

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP11-08

Title	Action Requested
Proposed Amendments to Canon 3 of the Code of Judicial Ethics	Review and submit comments by September 1, 2011
Proposed by	Proposed Effective Date
Supreme Court Advisory Committee on the Code of Judicial Ethics Hon. Richard D. Fybel, Chair	January 1, 2012
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics is proposes several amendments to canon 3 of the code. Canon 3 provides: “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.” 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 amended canon is attached.

Discussion

Several of the proposed amendments to canon 3 arise from the 2007 revisions to the American Bar Association’s Model Code of Judicial Conduct. The ABA last overhauled the model code in 1990. The committee reviewed each revision to the model code and discussed whether to recommend to the Supreme Court that amendments to the California code be adopted based on those revisions.

Other proposed amendments are based on recommendations by the Commission for Impartial Courts (CIC), which was formed by then–Chief Justice Ronald M. George in September 2007. The CIC submitted its final report to the Judicial Council in December 2009. The commission’s overall charge was to study and recommend ways to ensure judicial quality, impartiality, and accountability. Among other tasks, the CIC was charged more specifically with developing proposals to promote ethical and professional conduct by candidates for judicial office, including through amendments to the Code of Judicial Ethics.

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The remaining amendments have been proposed by the committee based on consideration of issues brought to its attention by other members of the judicial community.

1. Canon 3—title

The proposed amendment of the title of canon 3 (see attachment, p. 1, line 4), which currently states, “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently,” is based on the title of canon 3 in the 1990 model code. Based on the 2007 revisions to the model code, the committee proposes adding the term “competently” to the title. The ABA added the element of competence to the title in the 2007 revisions to highlight the importance of competence in a judge’s discharge of his or her duties. The committee further proposes this amendment to support the principle that judges should engage in continuing education.

2. Commentary following canon 3B(1)

The commentary to canon 3B(1) currently notes that the canon is based on “the affirmative obligation contained in the Code of Civil Procedure.” The committee concluded that the commentary would be more useful if it cited the specific code section in the Code of Civil Procedure, i.e., section 170 (p. 1, line 18).

3. Canon 3B(4)

Canon 3B(4) states that a judge “shall be patient, dignified, and courteous” and “shall require similar conduct of lawyers and of all court staff and personnel under the judge’s direction and control.” The committee proposes changing the phrase “court staff and personnel” to “staff and court personnel” (p. 1, line 27) to make it consistent with a proposed amendment to canon 3B(9) and with the current language of canon 3C(2), which would be renumbered canon 3C(3) under the proposed amendments.

4. Canons 3B(5) and 3B(6)

The proposed amendments of canons 3B(5) and (6) (p. 1, lines 33–34, 38–41; p. 2, lines 1–2) are based on rules 2.3(B) and (C) of the model code. Canon 3B(5) provides that a judge shall not, in the performance of judicial duties, engage in conduct that would reasonably be perceived as bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. Canon 3B(6) states that a judge shall require lawyers appearing before the judge to refrain from manifesting, by words or conduct, bias or prejudice based on the same categories, unless the category is a legitimate issue in the proceeding.

Rules 2.3(B) and (C) of the model code are nearly identical to canons 3B(5) and (6), but in the 2007 revisions, the ABA added gender, ethnicity, marital status, and political affiliation to the list of protected categories. The ABA added “gender” because of concern that “sex” may not capture bias or prejudice against transgender persons. The term “ethnicity” was added because the ABA regarded it as distinct from national origin. For example, in the case of an Arab-Canadian, discrimination on the basis of Arab ancestry would relate to ethnicity, but discrimination based on Canadian derivation would relate to national origin. The addition of marital status was the ABA’s reaction to reported instances in which judges had berated parties

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for cohabiting or having a child outside of wedlock. Finally, the ABA added political affiliation to address situations in which a judge displays animus toward litigants affiliated with a particular political party.

The committee agrees with the model code revisions and proposes adding these four terms to the list of protected categories in canons 3B(5) and (6).

5. Canon 3B(7)

The first proposed amendment to the first paragraph of canon 3B(7) (p. 2, lines 5–8; p. 4, lines 7–8) is based on rule 2.9(C) of the model code. The amendment addresses the issue of judges conducting independent investigations in cases before them. Currently, the prohibition against independently investigating facts is in the commentary following canon 3B(7)(e). The 1990 model code also relegated this prohibition to the commentary. The ABA in 2007 decided that this provision warrants placement in a rule (the equivalent of a canon in the California code) because consideration by a judge of only the evidence presented by the parties is a defining feature of the judge’s role in an adversarial system. The model code added an exception, however, for facts that are judicially noticed.

The committee agrees that the prohibition is important enough to be moved into the canon itself, with the added exception for facts that are judicially noticed. The committee also concluded that the provision should contain a specific reference to electronic media. This amendment eliminates the need to address the issue in the commentary, so the committee also proposes deleting from the commentary following canon 3B(7)(e) (renumbered as canon 3B(7)(d) in the proposed revision) the reference to independent investigations (p. 4, lines 7–8). The proposed amendments would, however, retain in the commentary the example that a judge is statutorily authorized to investigate and consult witnesses informally in small claims cases.

