CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
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CJEO *Draft* Formal Opinion 2024-027

PUBLIC RESPONSE TO JUDICIAL CRITICISM

Public Comments Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); Cal. Com. Jud. Ethics Opns., rule 5(b)(1), (e)).

The following comments received by the committee on CJEO Draft Formal Opinion 2024-027 were submitted with a statement waiving confidentiality or consenting to disclosure.

Comment No. 1
Submitted by: Tim Fall
Received on: August 6, 2024
Confidentiality waived.

The draft opinion is unfortunately worded in such a way as to discourage judges from employing the ability to speak during a recall or reelection campaign. It should be rewritten to drop the discouraging language and instead encourage judges to abide by the target canon of the opinion and to abide by all other canons as well. A simple advisement to make sure all canons are followed when commenting during a recall or reelection campaign would suffice.

The present opinion comes across as "Sure, the canon says you can talk, but we say you shouldn't." That essentially tells those who drafted the canon, and the Supreme Court that authorized the canon, that they got it wrong.

But they didn't. They got it right. This proposed opinion should be rewritten to recognize the Supreme Court's policy decision letting judges speak.

Comment No. 2
Submitted by: Anonymous
Received on: August 7, 2024
Confidentiality waived.

Please explain how it is ok for a sitting court administrator ie "judge" can be on the payroll of a law firm and without prior notice or disclosure to the litigants. How would the form 700 be relevant when appointed into position rather than elected? Any ruling by someone who has not specifically and openly disclosed their financial relationship to ANY law firm MUST be considered null and void and reheard by a non-biased non-conflicted judge or court administrator. There is a HUGE problem in Los Angeles County with this type of abuse. Mr. Richard Fine had exposed the court administrators but it was overlooked and he was arrested and thrown in jail for 18 months. The courts are assuming we civilians should be subject to their military tribunals which is unfair and unconstitutional. When will our state step in and regulate this? Do the feds need to step in instead? Stop the abuse.

Comment No. 3
Submitted by: Anonymous
Received: August 7, 2024
Confidentiality Waived

How can a judge receive a salary from both the state and from a law firm and without prior disclosure to all interested parties involved in a court matter? This should be mandatory that before a judge takes a case the judge or clerk should disclose their financial relationships most importantly a law firm.
Total conflict of interest. Puts a new spin on "we got the judge on our payroll"

Comment No. 4
Submitted by: Hon. Julie Conger, Ret.
Received: August 7, 2024
Confidentiality Waived

Public criticism of a judge's decision usually arises immediately after the ruling is made, well before any organized election or recall is underway. Most frequently, the public furor centers not upon the law or the procedures involved, but rather upon the exercise of the judge's discretion, particularly in cases involving hot-button issues such as sexual assault and drunk driving.
This CJEO opinion could further address the following issues:
1) Does the prohibition on public commentary (Canon 3B(9)) absolutely forbid any remarks with relation to public attacks upon a judicial decision which are not yet in connection with an election or recall campaign?
2) How to frame a message supporting the exercise of judicial discretion while staying within the confines of the Code of Judicial Ethics.
3) When a judicial decision is under attack in connection with an election or recall campaign, other judges may feel compelled to either criticize or support the decision. This CJEO opinion should address this concern to alert commenting judges to avoid the appearance of "warring judges" which would draw the judiciary into disrepute**.**

Comment No. 5
Submitted by: Judge Barbara A. Kronlund
Received: August 30, 2024
Confidentiality Waived

Thank you to the CJEO for drafting this important Opinion on public comment in the wake of the 2020 Canon 3B(9) amendment. I appreciate your work and the opportunity to comment thereon.

I am a Superior Court judge in San Joaquin County, and between my court commissioner service and time as a judge, I have been on the bench for approximately 29 years. During much of that time, I have been involved in studying and teaching judicial ethics, including having served for 11 years as a member as well as chair of CJA's Judicial Ethics Committee, teaching NJO for about 20 years, and teaching mandatory judicial ethics for about 15 years or so, including serving as a member of its curriculum committee for several cycles. I was appointed co-chair of CJA's Judicial Fairness Coalition (JFC), where I served for about 5 years and of which I am still a member.

I have been a champion of judicial independence for almost 20 years. I've presented extensively on the topic, and I produced a Power-point training on the importance of judicial independence to fair courts which has been shared with the bench and bar throughout California as well as with judges and attorneys across the country to support education efforts in this area.

