

Item SP07-02 Response Form

Title: Submission of Character Reference Letters to the Commission on Judicial Performance (amend Cal. Code Jud. Ethics, canon 2B)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____
(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

**Address: Ms. Geraldine Dungo,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102**

Fax: (415) 865-7664 Attention: Geraldine Dungo

Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 15, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Circulation for comment does not imply endorsement by the Supreme Court.

Title	Submission of Character Reference Letters to the Commission on Judicial Performance (amend Cal. Code Jud. Ethics, canon 2B)
Summary	This proposed amendment would permit judges to submit character reference letters to the Commission on Judicial Performance (CJP) on behalf of other judges who are under investigation by the CJP.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>There has been considerable confusion about the propriety of judges providing information, particularly character information, to the CJP on behalf of colleagues who are under investigation. Canon 2B(2) provides: “A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others; nor shall a judge testify voluntarily as a character witness.” Prior to 1996, the prevailing view was that canon 2B(2) precludes a judge from voluntarily writing a letter of support about the character of a colleague involved in a CJP proceeding or a lawyer involved in a State Bar proceeding. A judge could do so, however, pursuant to a subpoena or an official request from the agency involved.</p> <p>In 1996, the commentary to canon 2B was amended with regard to judges providing information on behalf of a lawyer or judge involved in disciplinary proceedings. The original version of the commentary stated, in pertinent part:</p> <p style="padding-left: 40px;"><i>A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in an awkward position of cross-examining the judge.</i></p> <p style="padding-left: 40px;"><i>This Canon, however, does not afford judges a privilege against testifying in response to an official summons.</i></p> <p>The commentary to the current canon 2B, as amended in 1996, states, in pertinent part:</p>

A judge must not testify as a character witness without being subpoenaed because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. A judge may provide information on behalf of a lawyer or a judge involved in disciplinary proceedings, and shall provide information to disciplinary bodies when officially requested to do so. This Canon does not afford judges a privilege against testifying in response to any official summons. (Emphasis added.)

The addition to the commentary of the penultimate sentence above has created confusion because it is unclear whether the “information” referenced in that sentence was intended to distinguish between factual information and character information.

For several reasons, the committee concluded that judges should be permitted to provide both factual and character information to the CJP on behalf of other judges, provided the information is based on personal knowledge. First, the committee believes these letters may be of assistance to the CJP in certain types of cases because they may provide information relevant to whether the conduct at issue is anomalous or whether the judge is having transient or more persistent personal difficulties that may have contributed to the misconduct. Such information may be useful to the CJP because it may provide a basis for determining the substance of the charge and the appropriate action.

Second, when formal proceedings have been instituted by the CJP, which occurs in a very small percentage of the CJP matters, a judge can subpoena a colleague to provide character testimony. However, when an investigation of a judge is pending but the matter has not progressed to formal proceedings, the respondent judge does not have subpoena power. If canon 2B prohibits judges from providing character information, unless subpoenaed, a judge who is not the subject of formal proceedings has no opportunity to subpoena fellow judges to provide character testimony or to submit character letters, even though the judge may be subject to an advisory letter or a private or public admonishment. Because the character letters may be helpful to the CJP in determining the appropriate disposition, it may assist the CJP to have this information earlier in the process rather than waiting until formal proceedings are filed.

Third, the distinction between factual information and character information is not always clear. For example, a judge who is under investigation for leaving work early might be described by a colleague as “hardworking.” Another judge accused of poor demeanor might be described as “pleasant” or “calm” or “polite.” Because it is sometimes difficult to distinguish between factual and character information, permitting judges to provide both would prevent confusion.

Finally, litigants in other types of proceedings are permitted to elicit character testimony from witnesses. The committee believes that judges, like other litigants, should be allowed to benefit from such information.

Although the committee concluded that judges should be permitted to submit character information on behalf of other judges without a subpoena, it does not recommend the same accommodation for attorney disciplinary proceedings. The committee expressed concern about disqualification of judges who submit character evidence on behalf of attorneys. If a judge submitted a character letter for an attorney, the judge would have to consider recusal whenever that attorney appears before the judge in the future. In addition, if judges were permitted to provide character information for attorneys, the arm’s length distance between them might be reduced. Although the committee recognizes, as noted above, the occasional difficulty in distinguishing between factual and character information, it concluded that maintaining the arms’ length relationship between judges and attorneys warrants different rules for judicial and attorney disciplinary proceedings. Therefore, the committee recommends clarifying canon 2B(2) to provide that judges may provide factual information to the State Bar, and must do so when subpoenaed, but may not provide character information without a subpoena.

