



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102

www.JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT [CJEO Draft Formal Opinion 2024-027]

Title

CJEO Draft Formal Opinion 2024-027:
Public Comment on a Pending Proceeding
in Connection with a Judicial Election or
Recall Campaign

Prepared by

The California Supreme Court
Committee on Judicial Ethics Opinions

For information about the committee and
its members, visit the [CJEO website](#)

Action Requested

Review and submit comments by
September 20, 2024

**Proposed Date of Adoption or Other
Action**

To be determined

Contact

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CJEO Invites Public Comment

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has adopted a draft formal opinion and approved it for posting and public comment pursuant to California Rules of Court, rule 9.80(j), and CJEO Internal Operating Rules and Procedures, rule 7(d). ([Rule 9.80](#); [CJEO Rules](#).) The public is invited to comment on the

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draft opinion before the committee considers adoption of an opinion in final form, or other action.

CJEO Draft Formal Opinion 2024-027 addresses the ethical parameters of judicial response to public criticism of a pending proceeding. Specifically, the draft opinion analyzes the 2020 amendment to canon 3B(9) of the Code of Judicial Ethics, which permits, in connection with a judicial election or recall campaign, any judge to make a public comment about a pending proceeding, subject to certain restrictions. The committee outlines the ethical limitations and recommends that judges utilize this tool with caution.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **September 20, 2024**, and may be submitted as described below.

How to Submit Comments

Comments may be submitted: (1) [online](#); (2) by email to Judicial.Ethics@jud.ca.gov; or (3) by regular mail to:

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San Francisco, California 94102

Comments Due by September 20, 2024

At the close of the comment period, on or after **September 20, 2024**, the committee will post on its [website](#) all comments that are not clearly identified as confidential.

Attachment: CJEO Draft Formal Opinion 2024-027: Public Comment on a Pending Proceeding in Connection with a Judicial Election or Recall Campaign

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**CALIFORNIA SUPREME COURT
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CJEO *Draft* Formal Opinion 2024-027

**PUBLIC COMMENT ON A PENDING PROCEEDING
IN CONNECTION WITH A JUDICIAL ELECTION OR RECALL CAMPAIGN**

I. Question

In 2020, the following language was added to canon 3B(9) of Code of Judicial Ethics: “In connection with a judicial election or recall campaign, this canon does not prohibit any judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.”¹ This canon applies to *any* judge, not just the one being criticized. In light

¹ All further references to the code, canons, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

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of “any” judge’s now increased ability to respond to judicial criticism, what are the ethical parameters of such a response?

II. Advice Provided

A judge’s decision(s) may at times be publicly criticized in connection with a judicial election or recall. This scenario may arise when a judge issues a decision that critics then use in support of a challenge to an incumbent, or to spearhead a recall campaign. These challenges are often highly publicized, and a judge’s opinion may be misrepresented or oversimplified by an opponent. A judge may feel compelled to respond. With the 2020 amendment to canon 3B(9), it is clear that a judge may publicly comment on a pending case in connection with an election or recall, so long as the comment would not impact the outcome or fairness of the proceeding, and only if the comment pertains to the procedural, factual, or legal basis of the decision(s) at issue.

However, the committee advises that judges utilize this tool with caution. The committee encourages judges to consider how commentary (or absence of the same) may affect public perception of the integrity, impartiality, and independence of the judiciary. If a judge does wish to respond to public criticism, they should consider enlisting the assistance of a third party. The canon applies to *any* judge, not just the one being criticized in connection with a judicial election or recall campaign. Because a judicial colleague would be subject to the same restrictions under the code as the judge who is being criticized, the committee recommends reaching out to an organization, entity, or individual with experience in these matters, such as a judicial association, bar association, trial or appellate lawyer association, or law school faculty.²

² The methodology of who and how to identify an outside party to assist in responding to judicial criticism in connection with an election or recall campaign is beyond the scope of this opinion.