During my tenure as co-chair of the JFC, we studied the successful recall in Santa Clara County of Judge Aaron Persky, and we collectively agreed that a huge factor in its success was the prohibition in Canon 3B(9) which disallowed public comment in defense of Judge Persky by both the judge himself, as well as judicial colleagues. The voting public wanted to hear from the "accused" judge, and that simply never occurred due to the restriction in Canon 3B(9).

As a result of our findings, the JFC drafted and then through our parent association, CJA, we promoted the adoption of the 2020 Canon 3B(9) amendment to specifically address the issue Judge Persky was faced with during his recall campaign. And with the increase in recall attempts and the huge increase in unfair judicial criticism, especially by use of social media, we included not only the recall

situation, but also elections in general. Judges simply can't be expected to fend off unfair recalls and "dirty" elections, fraught with unfair criticism, lies and slanderous attacks, with no ability to defend themselves.

All judges are impacted, at every level of the court system, everywhere in the country, by unfair criticism and baseless recall attempts. Public confidence is eroded exponentially by these kinds of attacks, and even more so as these assaults on the judiciary become more and more commonplace and are not swiftly and vigorously rebutted.

History forgotten tends to be repeated; I think it's important to include something in this Opinion about the genesis of the 2020 Canon 3B(9) amendment. It was all about the successful Judge Persky recall- the first such successful judicial recall in California in 86 years, I believe. And there was an onslaught of additional judicial recall attempts, which failed, immediately in the aftermath of the Persky recall, as other disgruntled litigants became emboldened by the possibility of removing judges. All judges should be concerned about baseless recall attempts, due to the contagion of such efforts and the ease of connecting with like-minded people on social media nowadays.

I am concerned that this Opinion merely recites the language of the amendment to Canon 3B(9), and then quickly shifts gears to warn judges that they should really not use it as a basis for public comment, and should recruit others to make the comment. This is a disservice to a hard-fought, significant amendment to the Canon. The amendment to Canon 3B(9) was literally a sea change in California Judicial Ethics. What this draft CJEO Opinion suggests is something which could always be done before the amendment; that is, others, who are not judges, could always come to our aid, and could always speak out on our behalf. That's been going on for decades.

It seems the Opinion has lost sight of the very point of the Canon amendment: the attacked judge and judicial colleagues were expected by the voting public to respond to the baseless and outrageous criticism, and they could not do so. Judges need this tool as a critical aid in defending themselves, if and when an appropriate situation arises. There will no doubt be more, egregious and notorious recall efforts to come, so judges should not be in fear of using this new defense mechanism to

protect themselves, their colleagues, and to stand up for judicial independence and the Rule of Law.

To make this Opinion useful to the judiciary, I urge the CJEO to include some actual examples, as to what falls within (or outside of), 3B(9)(a), and 3B(9)(b), as presented at page 7, under IV. Discussion, para. B.

It would be most helpful if CJEO specifically explained, and provided examples, as to what 3B(9) (a), "the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding" means and includes or excludes; and likewise, CJEO should explain and provide examples as to what 3B(9) (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" means and includes or excludes in practical terms. CJEO can provide practical, real-life examples, which can be anticipated to likely arise in the future, based on what we've all seen in the past.

At page 11, where the first full sentence starts, "Accordingly, the committee recommends…..", I would suggest that after "Accordingly," this language be added: **although it's entirely proper and ethical for a judge to comment within the parameters of Canon 3B(9) as amended.** Including this language makes clear that a judge has the ability to proceed with public comment as permitted by the amended Canon 3B(9), yet it suggests that the better course might still be for judges to not comment directly. Without including something like I suggest, CJEO is watering down a very powerful defense-tool which has taken a long time for judges to secure. This should not be treated lightly.

Finally, I would suggest CJEO include additional resources within footnote 11, to include at least ABOTA's Rapid Response Protocol to Judicial Criticism, CJA's Response to Unfair Criticism Committee, and CJA's Judicial Fairness Coalition which directs judges to numerous resources throughout the entire state to combat unfair judicial criticism.

Thank you for considering my Comment.

Sincerely,

Barbara A. Kronlund

Comment No. 6
Submitted by: Stephanie Kuo
On behalf of organization or entity: Los Angeles Superior Court
Received on: September 10, 2024
Confidentiality Waived

Thank you for the opportunity to comment on Draft Formal Opinion 2024-027. Generally we agree with the reasoning and conclusion and offer the following proposed edits.

First, the opinion has an appropriately cautious tone. However, the opinion as drafted might give the misimpression that the committee does not approve of judges using the new tool granted by the 2020 amendment to canon 3B(9). For balance and context, we propose adding a sentence on page 2 at the beginning of the second full paragraph: "Public comment by a judge permitted by the amendment may be proper and appropriate in certain circumstances." The paragraph then continues: "However, the committee advises that judges utilize this tool with caution . . . ."