Subsection (b) of canon 2B would address the issue of providing information to the CJP and subsection (c) would govern involvement in State Bar proceedings. Both subsections would state that a judge must provide information in response to a subpoena and “when officially requested to do so.” To dispel the notion that a request for information from a respondent’s attorney is an “official request,” the committee concluded that subsection (b) should state that a judge shall provide information in CJP proceedings “responsive to a subpoena or when officially requested to do so *by the commission.*” (Emphasis added.) Likewise, subsection (c) should state that a judge shall provide information in State Bar proceedings “responsive to a

subpoena or when officially requested to do so *by the State Bar.*” (Emphasis added.)

Under the proposed amendments, subsection (b) would allow a judge to provide factual and character information only if it is based on personal knowledge.

In addition to the substantive changes discussed above, the committee makes the following recommendations to make the canon more comprehensible and logical:

- The committee recommends merging the first part of the first sentence of canon 2B(2) and canon 2B(4) into one sentence. The first sentence of canon 2B(2) states: “A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others; nor shall a judge testify voluntarily as a character witness.” Canon 2B(4) begins: “A judge shall not use the judicial title in any written communication intended to advance the personal or pecuniary interest of the judge.” These two similar sentences would be combined in canon 2B(2) and would read: “A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.”
- Currently, some of the provisions of canon 2B(2) are stated in the affirmative and some are stated in the negative. Under the proposed amendments, all these provisions would be restated in the affirmative. Therefore, following canon 2B(2) would be a list of activities that would *not* be prohibited by the canon. Canon 2B(2)(a) would be the first subsection and would provide: “A judge may testify as a character witness, provided the judge does so only when subpoenaed.” The committee also recommends deleting the word “voluntarily” (“nor shall a judge testify voluntarily as a character witness”) because it is superfluous. A judge cannot give character testimony unless subpoenaed; therefore, a judge cannot volunteer to testify.
- All but the last sentence of the penultimate paragraph in the commentary following canon 2B(2) would be deleted because its contents would be moved into the canon.

The committee also recommends adding to the commentary following canon 2B(2) a cross-reference to canons 3D(1) and 3D(2), which require judges to take appropriate corrective action when they become aware of misconduct by other judges or attorneys. The committee reasoned that a cross-reference would ensure that anyone reading the canon would not mistakenly conclude that canon 2B is the extent of a judge’s obligation in this area. In addition, any public perception that this exception permits judges to write character reference letters so that they can protect other judges would be counterbalanced by the reference to the requirement that judges must take corrective action when another judge engages in misconduct. The proposed sentence would read: “See also canons 3D(1) and 3D(2) concerning a judge’s obligation to take appropriate corrective action regarding other judges who violate any provision of the Code of Judicial Ethics and attorneys who violate any provision of the Rules of Professional Conduct.”

The text of the proposed amendments to canon 2B is attached.

Attachment

Canon 2B of the California Code of Judicial Ethics 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. ***

B. Use of the Prestige of Judicial Office

(1) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.

(2) A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others; ~~nor shall a judge testify voluntarily as a character witness. A judge shall not initiate communications with a sentencing judge or a probation or corrections officer, but may provide them with information for the record in response to an official request. A judge may initiate communications with a probation or corrections officer concerning a member of the judge's family, provided the judge is not identified as a judge in the communication. This Canon does not prohibit the following:~~

(a) A judge may testify as a character witness, provided the judge does so only when subpoenaed.

(b) A judge may, without a subpoena, provide the Commission on Judicial Performance with a written communication containing (i) factual information regarding a matter pending before the commission, or (ii) information related to the character of a judge who has a matter pending before the commission, provided that any such factual or character information is based on personal knowledge. In commission proceedings, a judge shall provide information responsive to a subpoena or when officially requested to do so by the commission.

(c) A judge may provide factual information in State Bar disciplinary proceedings and shall provide information responsive to a subpoena or when officially requested to do so by the State Bar.

1
2 (d) A judge may respond to judicial selection inquiries, provide
3 recommendations (including a general character reference, relating to the
4 evaluation of persons being considered for a judgeship) and otherwise
5 participate in the process of judicial selection.

6
7 (e) A judge may serve as a reference or provide a letter of recommendation
8 only if based on the judge's personal knowledge of the individual. These
9 written communications may include the judge's title and be written on
10 stationery that uses the judicial title.