The second proposed amendment to the first paragraph of canon 3B(7) (p. 2, lines 11–12) is based on rules 2.9(A)(3) and (D), which now include language noting that a judge must make reasonable efforts to avoid receiving information that is not part of the record and to ensure that the rule is not violated by persons under the judge’s direction and control. The committee agrees that the “reasonable efforts” language should be adopted to require judges to make reasonable efforts to avoid ex parte communications.

6. Elimination of canon 3B(7)(a)

The proposed elimination of subdivision (a) of canon 3B(7) (p. 2, lines 14–17; p. 3, lines 33–39 and 42–43; p. 4, lines 1–2) is based on rule 2.9(A)(2) of the model code. Like that rule, canon 3B(7)(a) provides that a judge may obtain the advice of a disinterested expert on the law if the judge gives notice to the parties of the person consulted and the content of the advice and allows the parties to respond. The ABA considered eliminating this exception to the prohibition against ex parte communications because, like the prohibition against independent investigations, it is inconsistent with the notion that judges should decide cases based on the evidence presented by the parties. Specifically, under the 1990 model code, a judge could consult with an outside legal

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expert ex parte and receive oral advice before notifying the parties. In the 2007 revisions, the ABA determined that this exception was flawed because if such a consultation was problematic for reasons that had not occurred to the judge, post-consultation notification to the parties would come too late to prevent the problem from arising. In addition, advice delivered orally would affect the parties' ability to scrutinize the advice and challenge it effectively. Rule 2.9(A)(2) corrected these flaws, in the ABA's view, by requiring judges to notify the parties before the ex parte contact is made, and by making any advice received available to the parties in writing.

The committee concluded that the ABA's revisions to the exception do not adequately preserve the concept of judges deciding cases based on the evidence presented by the parties. The committee noted that Evidence Code section 730 authorizes a judge to appoint an expert if the judge determines that expert testimony is necessary. Therefore, the committee proposes eliminating the exception embodied in canon 3B(7)(a) (p. 2, lines 14–17), and explaining the reason for the elimination in the first paragraph of the commentary (p. 3, lines 33–37). The committee also proposes adding a reference to Evidence Code section 730 and noting that a judge can invite the filing of amicus curiae briefs (p. 3, lines 37–39).

The first paragraph of the current commentary following canon 3B(7) (p. 3, lines 42–43; p. 4, lines 1–2), states: "The proscription against communications concerning a proceeding includes communications from lawyers, law professors, and other persons who are not participants in the proceeding, except to the limited extent permitted by the exceptions noted in Canon 3B(7)." The committee recommends eliminating this one-sentence paragraph for two reasons. First, the committee proposes removing the only relevant exception under canon 3B(7), i.e., the one permitting judges to obtain the advice of a disinterested expert, so the last phrase of the sentence would be unnecessary. Second, the proposed commentary explaining why the exception pertaining to disinterested experts is being deleted (p. 3, lines 33–37) would note that "consulting with legal experts outside the presence of the parties is inconsistent with core tenets of the adversarial system." Therefore, the first part of the sentence would be redundant.

Finally, eliminating the exception pertaining to the advice of a disinterested expert makes the fourth paragraph of the current commentary unnecessary. (Under the proposed revisions to canon 3, this appears as the sixth paragraph of the commentary following canon 3B(7)(d).) That paragraph reads: "An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file an amicus curiae brief." The committee proposes deleting that paragraph from the commentary (p. 4, lines 7–8).

7. New canon 3B(7)(a) and commentary

Canon 3B(7)(b), which would be renumbered as canon 3B(7)(a), provides that a judge may consult "with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities . . ." Because there is confusion about the meaning of this phrase, the committee proposes language (p. 2, lines 20–35) that would clarify whom a judge may consult. First, the committee proposes adding a qualification that a judge may consult with court personnel only if the communication relates to that person's duty to aid the judge in carrying out

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the judge’s adjudicative responsibilities (p. 2, lines 20–22). The commentary would set forth two examples (p. 2, lines 40–42; p. 3, lines 1-2): (1) a bailiff may inform the judge of a safety threat, but may not tell the judge that a defendant was overheard making an incriminating statement during a court recess; and (2) a clerk may tell the judge about a technical defect in a proposed sentence, but may not suggest to the judge a particular sentence.

Second, the proposed amendment would specify who is included within the term “court personnel” (p. 2, lines 30–35). In this context, “court personnel” would include bailiffs, court reporters, court externs, research attorneys, clerks, and other court employees, but not lawyers in the proceeding, court appointees, public lawyers, social workers, or probation officers. Regarding consultations with probation officers, the committee proposes adding a one-sentence paragraph to the commentary (p. 3, lines 3–4) stating that a “sentencing judge may not consult ex parte with a representative of the probation department about a matter pending before the sentencing judge.” The committee concluded that such a consultation would be an improper ex parte communication if the parties are not present.

Third, the committee proposes adding two provisions to this canon based on rule 2.9(A)(3) of the model code. Rule 2.9(A)(3) and canon 3B(7)(b), which would be renumbered as canon 3B(7)(a), are nearly identical, but the ABA added the proposed qualification that a judge may consult court personnel “provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.” The ABA added this language to reinforce the ideas that the judge must not relinquish ultimate responsibility for deciding the case, and, in the course of such consultation, the judge should be careful not to acquire factual information to which he or she is not entitled. The committee agrees with this additional language and proposes that it be added to the canon (p. 2, lines 22–26).