Second, more concrete guidance to judges about making comments on pending matters would be helpful. For example, in connection with the first full paragraph on page 10 (beginning with "A judge must ensure . . . ."), if a judge is publicly criticized for a ruling made in a case pending before that judge and if that judge is considering a public response, should the judge also consider recusal?

Third, on page 10 at lines 4 to 6, the draft formal opinion states: "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, ..." We recommend deleting the phrase "is defending or advocating for the judge's own statements or decisions." Many responses to criticism about a judge's statements or decisions could be considered "defending or advocating," even if the responses merely explain the legal or factual basis for a decision or clarify a statement made by a judge, which the draft formal opinion states at page 9 is permissible. By making any public response to criticism, except perhaps by retracting the decision or statement, the judge is in effect defending the prior decision or statement.

Thank you for considering our comments.

Comment No. 7
Submitted by: Judge Khymberli S. Apaloo
Received on: September 18, 2024
Confidentiality Waived

I am a judge with 12 years on the bench. I have not been challenged, but several colleagues on my bench have. Not only is it a stressful situation for the judge who is challenged, but also for colleagues, some of whom would like to help the challenged judge, knowing that there are many ethical constraints.

In my experience, focusing on what judges can do for themselves and their colleagues is crucial. Getting the support of lawyers, law schools and bar associations is one part of the strategy to combat criticism, but the other part is for the public to hear from judges, get to know judges and see the criticized judge through that judge's own presentation, not one that is put on for them while they "hide away." Coming across as fearful of the challenge, aloof, or "out of touch in an ivory tower" is part of the criticism we often face. We lose public support when we are perceived in that light. This opinion encourages the behavior that leads to our loss of support, both individually and as a branch.

Implementing Canon 3B(9) was a huge forward step, not only for defending against criticism, but also toward educating the public and humanizing the bench by allowing for appropriate comments under appropriate conditions. If the opinion could reflect a better balance of what can be done and how to do it, not only what should be avoided, that would help judges tremendously. Judges should be encouraged to have agency on their own behalf. For better or worse, at the time of election or recall, judges are in a political setting during their campaign process; that requires judges to have some leeway to define ourselves to the public and speak about the rulings for which we are being challenged. Judges should be supported in that endeavor, even if it is a difficult ethical task.

Comment No. 8
Submitted by: California Judges Association
Received on: September 12, 2024
Confidentiality Waived

See **Attachment A**.

Attachment A

CALIFORNIA JUDGES ASSOCIATION
The Voice of the California Judiciary

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SUBMISSION OF COMMENT BY THE CALIFORNIA JUDGES ASSOCIATION

Date: September12, 2024

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

Contact information: Nicole Virga Bautista
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The California Judges Association (CJA) appreciates the opportunity to provide public comment regarding Draft Formal Opinion 2024-027. This comment was prepared by the CJA Executive Board[1] in conjunction with CJA's Judicial Fairness Coalition (JFC) whose Mission Statement is: "To promote and foster the independence of our courts by providing education and resources about the judicial branch, conducting outreach in our communities, and responding to false and misleading information about judges and the judiciary."

The task of ensuring that the public has full information regarding the judicial branch and the judiciary has grown increasingly critical. Recent polling unfortunately has shown that public trust in the judiciary is at an all-time low. CJA joins a chorus of others who believe this trust deficit is in large part due to a lack of information about the third branch of government, at both the state and federal levels. In the last year alone judges in California have been verbally attacked, faced calls to resign, and even received death threats, all for lawfully and ethically performing their jobs. The level of assault on the judicial branch and on individual judges is unprecedented. This affects the ability of the judiciary to perform their jobs in accordance with the rule of law and to attract new judges to the bench. To confront these challenges, we believe that wide dissemination of information about the nature and operation of the judiciary, including responding to specific attacks on judges must be an accessible tool for judges to employ.

[1] Hon. Erica Yew abstained from the vote.

The JFC's campaign to demystify the third branch of government and reinforce the importance of an impartial judiciary has demonstrated increasing success. JFC receives support from the bench and bar alike because of a recognition that judicial independence –the cornerstone of our system of justice – faces unprecedented perception challenges in the socio-political climate. Through the campaign, JFC has created and distributed myriad educational materials in conjunction with growing its social media presence. While historically voters have lacked awareness regarding judicial elections, candidate information, and the consequential impact of their votes, JFC has ignited a collective effort to assist the people of the State of California by offering education, facilitating access to pertinent information and resources, answering questions, and acting as diligent ambassadors for our third branch of government. As a number of JFC members worked on and supported the 2020 Canon 3B(9) amendment, including some who believed it should have been even more strongly worded, we feel compelled to share our comments regarding the draft opinion.

