

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP11-07

Title	Action Requested
Proposed Amendments to Canon 2 of the Code of Judicial Ethics	Review and submit comments by September 1, 2011
Proposed by	Proposed Effective Date
Supreme Court Advisory Committee on the Code of Judicial Ethics Hon. Richard D. Fybel, Chair	January 1, 2012
	Contact
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes several amendments to canon 2 of the code. Canon 2 provides: “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.” 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 amended canon is attached.

Discussion

Two of the proposed amendments to canon 2 arise from the 2007 revisions to the American Bar Association’s Model Code of Judicial Conduct. The committee reviewed each revision to the model code and discussed whether to recommend to the Supreme Court that amendments to the California code be adopted based on those revisions. The third proposed amendment was initiated by the committee.

1. Canon 2A

The proposed amendment to canon 2A (see attachment, p. 1, lines 11–14) is based on rule 2.10(B) of the model code, which prohibits a judge from making commitments or promises regarding cases, controversies, or issues that are likely to come before the court or that are

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inconsistent with the impartial adjudication of matters before the judge. In proposing adoption of substantially similar language in canon 2A, the committee notes that canon 5B contains a comparable provision that is limited to the election context. The proposed amendment to canon 2A would state: “A judge shall not make statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” The committee concluded that expanding this prohibition beyond the election context would promote public confidence in the integrity and impartiality of the judiciary.

2. Canon 2B(3) and commentary

The proposed amendments of canon 2B(3) and its commentary (p. 2, lines 26–43; p. 3, lines 1–8 and 37–42) concern a judge’s improper use of the prestige of judicial office in the initiation of communications with a sentencing judge or a probation or corrections officer. These revisions were proposed by the committee based on concerns that had been brought to the committee’s attention. Canon 2B(3) 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 proposes expanding the canon so that it applies to the Board of Parole Hearings (BPH) and the Governor, who is involved in parole and clemency matters, in addition to probation departments. The committee also proposes clarifying that the prohibition against initiating contact with a sentencing judge applies to matters pending before that sentencing judge.

When the committee first considered the issue of communications with the BPH and the Governor, it concluded that the judge who presided over a trial or sentenced a defendant may have an important role in determinations regarding parole and pardon requests. In fact, staff from the BPH and the Governor’s Office informed the committee that they routinely seek input from judges who presided over the cases. Moreover, the BPH is required by statute to notify the judge who tried the case when the board is considering parole suitability, and the board must consider any information submitted by the judge. (Pen. Code, § 3042.) When a convicted defendant applies to the Governor for a pardon or commutation of sentence, the Governor may require the judge who presided over the trial 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.)

Noting that these letters appear to be welcomed and are authorized by law, the committee concluded that there appears to be no reason to require an official request before a judge may send a letter to the Governor or the BPH, provided the judge served as the trial or sentencing judge. Indeed, there may be circumstances under which the judge does not receive formal notification of a request for a pardon or parole. Therefore, the committee proposes adoption of

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canons 2B(3)(a) (p. 2, lines 41–43) and (b) (p. 3, lines 1–3) to specifically permit a judge who presided over a trial or a sentencing to initiate contact with the BPH or the Governor.

Canon 2B(3) also contains an exception allowing a judge to initiate contact with these entities concerning a member of the judge’s family. The committee proposes creating a subsection (c) (p. 3, lines 5–9) for this exception and adding language that conforms to the language proposed for subsections (a) and (b).

The proposed language in the first paragraph of canon 2B(3) (p. 2, lines 26, 28–29, and 34–35) acknowledges that there are exceptions to the prohibition against initiating communications with these various entities.

Regarding contact with a representative of a probation department, the committee agreed that even a sentencing judge should not be permitted to initiate communications with a probation officer about a particular case because that would be an improper ex parte communication if it is done without the knowledge of the parties. The committee addresses this situation in proposed new canon 3B(7)(a) and its commentary. (See the Invitation to Comment on Proposed Amendments to Canon 3, item #7, p. 5.) To avoid, however, precluding a judge from contacting the probation department about sentencing issues in general, the committee proposes that the prohibition be limited to communications about a case pending before a sentencing judge. (The canon would clarify that “sentencing judge” includes a judge in juvenile proceedings, where the term “disposition” is used instead of “sentencing.”)