11
12 (f) *** [See Invitation to Comment SP07-03]

13
14 **ADVISORY COMMITTEE COMMENTARY:**

15 *A strong judicial branch, based on the prestige which comes from*
16 *effective and ethical performance, is essential to a system of government in*
17 *which the judiciary functions independently of the executive and legislative*
18 *branches. Judges should distinguish between proper and improper use of*
19 *the prestige of office in all of their activities.*

20
21 *A judge must avoid lending the prestige of judicial office for the*
22 *advancement of the private interests of the judge or others. For example, a*
23 *judge must not use the judicial position to gain advantage in a civil suit*
24 *involving a member of the judge's family; or use his or her position to gain*
25 *deferential treatment when stopped by a police officer for a traffic offense.*

26
27 *As to the use of a judge's title to identify a judge's role in the*
28 *presentation and creation of legal education programs and materials, see*
29 *Commentary to Canon 4B. In contracts for publication of a judge's*
30 *writings, a judge should retain control over the advertising, to the extent*
31 *feasible, to avoid exploitation of the judge's office. As to the acceptance of*
32 *awards, see Canon 4D(6)(c) and Commentary.*

33
34 ~~*A judge must not testify as a character witness without being*~~
35 ~~*subpoenaed because to do so may lend the prestige of the judicial office in*~~
36 ~~*support of the party for whom the judge testifies. A judge may provide*~~
37 ~~*information on behalf of a lawyer or a judge involved in disciplinary*~~
38 ~~*proceedings, and shall provide information to disciplinary bodies when*~~
39 ~~*officially requested to do so. This Canon does not afford judges a privilege*~~
40 ~~*against testifying in response to any official summons.*~~

41
42 *See also Canons 3D(1) and 3D(2) concerning a judge's obligation*
43 *to take appropriate corrective action regarding other judges who violate*

1 any provision of the Code of Judicial Ethics and attorneys who violate any
2 provision of the Rules of Professional Conduct.

3
4 *This Canon does not preclude internal discussions among judges*
5 *regarding the application of substantive or procedural provisions of law to*
6 *any pending criminal or civil case.*

7
8 ~~(3) A judge may respond to judicial selection inquiries, provide~~
9 ~~recommendations (including a general character reference, relating to the~~
10 ~~evaluation of persons being considered for a judgeship) and otherwise~~
11 ~~participate in the process of judicial selection.~~

12
13 ~~(4) A judge shall not use the judicial title in any written communication~~
14 ~~intended to advance the personal or pecuniary interest of the judge. A~~
15 ~~judge may serve as a reference or provide a letter of recommendation only~~
16 ~~if based on the judge's personal knowledge of the individual. These written~~
17 ~~communications may include the judge's title and be written on stationery~~
18 ~~that uses the judicial title.~~

19
20 C. ***

Item SP07-03 Response Form

Title: Communications With Corrections Officials (amend Cal. Code Jud. Ethics, canon 2B)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____
(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Geraldine Dungo,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102

Fax: (415) 865-7664 **Attention:** Geraldine Dungo

Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 15, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Title	Communications With Corrections Officials (amend Cal. Code Jud. Ethics, canon 2B)
Summary	This proposed amendment would clarify the circumstances under which a judge may communicate with corrections officials. It would add the Board of Parole Hearings and the Office of the Governor to the list of entities with whom a judge may communicate provided the judge presided over some aspect of the underlying case or was either the prosecutor or the defense counsel.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>Canon 2B(2) provides that a judge is not permitted to “initiate communications with a sentencing judge or a probation or corrections officer, but may provide them with information for the record in response to an official request.” The committee considered whether this part of the canon should be clarified and expanded so that it applies to the Department of Corrections and Rehabilitation, which includes the Board of Parole Hearings (BPH), and the Governor, who is involved in clemency matters, in addition to probation departments.</p> <p>The committee concluded that judges have an important role in determinations regarding parole and pardon requests if the judge was the prosecutor, the defense counsel, or the judge who presided over the trial or some other aspect of the case. The committee was informed by staff from the BPH and the Governor’s Office that they routinely seek input from judges who presided over the cases. The BPH is required by statute to notify the judge and the attorneys involved in the case when the board is considering parole suitability, and the board must consider any information submitted by the judge or any other person. (Pen. Code, § 3042.) Regarding the Governor’s Office, when an application is made to the Governor for a pardon or commutation of sentence, the Governor may require the judge who presided over the trial or the prosecutor to submit a summary of the facts proved at the trial and any other facts related to the propriety of granting or denying the application, together with a recommendation. (Pen. Code, § 4803.)</p> <p>Because these letters are welcomed and are authorized by law, the committee concluded there appears to be no reason to require an official request before a judge may send a letter to the Governor or the</p>

BPH. Indeed, there have been circumstances under which the trial court judge does not receive notification of a request for a pardon or parole. Regarding a judge who was the prosecutor or defense lawyer in the case, there is no basis for treating such communications any differently, provided the judge is not identified as a judge in the communication. Therefore, the committee recommends rewording and reformatting this part of canon 2B(2) to clarify that judges may initiate communications with officials from a probation department, the BPH, the Department of Corrections and Rehabilitation, and the Governor's Office under certain circumstances. The judge must have served as a judge in the underlying proceeding or as counsel for one of the litigants. The committee recommends retaining the provision that a judge can initiate communications in cases involving a member of the judge's family, provided the judge is not identified as a judge in the communication.