III. Authorities

A. Applicable Canons

Terminology:

“Impending proceeding” is a proceeding or matter that is imminent or expected to occur in the near future....

“Pending proceeding” is a proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed in any appellate process until final disposition.

Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

Canon 2A: “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, whether public or nonpublic, 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 following canon 2 and 2A: “*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.*”

Canon 3B(2): “A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.”

Canon 3B(4): “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge’s direction and control.”

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge’s direction and control. This canon does not prohibit judges from making statements in the course of

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their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. In connection with a judicial election or recall campaign, this canon does not prohibit any judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign. Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

Advisory Committee commentary following canon 3B(9): *“The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. A judge shall make reasonable efforts to ascertain whether a case is pending or impending before commenting on it. This canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.*

“Making statements in the course of their official duties” and “explaining the procedures of the court” include providing an official transcript or partial official transcript of a court proceeding open to the public and explaining the rules of court and procedures related to a decision rendered by a judge.

The provision allowing a judge to make a public comment about a pending decision that is the subject of criticism during an election campaign applies to all judicial elections, including recall elections. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the decision. For purposes of this provision, a recall campaign begins when a judge is served with a notice of intention to circulate a recall petition (see Elec. Code, § 11006), and a judicial election campaign begins when a judge or candidate for judicial office files a declaration of intention of candidacy for judicial office (see Elec. Code, § 8023).

Although this canon does not prohibit a judge from commenting on cases that are not pending or impending in any court, a judge must be cognizant of the general prohibition in Canon 2 against conduct involving impropriety or the appearance of impropriety. A judge should also be aware of the mandate in Canon 2A that a judge must

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act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In addition, when commenting on a case pursuant to this canon, a judge must maintain the high standards of conduct, as set forth in Canon 1.

Although a judge is permitted to make nonpublic comments about pending or impending cases that will not substantially interfere with a fair trial or hearing, the judge should be cautious when making any such comments. There is always a risk that a comment can be misheard, misinterpreted, or repeated. A judge making such a comment must be mindful of the judge’s obligation under Canon 2A to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. When a judge makes a nonpublic comment about a case pending before that judge, the judge must keep an open mind and not form an opinion prematurely or create the appearance of having formed an opinion prematurely.”

Canon 3B(11): “A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.”

B. Constitutional Provisions, Statutes, and Other Authorities

ABA Model Code of Judicial Conduct, rule 2.10

Broadman v. Commission on Judicial Performance (1998) 18 Cal.4th 1079

Code of Conduct for U.S. Judges, canon 3A(6)

California Judges Association, Judicial Ethics Committee, Advisory Opinion No. 24 (originally issued March 27, 1976)

California Judges Association, Judicial Ethics Update (Jan. 2016)

Commission on Judicial Performance, *Public Admonishment of Judge Bernard E. Revak* (2000)

Commission on Judicial Performance, *In the Matter Concerning Lord*, Decision and Order Imposing Public Admonishment (Apr. 11, 2018)

Inquiry Concerning Ross (2005) 49 Cal.4th CJP Supp. 79

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 1.35

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Ryan v. Commission on Judicial Performance (1988) 45 Cal.3d 518

Supreme Court Advisory Committee on the Code of Judicial Ethics, *Invitation to Comment SP19-05: Proposed Amendments to Canon 3B(9) and Commentary of the Code of Judicial Ethics* (Oct. 1, 2019)

IV. Discussion

A. Pre-2020 Parameters for Public Comment on Pending Proceedings

Canon 3B(9) is California’s primary ethical authority governing public commentary by judges. Canon 3B(9) of the code states: “A judge shall not make any public comment about a pending or impending proceeding in any court...”³ Canon 3B(9) goes on to say it “does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity.” The ABA Model Code, the Code of Conduct for U.S. Judges, and most other states’ codes of judicial conduct have similar if not identical restrictions.⁴