Fourth, based on rule 2.9, comment 5, of the model code, the committee proposes adding a provision (p. 2, lines 26–28) that prohibits a judge from communicating with a judge who has previously been disqualified from hearing the matter or with judges who have appellate jurisdiction over the proceeding. The ABA reasoned that if a judge is disqualified from hearing a given matter, it would defeat the purpose of the disqualification rules to permit another judge to confer with the disqualified colleague. Likewise, the canon would clarify that it would be inappropriate for a judge hearing an appeal to discuss the matter with the judge who presided over the matter below.

Finally, the committee also proposes adding commentary (p. 3, lines 5–9) stating that, in addition to not communicating with a judge who is disqualified from the matter, a judge must be careful not to talk to a judge whom the judge knows would be disqualified from hearing the matter. It would add that a judge who is aware that he or she would be disqualified from hearing the matter shall not discuss the matter with the judge assigned to the case.

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8. Canon 3B(7)(c)

See item #18 below—“New canon 3B(12)”—for an explanation of the proposed deletion of canon 3B(7)(c) (p. 3, lines 11–12).

9. Canons 3B(7)(d) and (e)—renumbered as canons 3B(7)(b) and (c)

In reviewing rule 2.9(A)(1) of the model code, which permits ex parte communications under certain circumstances for scheduling, administrative, or emergency purposes, the committee noted that its language is in the passive voice—ex parte communications “are permitted” for scheduling, administrative, or emergency purposes—signifying that either the judge or the parties could initiate the communication. By contrast, the opening paragraph of canon 3B(7) states that “a judge shall not initiate, permit, or consider” ex parte communications. But canon 3B(7)(d) provides only that a judge may “initiate” ex parte communications for scheduling, administrative purposes, or emergencies. And canon 3B(7)(e) states only that a judge may “initiate or consider” an ex parte communication when authorized by law. It is not clear why all three verbs—permit, consider, and initiate—are not used in all three parts of the canon. Because the committee concluded that a judge should be allowed to “initiate,” “permit,” or “consider” ex parte communications in all of these situations, the committee proposes that canons 3B(7)(d) and (e), which would be renumbered as canons 3B(7)(b) and (c), be amended so that all three verbs are used in all three parts of the canon (p. 3, lines 14 and 24).

In an effort to standardize the verbs used in this canon, the committee also proposes deleting the sentence in the commentary following canon 3B(7) (p. 4, lines 3–4) that reads: “This Canon does not prohibit a judge from initiating or considering an ex parte communication when authorized to do so by stipulation of the parties.” Instead, the committee proposes moving the concept of stipulation by the parties to the end of canon 3B(7)(e), which would be renumbered as canon 3B(7)(c) (p. 3, lines 25–26). That canon would read: “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.”

10. New canon 3B(7)(d)

The proposed adoption of a canon that would be numbered 3B(7)(d) (p. 3, lines 28–30), which advises a judge how to handle an unauthorized ex parte communication, is based on rule 2.9(B) of the model code. The canon would read: “If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” The ABA added this provision to the model code to provide guidance when judges unintentionally receive ex parte information.

The committee noted that this is the generally accepted means of addressing inadvertent ex parte communications, but proposes adding the canon because the code does not currently include any such provision.

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11. Commentary following proposed new canon 3B(7)(d)—second paragraph

See item #18 below—“New canon 3B(12)”—for an explanation of the proposed second paragraph of the commentary following new canon 3B(7)(d) (p. 3, lines 40–41).

12. Commentary following canon 3B(8)

See item #18 below—“New canon 3B(12)”—for an explanation of the proposed deletion of a sentence regarding settlement in the commentary following canon 3B(8) (p. 4, lines 25–26).

13. Canon 3B(9)

Canon 3B(9), which prohibits judges from making public comments about pending cases, also mandates that judges “require similar abstention on the part of court personnel subject to the judge’s direction and control.” The committee proposes changing the term “court personnel” to “staff and court personnel” (p. 4, line 35) to reflect the fact that court reporters and bailiffs are not always employed by the court and would therefore not be considered “court personnel.” This change would also make the canon consistent with the language in current canon 3C(2)—which would be renumbered canon 3C(3) under the proposed amendments (see item #19 below)—and with the proposed language in canon 3B(4).

Canon 3B(9) contains an exception for statements “explaining for public information the procedures of the court.” In reviewing rule 2.10(D) of the model code, the committee noted that the ABA deleted the phrase “for public information” from the exception. Although the ABA provides no explanation for this change, the committee concluded that the phrase adds nothing and could be confusing. Therefore, the committee proposes deleting the same phrase from canon 3B(9) (p. 4, line 37).

14. Commentary following canon 3B(9)—first paragraph

The first paragraph of the commentary following canon 3B(9) notes that the prohibition against publicly commenting on a pending case continues during the appellate process and until final disposition. The committee proposes adding a sentence (p. 5, lines 4–5) stating: “A judge shall make reasonable efforts to ascertain whether a case is pending or impending before commenting on it.” The committee believes this is a reasonable requirement that reinforces the concept that judges may make public comments only if the case is not pending or impending.

