

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP19-04

Title

Proposed Amendments to Commentary
Following Canon 2B of the Code of Judicial
Ethics

Action Requested

Review and submit comments by
December 2, 2019

Proposed by

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

Proposed Effective Date

April 1, 2020

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Date

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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics seeks public comment on whether to add new commentary to canon 2B addressing two different issues. First, proposed commentary would state that a judge who “likes,” rates, or comments on a product, service, or business on social media may violate the canon’s prohibition against lending the prestige of judicial office to advance the pecuniary interests of others, even if the judge is not identified as a judge in the post. It would also state that a judge may not “dislike,” rate negatively, or submit negative comments about a product, service, or business on the Internet. Second, proposed commentary would add a cross-reference to canon 4C(3)(d)(iv), which allows a judge to be a speaker, guest of honor, or recipient of an award for public or charitable service at a fundraising event. 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 amendments is attached.

Discussion

Canon 2B(2) states: “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.” The proposed amendments address two different topics that affect the same canon: (1) posting material on the Internet, and (2) judges being featured speakers or guests of honor at fundraising events.

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 These proposals are circulated for comment purposes only.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. Posting Material on the Internet

The committee received a letter from the Commission on Judicial Performance (CJP) proposing an amendment to the code providing that a judge “shall not endorse or promote any business or commercial venture.” The CJP proposal was prompted, in part, by judges posting reviews of businesses on the Internet, e.g., Facebook or Yelp, using only their names.

The CJP cites three reasons for this proposal. First, the existing canon 2B(2) does not specify whether a judge must use his or her title to lend the prestige of judicial office. Some judges have widely recognizable names, either statewide (e.g., Supreme Court justices) or, in small communities, countywide. Consequently, use of the judge’s name in association with a business can carry the imprimatur of judicial office even without use of the judicial title because many people know the person endorsing the business is a judge.

Second, it can be difficult for a judge to control use of his or her name by a business when the judge uses his or her name to endorse a business. A business could use the judge’s name and then, without permission, add the judge’s title or a photo of the judge wearing a robe to promote the business. According to the CJP, a “clear prohibition on commercial endorsements would avoid this problem” because the judge’s name could not be used.

Third, a bright-line rule would aid the CJP’s enforcement efforts. Currently, the CJP must assess whether the prestige of judicial office is being used. It must also determine whether the judge’s name is being used to promote a business and whether use of the name advances the pecuniary interest of the judge or another person. The CJP contends that a broad canon as suggested would only require the determination whether the judge endorsed a commercial enterprise. It would be unnecessary to assess whether the judge had invoked the prestige of judicial office or sought to advance someone’s pecuniary or personal interests.

The committee concluded that the language proposed by the CJP is too broad and vague. For example, under the proposed language, is a judge “promoting” a business by wearing a t-shirt with the name of the business on it or a corporation by buying/owning stock? The problem identified by the CJP could be more narrowly addressed in commentary with cautionary language about posting material on the Internet.

The committee’s proposed commentary is based on the premise that posting a positive review on Yelp or “liking” a business on Facebook may violate the prohibition against lending the prestige of judicial office to advance the business’s pecuniary interest.¹ The proposed language would state that if a judge posts material on the Internet, the judge may not lend the prestige of judicial

¹ See Cal. Judges Assn., Formal Ethics Opn. No. 66 (2010), p. 6 (a judge must be careful not to post any material that could be construed as advancing the interests of the judge or others); Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 8:33, p. 520 (a judge must be careful not to post anything that could be construed as advancing the pecuniary or personal interests of the judge or others, such as “liking” or otherwise indicating a favorable review of a particular product or service).

office to advance the pecuniary interests of the judge or others. As an example, the commentary would state that a judge who “likes,” rates, or comments on a product, service, or business on social media might reasonably be seen as lending the prestige of judicial office by endorsing the product, service, or business. Similarly, it would provide that a judge may not “dislike” or post negative comments about a product, service, or business on the Internet.

The proposed commentary also addresses the issue of judges posting reviews under a pseudonym. The committee agreed that if a judge uses an alias (or a moniker or screen name) to post a review, the judge might still “reasonably be seen” as endorsing the product, service, or business.

The committee concluded that these proposed amendments address the CJP’s concerns without being vague and overbroad.

2. Judges Being Featured Speakers and Guests of Honor

Canon 4C(3)(d)(iv) is, in essence, an exception to the prohibition against lending the prestige of judicial office. It provides that a judge “may be a speaker, guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds and complies with Canons 4A(1), (2), (3), and (4).”

The committee proposes adding a cross-reference to this canon in the commentary following canon 2B so that judges reading the canon are aware that there is an exception in another canon.

The commentary following Canon 2B 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 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. . . .

(3) * * *

ADVISORY COMMITTEE COMMENTARY: Canon 2B

A strong judicial branch, based on the prestige that comes from effective and ethical performance, is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. A judge should distinguish between proper and improper use of the prestige of office in all of his or her activities.

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.

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

If a judge posts material on the Internet, the judge may not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others, even if the judge is not identified as a judge in the post. For example, a judge who “likes,” rates, or comments on a product, service, or business on social media (using the judge’s name, a moniker, alias, or screen name) might reasonably be seen as lending the prestige of judicial office by endorsing the product, service, or business. Similarly, a judge may not “dislike,” rate negatively, or submit negative comments about a product, service or business on the Internet.

See canon 4C(3)(d)(iv) prohibiting the use of the prestige of judicial office for fundraising or membership solicitation, but allowing a judge to be a speaker, guest of honor, or

42 *recipient of an award for public or charitable service, provided the judge does not personally*
43 *solicit funds and complies with Canons 4A (1), (2), (3), and (4).*

44 *As to the use of a judge's title to identify a judge's role in the presentation and creation*
45 *of legal education programs and materials, see Commentary to Canon 4B. In contracts for*
46 *publication of a judge's writings, a judge should retain control over the advertising, to the extent*
47 *feasible, to avoid exploitation of the judge's office.*

48 *This canon does not afford a judge a privilege against testifying in response to any*
49 *official summons.*

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

53 *Except as set forth in Canon 2B(3)(a), this canon does not preclude consultations among*
54 *judges. Additional limitations on such consultations among judges are set forth in Canon*
55 *3B(7)(a).*

56
57 **C. * * ***