The text of the proposed amendments to canon 2B is attached. Note that the current language addressing communications with corrections officials in the Code of Judicial Ethics appears in canon 2B(2). (See Invitation to Comment SP07-02, which addresses a different aspect of Canon 2B(2).)

Attachment

Canon 2B of the California Code of Judicial Ethics 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. ***

B. Use of the Prestige of Judicial Office

(1) ***

(2) ***

(a)–(e) ***

(f) A judge may ~~shall not~~ initiate communications regarding a person charged with a crime with a sentencing judge or an official of a probation or corrections officer, but may provide them with information for the record in response to an official request. department, the Board of Prison Terms and the Department of Corrections and Rehabilitation regarding parole, or the Office of the Governor regarding clemency only under the following circumstances or when authorized by law:

(i) The judge served as a judge in the underlying criminal proceeding;

(ii) The judge served as counsel in the underlying criminal proceeding, provided the judge is not identified as a judge in the communication;

(iii) The matter ~~A judge may initiate communications with a probation or corrections officer~~ concerning a member of the judge's family, provided the judge is not identified as a judge in the communication.

ADVISORY COMMITTEE COMMENTARY ***

C. ***

Item SP07-04 Response Form

Title: Handling Cases With Self-Represented Litigants (amend Cal. Code Jud. Ethics, canon 3B(8) and Advisory Committee Commentary following canon 3B(8))

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____
(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 15, 2007

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Title	Handling Cases With Self-Represented Litigants (amend Cal. Code Jud. Ethics, canon 3B(8) and Advisory Committee Commentary following canon 3B(8))
Summary	This proposed amendment would state that judges must manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated. The commentary would include a sentence noting that a judge handling a case with a self-represented litigant has the discretion to take reasonable steps, consistent with the law, to enable the litigant to be heard.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>There has been a steady increase in the number of cases involving self-represented litigants, particularly in family law and unlawful detainer cases. Many judges are hesitant to assist self-represented litigants because they are uncertain how to do so without violating canon 2, which requires judges to avoid impropriety and the appearance of impropriety, and canon 2A, which provides that judges must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.</p> <p>The committee concluded it would be helpful to provide judges guidance in the Code of Judicial Ethics on the extent to which a judge can assist a self-represented litigant without violating any provision of the code. Some judges are unwilling to provide any assistance at all to self-represented litigants, while other judges are willing to assist but are wary of creating the appearance of bias. The proposed amendments would not require judges to help self-represented litigants, but it would provide guidance to those who wish to provide assistance so that the matter can be heard.</p> <p>The committee agreed that the appropriate placement for the proposed language is canon 3B(8), which requires judges to dispose of cases fairly, promptly, and efficiently, and the commentary following that canon. Although the proposed amendment to the canon makes no reference to self-represented litigants (because it would apply equally to litigants with counsel), the committee concluded that it would be helpful to include commentary that specifically references such litigants.</p>

	The text of the proposed amendments to canon 3B(8) and the commentary is attached.
	Attachment

Canon 3B(8) of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A. ***

B. Adjudicative Responsibilities

(1)–(7) ***

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

ADVISORY COMMITTEE COMMENTARY:

The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law, to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court’s business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants, and their lawyers cooperate with the judge to that end.

(9)–(11) ***

C.–E. ***

Item SP07-05 Response Form

Title: Conflicts of Interest for Judges With Administrative Responsibilities (amend Cal. Code Jud. Ethics, canon 3C(1))

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____
(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