15. Commentary following canon 3B(9)—proposed second paragraph

Canon 3B(9) states that the ban against judges making public statements about pending cases “does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court.” In discussing the issue of a judge responding to an attack on his or her rulings in a pending case, the CIC noted in its recommendation #15 that when a judge responds to such an attack, it may give the appearance that the judge has resorted to inappropriate means to defend his or her own ruling, which may negatively affect the perception of fairness. As a result, most judges err on the side of caution and do not make any public statements. To provide guidance to judges on acceptable conduct in the face of attacks

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on rulings, the CIC recommended the adoption of the following sentence in the commentary following canon 3B(9):

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

The CIC noted a possible concern that adding the proposed language could embolden judges to make statements to bolster their rulings or that go beyond the case. The CIC concluded, however, that the proposed amendment does not create any new exception to the prohibition in canon 3B(9); instead, it clarifies conduct that is already permissible under the rule.

The committee agrees with the CIC analysis and recommendation and proposes adding the language as the second paragraph of the commentary following canon 3B(9) (p. 5, lines 9-12).

16. Commentary following canon 3B(9)—proposed third paragraph

In its discussion about judges responding to attacks on rulings, the CIC agreed in its recommendation #14 that it would be useful to note in the commentary following canon 3B(9) that the canon does not prohibit a judge from responding to allegations concerning the judge’s conduct in a proceeding that is not pending or impending in any court.

The committee concluded that the CIC recommendation is too broad in that it refers to responding to allegations “concerning the judge’s conduct”, whereas canon 3B(9) addresses only making comments about pending or impending proceedings. Instead, the committee proposes adding language to the commentary (p. 5, lines 13–19) noting that the canon permits a judge to comment on cases that are not pending or impending in any court, but cautioning that the judge is nevertheless bound by other applicable canons. The committee proposes the following language as the third paragraph following canon 3B(9):

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 high standards of conduct, as set forth in Canon 1.

17. Commentary following canon 3B(9)—proposed fourth paragraph

In reviewing canon 3B(9), the committee observed that the canon prohibits all public comments about pending or impending cases, but only prohibits nonpublic comments that “might substantially interfere with a fair trial or hearing.” The committee considered whether the

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distinction between public and nonpublic comments should be eliminated by proposing that *all* comments about pending or impending proceedings be prohibited. The members agreed not to propose eliminating that distinction. They noted, however, that sometimes a comment the judge believes to be private could in fact be overheard and could therefore become public. In addition, such comments could be misinterpreted. Thus, the committee proposes adding language to the commentary following canon 3B(9) (p. 5, lines 20–28) to caution judges about making nonpublic comments on pending or impending cases. The proposed language reads:

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 private 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.

18. New canon 3B(12), commentary following canon 3B(12), and canons 3B(7) and (8)

The proposed adoption of new canon 3B(12) and commentary (p. 6, lines 6–35) is based, in part, on rule 2.6(B) of the model code and comments 2 and 3 to rule 2.6. The rule provides that a judge may encourage settlement as long as the judge does not coerce the parties to settle. The comments address the issue of judges engaging in settlement discussions and then presiding over the trial if settlement discussions are unsuccessful.

In discussing this matter, the committee considered the following issues:

- Whether judges should be prohibited from handling trials in cases in which they presided over a settlement conference or mediation;
- Whether the code should specifically state that a trial judge may handle a settlement conference or mediation in that matter;
- Whether a judge should advise parties before the dispute resolution process that the judge may learn something during the process that may require disqualification; and
- Where in the code the provisions should be placed.

The committee concluded that judges should not be prohibited from engaging in dispute resolution efforts in cases they are trying because a judge’s duties include providing opportunities to settle cases. While some judges decline to engage in resolution efforts in cases they will try, others are willing to do so under certain circumstances, e.g., when the trial will be by a jury. The committee was concerned that if the canon specifically authorizes trial judges to conduct settlement conferences where the judge will preside over the trial, judges may feel

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compelled to do so even though they may be uncomfortable engaging in such an effort. To address these concerns, the proposed canon and commentary, like the model code, would permit the practice but would caution judges about not appearing to be coercive and emphasize the need to remain impartial. The cautionary note is presented as a list of factors judges should consider in determining whether to preside over settlement discussions, such as whether the parties have requested or objected to the judge's participation and whether a litigant is self-represented. The third paragraph of the commentary to Canon 3B(12) would make it clear that a judge may decline to engage in settlement discussions if the judge believes those efforts could influence his or her decision making during trial. The commentary would also caution judges about the possibility of acquiring information during the resolution efforts that would require disqualification.

Regarding where to place the provisions concerning settlement discussions, the committee concluded that canon 3, which addresses adjudicative responsibilities of judges, is the appropriate place. Currently, conferring separately with parties to promote settlement is listed as an exception to the prohibition against improper ex parte communications (canon 3B(7)(c)). The committee determined that the issue of judges engaging in dispute resolution efforts warrants its own subsection of canon 3B. Therefore, the canon proposed by the committee would be a new canon 3B(12).

The committee also proposes minor amendments to canons 3B(7) (p. 3, lines 11–12; page 3, lines 40–41) and 3B(8) (p. 4, lines 25–26). Canon 3B(7) prohibits improper ex parte communications, but subdivisions (a)–(e) set forth circumstances in which ex parte communications are permitted. Subdivision (c) states that a judge “may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.” Because the new canon 3B(12) would address dispute resolution efforts, the committee proposes deleting the reference to separate settlement discussions from canon 3B(7) (p. 3, lines 11–12). The proposed second paragraph of the commentary following canon 3B(7) would explain that the exception in subdivision (c) has been moved to canon 3B(12) (p. 3, lines 40–41).