Finally, to remind judges that they must maintain high standards of conduct if they choose to initiate communications with corrections officials, and that they must avoid impropriety and the appearance of impropriety in those instances, the committee proposes adding a cautionary paragraph to the commentary following canon 2B(3) (p. 3, lines 37–42). The paragraph would state:

As to those communications that are permitted under this canon, a judge must keep in mind the general obligations to maintain high standards of conduct, as set forth in Canon 1, and to avoid any impropriety or the appearance of impropriety as set forth in Canon 2. A judge must also be mindful of Canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the courts.

3. Commentary following canon 2B(3)—third paragraph

The commentary following canon 2B(3), in the last sentence of the third paragraph, states: “As to the acceptance of awards, see Canon 4D(6)(c) and Commentary.” The committee proposes

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deleting the references to subdivision (c) of canon 4D(6) and the commentary because (1) subdivision (c) addresses awards to spouses, domestic partners, and family members, not to judges themselves, and (2) there is no commentary to that canon. Other subdivisions of canon 4D(6) are relevant to the issue of accepting awards, e.g., subdivision (a) and proposed subdivision (i), so the committee proposes retaining the reference to canon 4D(6) (p. 3, lines 26–27).

4. Canon 2C

The proposed amendments to canon 2C (p. 4, line 4) and its commentary (p. 4, lines 33, 36, and 37) are based on rule 3.6(A) of the model code. Both rule 3.6(A) of the model code and canon 2C of the California code prohibit membership in organizations that discriminate on the basis of various protected categories. The model code includes two categories that are not currently listed in canon 2C—gender and ethnicity. To ensure that all protected categories are covered, the committee proposes that these two categories be added to canon 2C and its commentary. The revised sentence in Canon 2C would read: “A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.” To read the proposed changes to the commentary in context, please refer to page 4, lines 33, 36, and 37 of the attached canon 2.

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Canon 2 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. Promoting Public Confidence

A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity* and impartiality* of the judiciary. A judge shall not make statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

ADVISORY COMMITTEE COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.

A judge must avoid all impropriety and appearance of impropriety.* A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.*

The prohibition against behaving with impropriety or the appearance of impropriety* applies to both the professional and personal conduct of a judge.*

The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity,* impartiality,* and competence.*

See also Commentary under Canon 2C.

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. This ~~C~~canon does not prohibit the following:

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

3
4 (b) A judge may, without a subpoena, provide the Commission on Judicial
5 Performance with a written communication containing (i) factual information
6 regarding a matter pending before the commission, or (ii) information related to
7 the character of a judge who has a matter pending before the commission,
8 provided that any such factual or character information is based on personal
9 knowledge.* In commission proceedings, a judge shall provide information
10 responsive to a subpoena or when officially requested to do so by the commission.

11
12 (c) A judge may provide factual information in State Bar disciplinary proceedings
13 and shall provide information responsive to a subpoena or when officially
14 requested to do so by the State Bar.

15
16 (d) A judge may respond to judicial selection inquiries, provide recommendations
17 (including a general character reference, relating to the evaluation of persons being
18 considered for a judgeship), and otherwise participate in the process of judicial
19 selection.

20
21 (e) A judge may serve as a reference or provide a letter of recommendation only if
22 based on the judge's personal knowledge* of the individual. These written
23 communications may include the judge's title and may be written on stationery
24 that uses the judicial title.

25
26 (3) Except as authorized by law* or these canons, a judge shall not initiate
27 communications with a sentencing judge or corrections officer about a proceeding
28 pending before the sentencing judge. Except as permitted in Canon 2B(3)(c),
29 below, or otherwise authorized by law* or these canons, a judge shall not initiate
30 communications with a representative of a probation or corrections officer,
31 department about a proceeding pending before a sentencing judge, but may
32 provide such representative with information in response to an official request.
33 “Sentencing judge” includes a judge who makes a disposition pursuant to Welfare
34 and Institutions Code section 725. Except as permitted in Canons 2B(3)(a)–(c),
35 below, or otherwise authorized by law* or these canons, a judge shall not initiate
36 communications with the Board of Parole Hearings regarding a parole proceeding,
37 or the Office of the Governor regarding a parole, a pardon, or a commutation of
38 sentence, but may provide them those entities with information for the record in
39 response to an official request.