This amendment, spurred in part by the Judge Aaron Persky (Santa Clara Superior Court) recall campaign addressed the previous Canon 3B(9) prohibition disallowing comment in defense of Judge Persky both by Aaron Persky and his judicial colleagues. Not only did the voting public want to hear Judge Persky and the judiciary's perspective but having that information would have been beneficial to the voters so that they could have made fully informed decisions. Then-existing Canon 3B(9) prohibited any response, however, resulting in a recall campaign which permitted only half the story to be available to the voting public. Putting aside the issue of whether this was unfair to Judge Persky, it was a disservice to voters across the state. The amendments to Canon 3B(9) were discussed, debated over and eventually approved in response to this.

The current version of Canon 3B(9) not only addresses a recall situation, but also addresses contested judicial elections. Were a sitting judge in a contested race to encounter unfair criticism, untruths, misrepresentations, and worse, the judge and the judge's colleagues can now provide certain limited information to ensure that there is a fair and balanced record for the benefit of the voters.

While recall mechanisms and contested elections continue to represent a healthy part of our democracy, meritless and malicious recall campaigns as well as politically motivated contested elections exist. Such a reality requires that the judiciary possess effective mechanisms to disseminate accurate information before any vote is conducted. That is precisely what the amendment to Canon 3B(9) accomplished.

CJA has concerns about the draft opinion because, as worded, it is likely to discourage judges and other judicial officers from utilizing the important latitude and rights they were given by the amendment. In other words, it could be a setback for unfairly criticized bench officers, and, more importantly, deprive voters of the information that they need to make informed voting decisions.

While it is tantamount for a judge to consider how an allowable statement under Canon 3B(9) may affect the public perception of the judiciary, it is equally important to consider how the *absence of information* may also affect, in a misleading way, the perception of the judiciary and thereby undermine the independence of the judiciary. There is a distinct probability in any given situation that the *lack of comment* by the judge or any judicial colleague damages the perception of the judiciary, whereas an appropriately tailored and truthful statement by the judge would be helpful in promoting a positive image of the judiciary. In other words, appropriate commentary by a member of the judiciary can promote a greater appreciation of the integrity, impartiality, and independence of the judicial branch.

The draft opinion suggests that a judge, who has a need to respond to unfair criticism in the context of a voting event, reach out to and request comment from professional organizations such as bar associations or law schools. However, this is exactly what the situation was *before* the 2020 amendment when the drafters determined that approach to be inadequate. A bar association speaking out on behalf of the judge can provide helpful information to the voting public, but it is not as effective (or quotable) as the judge or another judicial colleague making comment from the perspective of someone who does the job every day. There are also concerns with judges seeking what could be perceived as favors from bar associations by asking them to issue statements. In other words, a draft ethics opinion that recommends that judges should rely on bar associations and related organizations to disseminate accurate information is tantamount to reverting to the version of the rule prior to the 2020 amendment of Canon 3B(9).

CJA also has concerns about the utility of this opinion. CJA is unaware of any specific incidents where judges have improperly utilized the narrow rights granted by the amendment, or where public perception of the judiciary has been negatively impacted by a judge utilizing the narrow rights granted by the amendment. The draft opinion specifically advises that judges "utilize this tool with caution." The need for judges to employ caution in the course of their conduct and compliance with judicial ethics is sound advice, but making it the focus of the draft opinion suggests higher than usual level of caution is needed in this particular scenario, which may have the practical effect of causing judges to fear utilizing the tool at all. Judges are also aware that CJEO opinions are utilized by the Commission on Judicial Performance when imposing discipline. A very realistic concern is that an opinion of this nature, with a *recommendation* that the judge and judicial colleagues refrain from comment and rely upon bar associations and law schools, could be used against judges in a disciplinary proceeding. This may quash the use of the limited rights judges have.

CJA would urge the CJEO to revisit this opinion, including: 1. whether there is a need for it; 2. whether it will effectively quash judges from utilizing the rights that they have been granted by the plain language of the amended 3B(9); 3. whether it will deprive voters of useful information; and 4. whether the judicial branch, and thus the system of justice, benefits from the dissemination of honest and more robust information about how it actually handled a situation that is the subject of the criticism.

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