The commentary to canon 3B(8) also contains a reference to settlement discussions. It states: “A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.” Because this reference seems misplaced in canon 3B(8) (“A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.”) and because canon 3B(12) would address coercion, the committee proposes deleting the sentence in the commentary to canon 3B(8) (p. 4, lines 25–26).

19. Canon 3C

On April 29, 2009, the Supreme Court amended canon 3C(1), which addresses judges' administrative responsibilities. The revisions added to the canon the terms “impartially,” “on the

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basis of merit,” “free of conflict of interest,” and “in a manner that promotes public confidence in the integrity of the judiciary.” The revised canon states:

A judge shall diligently discharge the judge’s administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary. A judge shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

The committee now proposes that canon 3C(4), which would be renumbered as canon 3C(5), be amended to conform to the April 2009 revisions to canon 3C(1) (p. 8, lines 3–5), and that canon 3C be reorganized with certain duplicative provisions deleted (pp. 6–8). The proposed changes are designed to make canon 3C more logically arranged.

In its approach to reorganizing canon 3C, the committee agreed that changes should be minimal while still achieving the desired result. First, the members concluded that canon 3C(1)’s distinct concepts of a judge’s duty to discharge administrative responsibilities fairly and the obligation to maintain professional competence in judicial administration should be addressed in separate subsections. Thus, canon 3C(1) would be divided into canons 3C(1) and (2), and the subsequent subsections would be renumbered. Second, the first sentence of canon 3C(5)—“A judge shall perform administrative duties without bias or prejudice.”—would be deleted because it is duplicative of the first sentence in canon 3C(1). Finally, the remainder of canon 3C(5) would be incorporated into canon 3C(1) because they both address carrying out administrative duties without bias.

20. Canon 3C(2)—renumbered as canon 3C(3)

In the 2007 revisions to the model code, the ABA added gender, ethnicity, marital status, and political affiliation to the list of protected categories in canons addressing conduct that manifests bias or prejudice based on those categories. See item #4—“Canons 3B(5) and 3B(6)”—for an explanation of the proposal to add these categories to canon 3C(3) (p. 7, lines 22–24).

21. Commentary following canon 3C(4)—renumbered as canon 3C(5)

Canon 3C(4), which would be renumbered as canon 3C(5), contains several provisions related to court appointees, such as a prohibition against making unnecessary court appointments. The commentary includes the following sentence: “Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, court reporters, court interpreters, and bailiffs.” Court personnel and staff are not actually “appointees” of a judge. Therefore, the committee proposes that the second part of that sentence be deleted because it is inaccurate (p. 8, lines 9–13). To the extent that a judge is involved in the “appointment” or hiring of these individuals, the committee believes renumbered canon 3C(5) makes clear that a judge must avoid nepotism and favoritism.

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22. Canons 3D(1) and 3D(2)

Canon 3D(1) addresses the issue of a judge's disciplinary responsibilities with regard to other judges, while canon 3D(2) concerns disciplinary responsibilities in relation to attorneys. The committee observed that the language of the two canons is not parallel. Specifically, canon 3D(1) states that a judge must "take or initiate" appropriate corrective action against judges who engage in misconduct, while canon 3D(2) requires only that a judge "shall take" appropriate corrective action against an attorney who violates the Rules of Professional Conduct. In addition, canon 3D(1) provides that appropriate corrective action "may include reporting the violation to the appropriate authority," but canon 3D(2) does not contain that phrase. To make the canons parallel, the committee proposes that "or initiate" be deleted from canon 3D(1) (p. 8, line 18) and that the phrase "which may include reporting the violation to the appropriate authority" be added to canon 3D(2) (p. 8, lines 23–24).

23. Canon 3D(2)

In November 2007, the California Commission on the Fair Administration of Justice (CCFAJ) issued a report describing a serious problem of the underreporting to the State Bar of misconduct and incompetence of prosecutors and defense lawyers in California's criminal justice system. The report recommended amendments to the Code of Judicial Ethics and to the California Rules of Court to clarify the circumstances under which a judge must report an attorney to the State Bar. Canon 3D(1) requires that a judge have "reliable information" that another judge has violated a provision of the Code of Judicial Ethics. By contrast, canon 3D(2) requires that a judge have "personal knowledge" that a lawyer has violated the Rules of Professional Conduct.

Based on the report's findings, the committee agreed that because canon 3D(2) has a personal knowledge requirement, there is confusion among the courts as to who must report an attorney when the Court of Appeal concludes that there has been misconduct based on the record on appeal. An appellate justice might decide that reaching such a conclusion based on the record is not "personal knowledge." To ensure that an appellate court takes action against a lawyer under these circumstances, the committee proposes adding the phrase "or concludes that a lawyer has committed misconduct" to canon 3D(2) (p. 8, lines 22–23). (The CCFAJ also recommended adoption of a detailed rule of court that would specify who must report certain violations to the State Bar. That proposal will be considered by the appropriate Judicial Council committee.)

Canon 3D(2) as amended would read: "Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct or concludes that a lawyer has committed misconduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority."