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Title	Conflicts of Interest for Judges With Administrative Responsibilities (amend Cal. Code Jud. Ethics, canon 3C(1))
Summary	This proposed amendment would require judges to discharge their administrative responsibilities free of conflicts of interest.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>As a consequence of state funding of the trial courts, judges have undertaken administrative and business responsibilities and decisions that previously were handled by the counties. For example, judges are sometimes involved in selecting contractors for various purposes on behalf of the court, such as working on new or renovated courthouses, or in leasing or acquiring property. Judges also occasionally appear on behalf of their courts before zoning commissions and boards of supervisors.</p> <p>The Political Reform Act (Gov. Code, § 81000 et seq.), which prohibits public officials from participating in government decisions in which they have a financial interest, does not apply to judges because they are not considered “public officials” under the act. (Gov. Code, § 82048.) The disqualification provisions in canon 3 are also inapplicable because they refer exclusively to the duty to disqualify from a “proceeding,” not from business transactions or administrative decisions. The only canons that appear to be applicable are canon 1, which requires judges to uphold the integrity and independence of the judiciary, canon 2, which states that judges must avoid impropriety and the appearance of impropriety, and canon 2A, which provides that judges must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.</p> <p>The committee agreed that a canon focusing on administrative and business conduct would be beneficial in that it would promote the fair and conflict-free administration of the courts. Because existing canon 3C pertains to administrative responsibilities of judges, the committee concluded that the new language should be inserted into that canon.</p> <p>The text of the proposed amendments to canon 3C(1) is attached.</p>
	Attachment

Canon 3C(1) of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A.-B. ***

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities free of conflict of interest and without bias or prejudice, ~~and~~ shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2)-(5) ***

D.-E. ***

Item SP07-06 Response Form

Title: Self-Reporting to the Commission on Judicial Performance (amend Cal. Code Jud. Ethics, canon 3D(3) and Advisory Committee Commentary following canon 3D(3))

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

(please print)

Organization: _____

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Title	Self-Reporting to the Commission on Judicial Performance (amend Cal. Code Jud. Ethics, canon 3D(3) and Advisory Committee Commentary following canon 3D(3))
Summary	These proposed amendments would: (1) provide that retired judges sitting on assignment (assigned retired judges) self-report to the Chief Justice when charged with or convicted of a crime, and that subordinate judicial officers (SJOs) similarly self-report to the presiding judges of the courts in which they sit as well as to the Commission on Judicial Performance (CJP); and (2) add citations filed directly with the court to the list of charging documents that trigger the self-reporting requirement for all judicial officers.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>A. Self-Reporting by Assigned Retired Judges and SJOs</p> <p>Canon 3D(3) requires a judge who is charged with or convicted of certain crimes to self-report to the CJP. These crimes include all felonies, misdemeanors involving moral turpitude, and misdemeanors involving violence, the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol.</p> <p>Under canon 6A, the term “judge” includes assigned retired judges and SJOs. Therefore, assigned retired judges and SJOs must comply with the self-reporting requirement of canon 3D(3). The CJP, however, does not have jurisdiction to discipline assigned retired judges for conduct that occurs while they are sitting on assignment. Rather, under article VI, section 6, of the California Constitution, the Chief Justice has the power to determine which retired judges may participate in the Assigned Judges Program. The committee concluded that it makes more sense for an assigned retired judge to self-report to the Chief Justice than to the CJP.</p> <p>With regard to SJOs, the CJP shares jurisdiction with the courts. A complaint about an SJO must first be filed with and considered by the court in which the SJO sits. If the complainant is dissatisfied with the court’s disposition of the complaint, the complainant may ask the CJP to review the matter. (Cal. Rules of Court, rule 10.703(1).) Because the courts and the CJP have concurrent jurisdiction, the committee concluded that SJOs should be required to self-report to the presiding</p>

judges of the courts in which they sit as well as to the CJP.

B. Direct Filing of Citation

Canon 3D(3) requires a judge to notify the CJP when the judge “is charged by prosecutorial complaint, information or indictment” with the types of crimes noted above and when the judge is convicted. In some jurisdictions within California, driving under the influence of alcohol cases (DUIs) are no longer initiated by the district attorney filing a prosecutorial complaint, but rather by a direct filing of law enforcement’s citation of the driver. In those jurisdictions, judges are technically not required to self-report when they are charged because the citation is not a “prosecutorial complaint, information, or indictment.” Because direct filing of citations is becoming more prevalent, the committee concluded that the canon should be amended to avoid inconsistent application of the self-reporting requirement throughout the state. The term “citation” does not include traffic citations or other citations for offenses not covered by the self-reporting requirement. Therefore, the committee recommends including a clarification to that effect in the commentary following canon 3D(3).

The proposed amendment would also include a qualification that the judge must be charged *in court* with the citation. This additional requirement would clarify that if a judge who is cited appears in court and finds that the citation has not been filed, the judge need not report the fact that he or she received the citation.

In reviewing the language of canon 3D(3), the committee also concluded that dividing the canon’s one lengthy sentence into three sentences would make it more comprehensible.

The text of the proposed amendments to canon 3D(3) and the commentary is attached.