Prior to 2020, the code did not address public comment in the context of an election or recall campaign. The Supreme Court Advisory Committee on the Code of Judicial Ethics sought to address this with an amendment. In their Invitation to Comment, the Advisory Committee stated that the proposed amendment to canon 3B(9) was necessary “in light of the increase in attacks on judges’ judicial independence often based on a single unpopular but lawful decision by the judge.”⁵

³ Cal. Code Jud. Ethics, canon 3B(9); Cal. Judges Assn., *Opinion 24: Response to Judicial Evaluation Polls and Public Criticism* (Mar. 1976), p. 2 (judges are permitted to respond publicly to judicial evaluation polls and public criticism, “except where the response would involve the merits of a specific pending or impending judicial proceeding”).

⁴ ABA Model Code of Judicial Conduct, rule 2.10; Code of Conduct for U.S. Judges, canon 3A(6); Gray, *Commenting on Pending Cases* (2001) American Judicature Society.

⁵ Supreme Court Advisory Committee on the Code of Judicial Ethics, *Invitation to Comment SP19-05, Proposed Amendments to Canon 3B(9) and Commentary of the Code of*

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B. Post-2020 Parameters for Public Comment on Pending Proceedings

“A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism....” (Canon 3B(2).) This expectation exists alongside the fact that in California, judges are subject to judicial challenges and recall elections, which may be sparked by judicial decisions. The 2020 amendment to canon 3B(9) expressly addressed this scenario by adding the language in bold, below:

A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge’s direction and control. This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. **In connection with a judicial election or recall campaign, this canon does not prohibit any judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.** Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.⁶

Judicial Ethics (Oct. 1, 2019), pp. 1-2 <<https://www.courts.ca.gov/documents/SP19-05.pdf>> [as of July 31, 2024].

⁶ “For purposes of this provision, a recall campaign begins when a judge is served with a notice of intention to circulate a recall petition (see Elec. Code, § 11006), and a judicial election campaign begins when a judge or candidate for judicial office* files a declaration of intention of candidacy for judicial office (see Elec. Code, § 8023).” Advisory Com. com. foll. canon 3B(9).

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The Advisory Committee commentary following canon 3B(9) states in relevant part, with the amended language in bold:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition....

“Making statements in the course of their official duties” and “explaining the procedures of the court” include providing an official transcript or partial official transcript of a court proceeding open to the public and explaining the rules of court and procedures related to a decision rendered by a judge.

The provision allowing a judge to make a public comment about a pending decision that is the subject of criticism during an election campaign applies to all judicial elections, including recall elections. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the decision....

Amended canon 3B(9) allows any judge to make a public comment on a pending proceeding in connection with an election or recall, but there are two important restrictions. First, a judge, in connection with a judicial election or recall campaign, may only make a public comment on a pending proceeding if the comment “would not reasonably be expected to affect the outcome or impair the fairness of the proceeding.” (Canon 3B(9).) Judges are advised to carefully weigh the import of a public response against the potential that any response may impair the fairness of the proceeding. Any public comment from a judge before the court has issued a final ruling in the case has a much higher chance of affecting the outcome or impairing the fairness of the

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proceeding.⁷ Likewise for any commentary implying that a judge could influence the outcome of a case and/or that the judge has access to inside information.⁸

Canon 3B(9) as amended also requires that any public comment by a judge regarding a pending proceeding must be limited to the procedural, factual, or legal basis of a decision about which a judge has been criticized during an election or recall campaign. This may include providing a detailed explanation on the record of the facts and laws that the judge relied upon in deciding the case. A judge may also provide an official transcript of a court proceeding open to the court, or publicly explain the rules of court and procedures underlying the decision.⁹

The 2020 amendment to canon 3B(9) makes explicit that judges may publicly comment on a pending proceeding in connection with an election campaign. Nevertheless, a judge must weigh the benefit of publicly responding against the risk that the commentary may run astray of their other ethical obligations under the code. These include the duty to maintain high standards of conduct under canon 1, and the duty to avoid impropriety or the appearance of impropriety, and to promote public confidence in the integrity and impartiality of the judiciary as set forth in canons 2 and 2A. Canon 2A goes on to say a judge may not make any statement which would commit the judge with

⁷ See, e.g., *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 542-544 (Judge showed a newspaper reporter his draft decision in a case and discussed it with the reporter before notifying the parties).