24. Commentary following canon 3D(2)

In response to the CCFAJ report described in item #23, above, the committee proposes language that would enhance the last sentence of the commentary following canon 3D. Currently, that sentence reads: "Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional reporting requirements regarding lawyers." The committee

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proposes that the sentence be modified as follows, with a specific reference to the statute mentioned in the canon (p. 8, lines 30–33): “Judges should note that in addition to the action required by Canon 3D(2), California law imposes mandatory additional reporting requirements on judges regarding lawyer misconduct. See Business and Professions Code section 6086.7.”

Another proposed amendment to the commentary (p. 8, lines 28–29) is based on rule 2.14 of the model code, which addresses the issue of appropriate action as to a judge who is impaired. The ABA added language indicating that appropriate action “may include a confidential referral to a lawyer or judicial assistance program.” The committee agrees that this language would be helpful to judges, particularly presiding judges, who believe a colleague’s performance may be affected by his or her impairment.

The committee also proposes deleting the term “if available” in the first sentence of the commentary (p. 8, line 28; p. 9, line 13) because it is unnecessary. If other direct action is not available to the judge, the judge cannot take the action. In addition, the term could provide a judge with an excuse for not taking action.

The committee observed that the terminology section of the code contains a definition of “appropriate authority.” The committee also noted that only canon 3D contains that term. The committee proposes deleting the definition from the terminology section and placing it in the commentary to canon 3D (p. 8, lines 34–35; Terminology section, p. 1, lines 7–9). Someone reading canon 3D and seeking the definition of the term would then be able to find it without the extra step of referring to the terminology section.

Finally, the committee proposes moving the commentary that currently follows canon 3D(3) (p. 9, lines 11–16) so that it follows canon 3D(2) (p. 8, lines 26–33). The commentary is unrelated to canon 3D(3), which concerns self-reporting by judges of criminal charges or convictions.

25. New canon 3D(4) and commentary

The proposed adoption of a new canon 3D(4) (p. 9, line 18) is based on rule 2.16(A) of the model code, which addressed the issue of cooperation with disciplinary authorities. The canon would require a judge to “cooperate with judicial and lawyer disciplinary agencies.” Government Code section 68725 requires “officers and employees of state and local public bodies and departments” and “attaches of the courts” to cooperate with CJP investigations. Because there is no specific reference to “judges” in the statute or any reference to the State Bar, the committee proposes that the new canon be adopted.

In addition, the committee proposes adding commentary that would specifically reference Government Code section 68725 and rule 104 of the Rules of the Commission on Judicial Performance, which requires a respondent judge to cooperate with the commission in accordance with section 68725. The commentary would read:

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See Government Code section 68725, which requires judges to cooperate with and give reasonable assistance and information to the Commission on Judicial Performance, and rule 104 of the Rules of the Commission on Judicial Performance, which requires a respondent judge to cooperate with the commission in all proceedings in accordance with section 68725.

26. New canon 3D(5)

The proposed adoption of a new canon 3D(5) (p. 9, lines 27–28) is based on rule 2.16(B) of the model code. The canon would prohibit a judge from retaliating against a person who cooperated with an investigation of a judge or a lawyer. The committee notes that although retaliating against someone who cooperates in an investigation is clearly unethical, there is currently no provision in the code specifically addressing the issue. Therefore, the committee proposes adopting this provision with the same language used in the model code: “A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.”

27. Canon 3E—title

Canon 3E is currently entitled, “Disqualification.” Because the canon addresses both disqualification and disclosure, the committee recommends amending the title (p. 9, line 30) to read: “Disqualification and Disclosure.”

28. Restructuring of canon 3E

The committee proposes the adoption of new disqualification and disclosure provisions within canon 3E. (See items #29 and 30, below.) To avoid substantial renumbering of canon 3E and to clearly identify which subsections address which subjects, the committee proposes dividing canons 3E(2) and (3) into subsections with titles (p. 9, lines 37; p. 10, lines 1 and 18; p. 11, line 41; p. 12, lines 1 and 8).

29. New canons 3E(2)(b) and (c) and commentary

The proposed adoption of new canons 3E(2)(b) and (c) (p. 10, lines 1–40; p. 11, lines 1–39) is based, in part, on CIC recommendation #29, which would require superior court judges to disclose to litigants, counsel, and other interested persons appearing before the judge all contributions of \$100 or more to the judge’s campaign. The proposals are also based on new legislation (Code Civ. Proc., § 170.1(a)(9)) requiring (1) disqualification of trial court judges who receive certain campaign contributions, and (2) disclosure of contributions of \$100 or more.

In the CIC’s view, mandatory disclosure by judges of all contributions of \$100 or more—the level at which contributions are currently reportable under the Political Reform Act (Gov. Code, § 84211(f))—would enhance public trust and confidence in an impartial judiciary without the need for contribution limits. For example, if the public knows that an affected litigant will be told of—and presumably have the chance to act on—a contribution made to a judge by the litigant’s opponent or another interested party, then the public will have a “check” to help ensure that money given to judges will not result in biased decisions.

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Based on CIC recommendation #30 (disqualification of trial court judges based on campaign contributions), the Legislature in 2010 adopted Code of Civil Procedure section 170.1(a)(9), which, in addition to mandating disqualification based on campaign contributions, requires a judge to disclose any contribution from a party or lawyer in a matter before the court that is required to be reported under the Political Reform Act, even if the amount would not require disqualification under section 170.1(a)(9). Section 170.9(a)(9)(C) provides: “The manner of disclosure shall be the same as that provided in Canon 3E of the Code of Judicial Ethics.”