Attachment

Canon 3D(3) of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A.-C. ***

D. Disciplinary Responsibilities

(1)-(2) ***

(3) ~~A judge who is charged by~~ shall promptly report in writing to the Commission on Judicial Performance when he or she is charged in court by citation, prosecutorial complaint, information, or indictment, or convicted of a with any crime in the United States, as specified below. Crimes that must be reported are: (1) all crimes, other than ~~one~~ those that would be considered a misdemeanors not involving moral turpitude or an infractions under California law,; and (2) but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol. ~~A judge also shall promptly report and in writing report that fact to the Commission on Judicial Performance in writing upon conviction of such crimes.~~

If the judge is a retired judge serving in the Assigned Judges Program, he or she shall promptly report such information in writing to the Chief Justice rather than to the Commission on Judicial Performance. If the judge is a subordinate judicial officer, he or she shall promptly report such information in writing to both the presiding judge of the court in which the subordinate judicial officer sits and the Commission on Judicial Performance.

ADVISORY COMMITTEE COMMENTARY:

Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional reporting requirements regarding lawyers.

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The term “citation” in Canon 3D(3) is not intended to expand the list of crimes that would require self-reporting. A judge must only self-report a citation that charges one of the crimes described in the canon.

Item SP07-07 Response Form

Title: Disclosure by Trial Court Judges (amend Cal. Code Jud. Ethics, canons 3E(2) and 6D(5)(a), and the commentary following canon 3E)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

**Address: Ms. Geraldine Dungo,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102**

Fax: (415) 865-7664 Attention: Geraldine Dungo

Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 15, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Title	Disclosure by Trial Court Judges (amend Cal. Code Jud. Ethics, canons 3E(2) and 6D(5)(a), and Advisory Committee Commentary following canon 3E)
Summary	The proposed amendments would provide that a judge must disclose on the record information that is reasonably relevant to the question of disqualification, rather than disclose <i>what the judge believes</i> the parties or their lawyers might consider relevant.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>Currently, canon 3E(2) provides that judges must disclose on the record “information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.” The Supreme Court Advisory Committee on the Code of Judicial Ethics has recommended to the Supreme Court that it change this language to focus on information a reasonable person, rather than the judge, the parties, or their attorneys, would consider relevant to the issue of disqualification.</p> <p>The purpose of nondisqualifying disclosure is to provide the parties with information beyond the strict criteria for disqualification for use in a motion to disqualify a judge. With the disclosure requirement currently cast in subjective terms of <i>what the judge believes</i> the parties might consider relevant, the purpose of the disclosure provision may be defeated. By focusing on the subjective belief of the judge, who already has decided the information does <i>not</i> require disqualification, the current language may not advance the reflective consideration the disclosure requirement is intended to promote. The committee concluded that changing the language of the disclosure requirement to be objective would further the purpose of the provision.</p> <p>In July 2006, the committee circulated for comment a proposed amendment to canon 3E(2) that would have changed the focus from what “the judge believes the parties or their lawyers might consider relevant to the question of disqualification” to what “the parties or their lawyers might reasonably consider relevant.” After considering comments, the committee decided not to recommend the proposed amendment to the Supreme Court. Instead, the committee agreed that</p>

the language should be modified to require disclosure of information that is “reasonably relevant” to the question of disqualification. This standard is more objective than either the existing language or the modified language that was circulated for comment in July 2006.

To avoid excessive and unnecessary disclosure, the committee has recommended adding the word “reasonably” to qualify “relevant” and tying the disclosure to disqualification for cause under Code of Civil Procedure section 170.1. Without the link to section 170.1, parties might argue that certain extraneous information about a judge should be disclosed because the information could lead a party to file a peremptory challenge against the judge.

To clarify that disclosure of any information by the judge must be related to the case before the judge, an Advisory Committee Commentary would be added following canon 3E(2). The commentary would also specify that the disclosure must be related to a ground for disqualification set forth in Code of Civil Procedure section 170.1.

The Advisory Committee Commentary at the end of canon 3E and canon 6D(5)(a), which pertains to temporary judges, referees serving under Code of Civil Procedure sections 638 and 639, and court-appointed arbitrators, would also require amendment because they track the current language of the disclosure provision in canon 3E(2).

The text of the proposed amendments to canon 3E(2), the commentary following canon 3E, and canon 6D(5)(a), are attached.

Attachment

Canon 3E(2) of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A.–D. ***

E. Disqualification

(1) ***

(2) In all trial court proceedings, a judge shall disclose on the record information that ~~the judge believes the parties or their lawyers might~~ is reasonably consider relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

(3)–(5) ***

ADVISORY COMMITTEE COMMENTARY

Canon 3(E)(1) sets forth the general duty to disqualify applicable to a judge of any court. Sources for determining when recusal or disqualification is appropriate may include the applicable provisions of the Code of Civil Procedure, other provisions of the Code of Judicial Ethics, the Code of Conduct for United States Judges, the American Bar Association’s Model Code of Judicial Conduct, and related case law.