40
41 (a) A judge may initiate communications with the Board of Parole Hearings
42 regarding parole of an inmate if the judge presided over the trial or sentenced the
43 inmate.

1 (b) A judge may initiate communications with the Office of the Governor
2 regarding parole, pardon, or commutation of sentence if the judge presided over
3 the trial or sentenced the person seeking parole, pardon, or commutation.
4

5 (c) A judge may initiate communications with a probation or corrections officer a
6 representative of a probation department, the Board of Parole Hearings regarding
7 parole, or the Office of the Governor regarding parole, pardon, or commutation of
8 sentence concerning a member of the judge's family,* provided the judge is not
9 identified as a judge in the communication.

10
11 **ADVISORY COMMITTEE COMMENTARY**

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

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

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

28 *This ~~C~~anon does not afford judges a privilege against testifying in*
29 *response to any official summons.*

30 *See also Canons 3D(1) and 3D(2) concerning a judge's obligation to take*
31 *appropriate corrective action regarding other judges who violate any provision of*
32 *the Code of Judicial Ethics and attorneys who violate any provision of the Rules of*
33 *Professional Conduct.*

34 *This ~~C~~anon does not preclude internal discussions among judges*
35 *regarding the application of substantive or procedural provisions of law* to any*
36 *pending criminal or civil case.*

37 *As to those communications that are permitted under this canon, a judge*
38 *must keep in mind the general obligations to maintain high standards of conduct,*
39 *as set forth in Canon 1, and to avoid any impropriety* or the appearance of*
40 *impropriety* as set forth in Canon 2. A judge must also be mindful of Canon 2A,*
41 *which requires a judge to act at all times in a manner that promotes public*
42 *confidence in the integrity* and impartiality* of the courts.*
43

1 **C. Membership in Organizations**

2
3 A judge shall not hold membership in any organization that practices invidious
4 discrimination on the basis of race, sex, gender, religion, national origin, ethnicity,
5 or sexual orientation.

6
7 This Canon does not apply to membership in a religious organization or an
8 official military organization of the United States. So long as membership does
9 not violate Canon 4A, this Canon does not bar membership in a nonprofit youth
10 organization.*

11
12 **ADVISORY COMMITTEE COMMENTARY**

13 *Membership of a judge in an organization that practices invidious*
14 *discrimination gives rise to a perception that the judge's impartiality* is impaired.*
15 *This Canon exempts membership in religious and military organizations and,*
16 *subject to Canon 4A, does not bar membership in nonprofit youth organizations.**
17 *These exemptions are necessary because membership in United States military*
18 *organizations is subject to current valid military regulations, and religious beliefs*
19 *are constitutionally protected. Membership in nonprofit youth organizations* is*
20 *not barred to accommodate individual rights of intimate association and free*
21 *expression. See also Canon 3E and its Commentary concerning disqualification*
22 *and disclosure.*

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

35 *Although Canon 2C relates only to membership in organizations that*
36 *invidiously discriminate on the basis of race, sex, gender, religion, national origin,*
37 *ethnicity, or sexual orientation, a judge's membership in an organization that*
38 *engages in any discriminatory membership practices prohibited by law* also*
39 *violates Canon 2 and Canon 2A and gives the appearance of impropriety.* In*
40 *addition, it would be a violation of Canon 2 and Canon 2A for a judge to arrange*
41 *a meeting at a club that the judge knows* practices such invidious discrimination*
42 *or for the judge to use such a club regularly. Moreover, public manifestation by a*
43 *judge of the judge's knowing* approval of invidious discrimination on any basis*

- 1 *gives the appearance of impropriety* under Canon 2 and diminishes public*
- 2 *confidence in the integrity* and impartiality* of the judiciary in violation of*
- 3 *Canon 2A.*

Item SP11-07 Response Form

Title: Proposed Amendments to Canon 2 of the Code of Judicial Ethics

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

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Thursday, September 1, 2011

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