

# Supreme Court Advisory Committee on the Code of Judicial Ethics

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## INVITATION TO COMMENT

SP18-05

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**Title**

Proposed Amendment to Commentary  
Following Canon 3D(2) 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

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**Date**

March 20, 2018

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### Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes adding new commentary following canon 3D(2) providing that appropriate corrective action as to an attorney who has engaged in misconduct could include writing about the misconduct in a judicial decision. Currently, the commentary states that appropriate corrective action could include direct communication with the lawyer, other direct action such as a confidential referral to a lawyer assistance program, or a report to the “appropriate authority, or other agency or body.” After receiving and reviewing comments on this proposal, the committee will make recommendations to the Supreme Court regarding the proposed amendment. The full text of the proposed amendment is attached.

### Discussion

The proposed amendment is intended to clarify the code. Canon 3D(2) requires a judge to take “appropriate corrective action” whenever the judge “has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct.” The commentary following canon 3D (which also includes a provision addressing appropriate corrective action with regard to judicial misconduct) states: “Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body.” The commentary notes that California law imposes

*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 These proposals are circulated for comment purposes only.*

additional requirements on judges to report certain types of attorney misconduct to the State Bar. (See Bus. & Prof. Code, §§ 6086.7, 6086.8, subd. (a); Cal. Rules of Court, rules 10.609, 10.1017.)

The committee considered whether a judge may satisfy the obligation to take appropriate corrective action by writing about the lawyer misconduct in a judicial decision, or whether the judge must take other additional action, such as reporting the attorney to the State Bar. The committee agreed that no further action is necessary if a judge writes about the misconduct in a decision. Nothing prohibits a judge from reporting an attorney to the State Bar in addition to addressing the misconduct in a written decision; the canon merely provides that the judge must take “appropriate corrective action,” which could simply be direct communication with the attorney. If direct communication with an attorney qualifies as appropriate corrective action under certain circumstances, a judicial decision addressing the misconduct, available publicly, should also be sufficient in some situations. This would include both published and unpublished appellate decisions as well as written trial court statements of decision and court orders.

The Advisory Committee Commentary to canons 3D(1) and 3D(2) would be amended to read:

**CANON 3**

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

**A. – C. \* \* \***

**D. Disciplinary Responsibilities**

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority. (See Commentary to Canon 3D(2).)

(2) Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.

*ADVISORY COMMITTEE COMMENTARY: Canons 3D(1) and 3D(2)*

*Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. It could also include writing about the misconduct in a judicial decision. Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional mandatory reporting requirements to the State Bar on judges regarding lawyer misconduct. See Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), and California Rules of Court, rules 10.609 and 10.1017.*

*“Appropriate authority” means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.*

**(3) – (5) \* \* \***

**E. \* \* \***