The committee therefore proposes adoption of new canons 3E(2)(b) and (c) to effectuate Code of Civil Procedure section 170.1(a)(9)(C). Canon 3E(2)(b)(i) (p. 10, lines 6–9) sets forth the disclosure requirement for trial court judges regarding campaign contributions made directly to the candidate or the candidate’s campaign committee. Canon 3E(2)(b)(ii) (p. 10, lines 11–16) addresses indirect contributions that either support the candidate or oppose the candidate’s opponents. These contributions must be reported only if the judge has “actual knowledge” of the contribution, but the canon would require the judge to “make reasonable efforts to be informed” of such contributions.

The concept of disclosure raises logistical issues as to how, when, and for how long the recommended disclosures must be made. Canon 3E(2) of the Code of Judicial Ethics currently provides: “In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” Regarding how long a trial court judge must continue to disclose, the committee proposes that the required disclosure period should continue for two years after the date on which the judge takes the oath of office or two years from the date of the contribution, whichever is later (p. 10, lines 38–40). The recommendation is consistent with California Judges Association’s Formal Opinion #48.

The committee considered how disclosure should be made. First, it proposes that trial court judges be required to maintain a list of contributors of \$100 or more, updated weekly until 16 days before the election. During that final 16-day period, the disclosures must be updated daily (p. 11, lines 1–8). This is consistent with state reporting requirements for candidates for public office.

The committee also proposes that a trial court judge be required to post a notice outside the courtroom advising the public that a written list of contributions is available for review in a specified accessible location in the courthouse and on the court’s website, if feasible (p. 10, lines 24–31). The committee rejected the idea of keeping the list inside the courtroom because of the potential coercive effect on litigants and attorneys, who may feel compelled to make a contribution. The canon would state that compliance with the disclosure requirements of canons 3E(2)(b) and (c) satisfies the obligation under canon 3E(2) that the disclosure be made “on the record,” *unless* the judge believes the circumstances require disclosures to be made in open court (p. 10, lines 33–36). Thus, if a judge has reason to believe that disclosure of a particular campaign contribution will not be communicated effectively by reference to the list, or if there is some other

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circumstance warranting disclosure on the record in open court, the judge cannot rely on referring the parties to the list.

Regarding the content of the disclosures, the canon would require the same information a candidate must provide under the regulations of the Fair Political Practices Commission (FPPC) (p. 10, lines 20–22).

The committee also proposes adoption of commentary explaining the purpose of the disclosure requirement (p. 11, lines 11–18). It would note that a judge may have disqualification obligations under Code of Civil Procedure section 170.1 and that a judge may be required by canon 3E(2)(a) to disclose campaign contributions that would otherwise need not be disclosed under the new canon (p. 11, lines 18–27). The commentary would also suggest language a judge could use on the sign posted outside the courtroom (p. 11, lines 28–36). Finally, the commentary would cross-reference canon 5B, the Political Reform Act, and FPPC regulations, all of which contain other provisions related to judicial elections (p. 11, lines 37–39).

Although the committee does not propose disclosure provisions for appellate justices, it does propose adoption of a canon requiring disqualification of appellate justices based on campaign contributions from a party or a lawyer in a matter before the court. (See item #35, below.)

30. New canon 3E(3)(a)

The proposed adoption of new canon 3E(3)(a) (p. 12, lines 1–6) is based on rule 2.11(A)(5) of the model code and CIC recommendation #5. The new canon would provide that a judge is disqualified if he or she, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

In *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, the U.S. Supreme Court held that a provision in the Minnesota Code of Judicial Conduct prohibiting a judicial candidate from announcing “his or her views on disputed legal or political issues” violated the First Amendment. In response to this ruling, the ABA in 2003 added the following disqualification provision to the model code, now codified as rule 2.11(A)(5), under which a judge is disqualified if

[t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

The CIC agreed that California should adopt a similar provision, but with two distinctions. First, the provision would include an objective standard. To avoid confusion, the language would track as closely as possible the objective disqualification language of Code of Civil Procedure section 170.1(a)(6)(A)(iii). (Section 170.1(a)(6)(A)(iii) provides that a judge is disqualified if “[a] person

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aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”) Second, although the model code provision includes the phrase “appears to commit,” the CIC determined that adding a reasonableness standard to cover implied commitments is a better approach and is consistent with the Code of Judicial Ethics and the Code of Civil Procedure. In addition, the “appears to commit” phrase is vague and subject to constitutional attack. Finally, the CIC noted that adding a disqualification provision for commitment statements would provide judges with an express and sound basis to explain to the electorate that if they announce their views on certain issues, they may later be disqualified from hearing cases involving those issues.

The committee agrees with the CIC and proposes adoption of the following language:

A judge is disqualified if the judge, while a judge or candidate for judicial office, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in a proceeding.

Based on the CIC recommendation, the committee proposes that the new rule be added to the Code of Judicial Ethics instead of amending Code of Civil Procedure section 170.1. Placement in canon 3E would make the provision applicable to appellate justices and trial court judges, unlike placement in section 170.1, which applies only to trial court judges. Adding this new language to the canons would also unify in the Code of Judicial Ethics both the rule prohibiting commitments (canon 5B) and the rule setting forth the consequence of making a commitment.