⁸ See, e.g., Commission on Judicial Performance, *Public Admonishment of Judge Bernard E. Revak* (2000), pp. 3-4 (Judge's comments "purported to convey to his friends the outcome of a court case in which they were involved" and "implied to laypersons involved in a pending case that the judge was conveying inside information." Though the judge argued it was a "joke," his conduct caused the plaintiffs to file a motion for an evidentiary hearing, recusal of justices, and transfer of the appeal to a different court. Even though the motions were denied, the Supreme Court of California "ordered that the appeal be transferred to another district 'to avoid even the appearance of impropriety.'")

⁹ Advisory Com. com. foll. canon 3B(9).

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respect to cases or issues that are likely to come before the courts. Canon 3B(4) requires judges to be patient, dignified, and courteous.

A judge must ensure that any public response to criticism is consistent with these ethical obligations under the code. Issues may arise when a judge's public commentary suggests that a judge has surrendered impartiality and become embroiled, is defending or advocating for the judge's own statements or decisions, gives the impression of prejudgment, or appears to take sides on a case, controversy, or issue that is likely to come before the courts or that are inconsistent with the impartial performance of the judge's duties in violation of canon 2A.¹⁰ A judge may also violate the code if their public commentary is perceived to be undignified or discourteous in violation of canon 3B(4), such as a flippant or unprofessional comment about a litigant, juror, witness, or attorney. In addition, judges must avoid disclosing confidential information about a case or a party.

When deciding whether and how to respond to public criticism, a judge should still consider "whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the decision." (Advisory Com. commentary foll. canon 3B(9).) It bears repeating, however, that canon 3B(9) as amended applies to *any* judge making a public comment about a pending proceeding in connection with a judicial election or recall campaign. It is not limited to

¹⁰ While decided well before the 2020 amendment, the California Supreme Court in *Broadman v. Commission on Judicial Performance* presaged similar concerns: "A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary... When the case is pending before the commenting judge, the public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties. When the case is pending before a judge other than the commenting judge, the public may perceive the comment as an attempt to influence the judge who is charged with deciding the case. Such comments may also create the public impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties." (1998) 18 Cal.4th 1079, 1100-1101.

the judge whose decision is being criticized. Accordingly, the committee recommends that if the criticized judge wishes to seek assistance from a third party, it should be someone other than a fellow judicial officer. This may include an outside organization, entity, or individual, such as a judicial association, bar association, trial or appellate lawyer association, or law school faculty. “When judges are unfairly attacked, state and local bar leaders are often the first line of defense.... The [American Bar Association] has a long-standing policy encouraging all state, local, and territorial bar associations to adopt programs enabling timely and effective responses to criticism of judges....”¹¹

V. Conclusion

Canon 3B(9) as amended gives judges the ability to publicly comment on pending proceedings in connection with a judicial election or recall campaign, but caution is required. Public comment is only permitted if “(a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.” Judges must also consider how any potential response or lack of response could affect public perception of the integrity, impartiality, and independence of the judiciary. When faced with the decision of whether and how to respond to criticism, a judge should consider enlisting the assistance of a third party as recommended in the Advisory Committee commentary to canon 3B(9). When seeking this third-party assistance, the committee recommends a judge consult an organization, entity, or individual with experience in these matters, such as a judicial, bar, or lawyers’ association, or law school faculty.

¹¹ Carlson, *How state and local bar associations can protect judges from unfair attacks* (Mar. 2018) <https://www.abajournal.com/news/article/state_and_local_bar_associations_are_first_line_of_defense> [as of July 31, 2024].

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This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this opinion are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

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