The decision whether to disclose information under Canon 3E(2) is a judicial decision based on the facts of the case before the judge. A judge is only required to disclose information that is related to the grounds for disqualification set forth in Code of Civil Procedure section 170.1.

Canon 3E(4) sets forth the general standards for recusal of an appellate justice. The term “appellate justice” includes justices of both the Courts of Appeal and the Supreme Court. Generally, the provisions concerning disqualification of an appellate justice are intended to assist justices in determining whether recusal is appropriate and to inform the public why recusal may occur.

However, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial

1 review of a judicial salary statute, or might be the only judge available in a
2 matter requiring judicial action, such as a hearing on probable cause or a
3 temporary restraining order. In the latter case, the judge must promptly
4 disclose on the record the basis for possible disqualification and use
5 reasonable efforts to transfer the matter to another judge as soon as
6 practicable.
7

8 In some instances, membership in certain organizations may have
9 the potential to give an appearance of partiality, although membership in
10 the organization generally may not be barred by Canon 2C, Canon 4, or
11 any other specific canon. A judge holding membership in an organization
12 should disqualify himself or herself whenever doing so would be
13 appropriate in accordance with Canon 3E(1), 3E(4), or 3E(5) or statutory
14 requirements. In addition, in some circumstances, the parties or their
15 lawyers may consider a judge's membership in an organization relevant to
16 the question of disqualification, even if the judge believes there is no actual
17 basis for disqualification. In accordance with this Canon, a judge should
18 disclose to the parties his or her membership in an organization, in any
19 proceeding in which ~~the~~ that information is reasonably judge believes the
20 ~~parties or their lawyers might consider this information~~ relevant to the
21 question of disqualification under Code of Civil Procedure section 170.1,
22 even if the judge concludes there is no actual basis for disqualification.

Canon 6D(5)(a) of the California Code of Judicial Ethics would be amended to read:

CANON 6

COMPLIANCE WITH THE CODE OF JUDICIAL ETHICS

A.–C. ***

D. Temporary Judge, Referee, or Court-Appointed Arbitrator

(1)–(4) ***

(5) A temporary judge, referee, or court-appointed arbitrator shall, from the time of notice and acceptance of appointment until termination of the appointment:

(a) In all proceedings, disclose in writing or on the record information as required by law, or information that ~~the parties or their lawyers might~~ is reasonably ~~consider~~ relevant to the question of disqualification under Canon 6D(3), including personal or professional relationships known to the temporary judge, referee, or court-appointed arbitrator, that he or she or his or her law firm has had with a party, lawyer, or law firm in the current proceeding, even though the temporary judge concludes that there is no actual basis for disqualification.

(b) ***

(6)–(12) ***

Item SP07-08 Response Form

Title: Misuse of Prestige of Office by Temporary Judges, Referees Serving Under Code of Civil Procedure Sections 638 and 639, and Court-Appointed Arbitrators (amend Cal. Code Jud. Ethics, canon 6D)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____
(please print)

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Geraldine Dungo,
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664 **Attention:** Geraldine Dungo

Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 15, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Circulation for comment does not imply endorsement by the Supreme Court.

Title	Misuse of Prestige of Office by Temporary Judges, Referees Serving Under Code of Civil Procedure sections 638 and 639, and Court-Appointed Arbitrators (amend Cal. Code Jud. Ethics, canon 6D)
Summary	This proposed amendment would make permanent the prohibition against temporary judges, referees, and court-appointed arbitrators using their title or lending the prestige of judicial office to advance the interests of themselves or others. Currently, this prohibition is limited to the time period between the date of appointment and termination of the appointment.
Source	Supreme Court Advisory Committee on the Code of Judicial Ethics
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>Certain canons are applicable to temporary judges, referees serving pursuant to Code of Civil Procedure sections 638 and 639 (such as discovery referees), and court-appointed arbitrators only from the time of appointment until termination of the appointment, while others apply indefinitely from the time of appointment. Canon 6D(2)(b) provides that such a judicial officer shall not, from the time of notice and acceptance of appointment until termination of the appointment, “lend the prestige of judicial office to advance his, her, or another person’s pecuniary or personal interests and [shall] not use his or her judicial title in any written communication intended to advance his, her, or another person’s pecuniary or personal interest, except to show his, her, or another person’s qualifications.”</p> <p>Because the existing prohibition extends only to the time the appointment terminates, an attorney who serves once as a temporary judge currently would be permitted to print stationery with the heading “Pro Tem Judge” to be used for business purposes after the appointment is completed. The Supreme Court in 2006 adopted canon 6D(9), which addresses this issue as it pertains to court-appointed temporary judges. It states:</p> <p style="padding-left: 40px;">A temporary judge appointed under rule 2.810 of the California Rules of Court, from the time of appointment and continuing indefinitely after the termination of the appointment, shall not use his or her title or service as a temporary judge as a description of the lawyer’s current or former principal profession, vocation, or occupation on a ballot designation for judicial or other elected</p>

