in discussions about a case with a judge who has previously been disqualified from hearing that matter.” The reason for this prohibition, added to the code in 2013, is that if a judge is disqualified from hearing a given matter, it would defeat the purpose of the disqualification rules to permit the judge ultimately assigned to hear the case to confer with the disqualified colleague.

The language in canon 3B(7)(a) is so broad, however, as to prohibit a judge who will not be hearing the case from discussing it with the disqualified judge. For example, if a judge is

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 These proposals are circulated for comment purposes only.

disqualified frequently from hearing certain matters, a presiding judge who will not be the new judge assigned to the matter would not be allowed to discuss with the disqualified judge the issues that form the basis of the disqualifications.

The proposed amendments would make the canon specifically applicable to the situation it was intended to address, i.e., that a new judge assigned to the case will not discuss the case with the disqualified judge.

Canon 3B(7)(a) and its commentary would be amended to read:

CANON 3

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

A. * * *

B. Adjudicative Responsibilities

(1) – (7) * * *

(a) Except as stated below, a judge may consult with other judges. A judge presiding over a matter shall not engage in discussions about a that case with a judge who has previously been disqualified from hearing that ~~matter~~ case; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

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ADVISORY COMMITTEE COMMENTARY: Canon 3B(7)(a)

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This canon prohibits a judge who is presiding over a case from discussing ~~a~~ that case with another judge who has already been disqualified from hearing that matter. A judge also must be careful not to talk to a judge whom the judge knows would be disqualified from hearing the matter.

(b) – (d) * * *

(8) – (12) * * *

C. – E. * * *