



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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

I. Question

In 2020, in response to the recall of Judge Aaron Persky, the following language was added to canon 3B(9) of the California 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 of “any” judge’s now

¹ All further references to the code, canons, Terminology, and Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

increased ability to respond to judicial criticism, what are the ethical parameters of such a response?

II. Advice Provided

A judge's decisions 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. The 2020 amendment to canon 3B(9) makes 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.

If a judge decides to make a public comment on a pending proceeding under these circumstances, the judge is advised to consider how the commentary (or absence of the same) may affect public perception of the integrity, impartiality, and independence of the judiciary. Judges are also permitted under the code to enlist the assistance of a third party in responding to public criticism. This may include an organization with experience in responding to public criticism of judges, including California Judges Association's (CJA) Response to Unfair Criticism Committee,² the American Board of Trial Advocates

² California Judges Association, *Response to Unfair Criticism* <<https://www.caljudges.org/RTC.asp>>, see also California Judges Association, *Response to Unfair Criticism* committee page <<https://www.caljudges.org/CommCriticism.asp>> [as of Nov. 19, 2024].

(ABOTA),³ the American Bar Association, or state or local bar association.⁴ Judges may also seek assistance from a fellow judge. Judges making a public comment on a pending proceeding in defense of another judge must ensure that their commentary complies with the canons, including canon 3B(9) as amended.

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.”

³ ABOTA has adopted guidelines for each chapter of ABOTA to use to provide responses to misinformation or unwarranted criticism of an individual judge or judiciary. ABOTA’s goal is to “[m]aintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary.” American Board of Trial Advocates, *Protocol for Responding to Unfair Criticism of Judges* <<https://cal-abota.org/pdf/UnfairCriticismofJudges.pdf>> [as of November 19, 2024]; San Diego Chapter of the American Board of Trial Advocates, *Responding to Unfair Criticism of Judges* <<https://sdabota.org/Criticism.aspx>> [as of November 19, 2024].

⁴ 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 November 19, 2024].

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 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 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. Statutes, Cases, and Other Authorities

ABA Model Code of Judicial Conduct, rule 2.10

American Board of Trial Advocates, *Protocol for Responding to Unfair Criticism of Judges*

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)

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

Domonoske & Gonzales, Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner, NPR (June 5, 2018) *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518

Responding to Unfair Criticism of Judges, San Diego Chapter of the American Board of Trial Advocates

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 Ethical Parameters for Public Comment on Pending Proceedings

Canon 3B(9) is California's primary ethics 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. . . ."⁵ 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

⁵ Cal. Code Jud. Ethics, canon 3B(9); California Judges Association, Opinion No. 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").

Code, the Code of Conduct for U.S. Judges, and most other states' codes of judicial conduct have similar if not identical restrictions.⁶

In 2018, Santa Clara Superior Court Judge Aaron Persky was recalled — California's first successful judicial recall in 86 years — based on his decision in one case.⁷ Many attributed the success of the recall effort to the fact that Judge Persky was prohibited from making a public comment on the case in question under canon 3B(9) as it was then written. The Supreme Court Advisory Committee on the Code of Judicial Ethics sought to address this with an amendment. In its 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.”⁸ When a judge is challenged, the public may expect the criticized judge to respond. Prior to the amendment, a judge’s ability to respond was limited, and the general public may have mistaken a judge’s silence as acquiescence. The rise in recall attempts, judicial challenges, and judicial criticism in general, amplified by social media, highlighted the need for a way by which judges could ethically respond on their own behalf, or on behalf of their colleagues, in the public sphere.

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

Canon 3B(2) provides that “A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism. . . .” This expectation exists alongside the fact that in California, judges are subject to judicial challenges and recall

⁶ 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.

⁷ Domonoske & Gonzales, *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NPR (June 5, 2018) <<https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur>> [as of November 19, 2024].

⁸ 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), pp. 1–2 <<https://www.courts.ca.gov/documents/SP19-05.pdf>> [as of November 19, 2024].

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.⁹

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

⁹ “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. commentary foll. canon 3B(9).

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)(a).) Judges are advised to 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 higher chance of affecting the outcome or impairing the fairness of the proceeding.¹⁰ 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.¹¹

Canon 3B(9)(b) 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

¹⁰ 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).

¹¹ 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.’ ”)

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 public, or publicly explain the rules of court and procedures underlying the decision.¹²

The 2020 amendment to canon 3B(9) makes explicit that judges may publicly comment on a pending proceeding in connection with a recall or election campaign. Nevertheless, a judge must carefully 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 respect to cases or issues that are likely to come before the courts.

A judge must ensure that any public response to criticism is consistent with these ethical obligations under the code. Issues may arise if a judge’s public comments suggest that a judge is not impartial or has become embroiled; if the judge 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 if a judge acts inconsistent with the impartial performance of the judge’s duties in violation of canon 2A.¹³ Judges must also be mindful of canon 3B(4), which requires judges to be patient, dignified, and courteous with those they deal with in an official capacity, and that any commentary will be part of the public record.

¹² Advisory Com. commentary foll. canon 3B(9).

¹³ Although it was decided long 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.

As noted above, canon 3B(9) allows *any* judge to make a public comment about a pending proceeding in connection with a judicial election or recall. It is not limited to the judge whose decision is being criticized. However, a judge should ensure that any public commentary about another judge’s decision complies with the code, including the limitations contained in amended canon 3B(9)(a) and (b).

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).) A judge who wants third-party assistance in publicly responding to criticism under canon 3B(9) may seek it from a fellow judicial officer (subject to the limitations of the code), or an outside organization, entity, or individual, such as law school faculty, a trial or appellate lawyers association, a judicial association, or a bar association. When judges are criticized, “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. . . .”¹⁴ Other organizations with experience in responding to public criticism of judges include CJA’s Response to Unfair Criticism Committee¹⁵ and state and local chapters of ABOTA.¹⁶

¹⁴ Carlson, *How state and local bar associations can protect judges from unfair attacks* (Mar. 2018) ABA Journal <https://www.abajournal.com/news/article/state_and_local_bar_associations_are_first_line_of_defense> [as of November 19, 2024].

¹⁵ California Judges Association, *Response to Unfair Criticism* <<https://www.caljudges.org/RTC.asp>> [as of November 19, 2024]; *see also* California Judges Association, *Response to Unfair Criticism* committee page <<https://www.caljudges.org/CommCriticism.asp>> [as of November 19, 2024].

¹⁶ ABOTA has adopted guidelines for each chapter of ABOTA to use to provide responses to misinformation or unwarranted criticism of an individual judge or judiciary. ABOTA’s goal is to “[m]aintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary.” American Board of Trial Advocates, *Protocol for Responding to Unfair Criticism of Judges*, p. 1 <<https://cal-abota.org/pdf/UnfairCriticismofJudges.pdf>> [as of November 19, 2024]; *Responding to Unfair Criticism of Judges*, San Diego Chapter of the American Board of Trial Advocates <<https://sdabota.org/Criticism.aspx>> [as of November 19, 2024].

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 so long as “(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 ensure that any public response complies with all other requirements under the code, and should consider how any potential response or lack of response could affect public perception of the integrity, impartiality, and independence of the judiciary. If a judge wishes to enlist the assistance of a third party in responding to public criticism as suggested in the Advisory Committee commentary to canon 3B(9), they should consult a judicial colleague (noting the applicable ethical restraints on the other judge), or an organization, entity, or individual with experience in these matters, such as a judicial, bar, or lawyers’ association, or law school faculty.



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).)