office, in an advertisement about the lawyer's law firm or business, or on a letterhead, business card, or other document that is distributed to the public identifying the lawyer or the lawyer's law firm.

The committee concluded that the prohibition in canon 6D(2)(b) against improperly lending the prestige of office should be made continuing for all temporary judges (not only court-appointed temporary judges), referees, and court-appointed arbitrators. The committee believes these individuals should not be permitted to lend the prestige of office to advance anyone's personal or pecuniary interests at any time after their temporary appointments. Making the prohibition permanent would be consistent with canon 6D(9)'s permanent ban on use of the title for court-appointed temporary judges, but it would extend that ban to all temporary judges, referees serving pursuant to Code of Civil Procedure sections 638 and 639, and court-appointed arbitrators. It would also cover both misuse of the title and improperly lending the prestige of office to advance any person's interests.

Under the proposed amendment, canon 6D(2)(b) would be moved to canon 6D(8), which contains prohibitions that apply indefinitely.

The text of the proposed amendment to canon 6D is attached.

Attachment

Canon 6D of the California Code of Judicial Ethics would be amended to read:

CANON 6

COMPLIANCE WITH THE CODE OF JUDICIAL ETHICS

A.–C. ***

D. Temporary Judge, Referee, or Court-Appointed Arbitrator

A temporary judge, a person serving as a referee pursuant to Code of Civil Procedure section 638 or 639, or a court-appointed arbitrator shall comply only with the following Code provisions:

(1) ***

(2) A temporary judge, referee, or court-appointed arbitrator shall, from the time of notice and acceptance of appointment until termination of the appointment:

(a) Comply with Canons 2B(1) [not allow family or other relationships to influence judicial conduct], 3B(1) [hear and decide all matters unless disqualified] and (2) [be faithful to and maintain competence in the law], 3B(5) [perform judicial duties without bias or prejudice], 3B(7) [accord full right to be heard to those entitled; avoid ex parte communications, except as specified] and (8) [dispose of matters fairly and promptly], 3C(1)[discharge administrative responsibilities without bias and with competence and cooperatively], (2) [require staff and personnel to observe standards of conduct and refrain from bias and prejudice] and (4) [make only fair, necessary, and appropriate appointments];

~~(b) Not lend the prestige of judicial office to advance his, her, or another person's pecuniary or personal interests and not use his or her judicial title in any written communication intended to advance his, her, or another person's pecuniary or personal interests, except to show his, her, or another person's qualifications;~~

~~(e)~~ (b) Not personally solicit memberships or donations for religious, fraternal, educational, civic, or charitable organizations from the parties and lawyers appearing before the temporary judge, referee, or court-appointed arbitrator;

~~(d)~~ (c) Under no circumstance accept a gift, bequest, or favor if the donor is a party, person, or entity whose interests are reasonably likely to come before the temporary judge, referee, or court-appointed arbitrator. A temporary judge, referee, or court-appointed arbitrator shall discourage members of the judge's family residing in the judge's household from accepting benefits from parties who

1 are reasonably likely to come before the temporary judge, referee, or court-
2 appointed arbitrator.

3
4 (3)–(7) ***

5
6 (8) A temporary judge, referee, or court-appointed arbitrator shall, from time of
7 notice and acceptance of appointment and continuing indefinitely after the
8 termination of the appointment:

9
10 (a) Comply with Canons 3(B)(11) [no disclosure of nonpublic information
11 acquired in a judicial capacity] (except as required by law); ~~and~~

12
13 (b) Not commend or criticize jurors sitting in a proceeding before the temporary
14 judge, referee, or court-appointed arbitrator for their verdict other than in a court
15 order or opinion in such proceeding, but may express appreciation to jurors for
16 their service to the judicial system and the community; and

17
18 (c) Not lend the prestige of judicial office to advance his, her, or another person's
19 pecuniary or personal interests and not use his or her judicial title in any written
20 communication intended to advance his, her, or another person's pecuniary or
21 personal interests, except to show his, her, or another person's qualifications.

22
23 (9)–(12) ***

24
25 E.–H. ***