31. Canons 3E(3)(b) and 3E(5)(d)

Canon 3E(3), which would be renumbered as canon 3E(3)(b), is a disqualification provision based on bond ownership. The reference to corporate bonds requires disqualification if the value of the bond issued by a party to a proceeding and owned by the judge exceeds \$1,500. Canon 3E(5)(d) is a provision requiring disqualification of any appellate justice who owns a legal or equitable interest exceeding \$1,500 in a party to a proceeding. To make the dollar amounts in these canons easier to find when skimming the canons, the committee proposes changing the longhand text—“one thousand five hundred dollars”—to a numerical figure, i.e., “\$1,500” (p. 12, line 11; p. 13, line 13).

32. Canon 3E(5)(a)

Canon 3E(5)(a) requires disqualification of an appellate justice if the justice has appeared or otherwise served as a lawyer in the pending matter or has appeared or served as a lawyer in any other related matter. The committee proposes substituting the word “proceeding” for “matter” in the canon (p. 12, lines 36–38) for two reasons. First, the term “pending proceeding” is used elsewhere in the code, e.g., canon 3B(9), so this amendment would achieve uniformity throughout the code. Second, the committee proposes adding a definition of the term “pending proceeding” to the terminology section (see the Invitation to Comment on Proposed Amendments to Terminology Section, item #12, p. 5).

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33. Canon 3E(5)(d)

Canon 3E(5)(d), which addresses disqualification of appellate justices based on financial interest in a party, states that “holding office in an educational, religious, charitable, fraternal, or civic organization does not confer a financial interest in the organization’s securities.” The committee proposes changing all references to a “fraternal organization” in the code (including several references in canon 4) to “service organization” (p. 13, lines 15-16) because use of the term “fraternal” may be perceived as sexist. To ensure that the proposed change does not lead anyone to conclude that certain fraternal organizations are no longer covered by the canons, the committee also proposes adding that term to the terminology section as follows: “‘Service organization’ includes any organization commonly referred to as a ‘fraternal organization.’” (See the Invitation to Comment on Proposed Amendments to Terminology Section, item #13, p. 6.)

34. Canon 3E(5)(h)

The committee noted an ambiguity in canon 3E(5)(h), which deals with a judge’s prospective employment as a dispute resolution neutral. In the second paragraph following subsection (iv), the definition of “party” applies only to canon 3E(5)(h), but the prefatory language—“For purposes of this canon, ‘party’ includes . . .”—suggests that the definition applies to all references to the term “party” throughout canon 3E. The committee proposes that this ambiguity be clarified (p. 14, lines 22, 35, and 39) by specifying that the definition in the paragraph following subsection (iv) pertains only to that subsection, not to canon 3E as a whole. This would be accomplished by the following amendment:

For purposes of ~~this~~ canon 3E(5)(h), “party” includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

The committee also proposes parallel amendments to the paragraphs preceding and following the paragraph discussed above because both of those paragraphs begin with the same language.

35. New canon 3E(5)(j)

The proposed adoption of a disqualification requirement for appellate justices who receive campaign contributions of \$5,000 or more (p. 15, lines 5–17) is based, in part, on CIC recommendation #33, and on new legislation—Code of Civil Procedure section 170.1(a)(9)—requiring disqualification of trial court judges based on campaign contributions.

The CIC recommended that appellate justices be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the justice’s campaign, directly or indirectly. The CIC agreed that public trust and confidence is even more of an issue with appellate decisions than with trial courts because of their considerably greater impact and the attention and scrutiny they receive.

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The committee noted several differences between trial court and appellate court procedures that make it difficult to simply apply section 170.1(a)(9) to the appellate courts. These differences include the size of the geographical district, lack of disclosure about who is on the appellate panel until later in the process, length of the term of office, lack of a formal mechanism by which parties can waive disqualification in appellate courts, and the greater difficulty of finding a replacement in the appellate setting than in the trial court setting. In addition to these differences, the committee observed that to obtain a waiver, a justice or judge must disclose the basis of the disqualification. Trial court judges can accomplish this when the parties appear in court, but appellate justices do not have this option because the parties do not appear until oral argument.

Having considered all these distinctions, the committee nevertheless agreed that the code should contain a similar disqualification provision for appellate justices because the differences do not justify the existence of a disqualification provision for trial court judges but not for appellate justices. Therefore, the committee proposes adoption of canon 3E(5)(j), which would require disqualification of Supreme Court and Court of Appeal justices based on campaign contributions of \$5,000 or more. The committee believes the higher dollar amount for justices (the amount for trial court judges is \$1,500) is justified by the fact that appellate districts are larger than superior court jurisdictions.

The committee also agreed that the length of time the disqualification remains in effect should be six years because that is the time period for trial court judges in section 170.1(a)(9) and there is inadequate justification to warrant a shorter disqualification period for appellate justices than for superior court judges.

Mandatory disqualification carries with it the possibility of a litigant gaming the system, i.e., making a large contribution to a particular justice for the express purpose of forcing that justice to disqualify himself or herself. The Legislature recognized this issue and included a waiver provision under which the noncontributing party may waive a disqualification that would otherwise occur because of another party's or counsel's campaign contributions. Likewise, the committee proposes that new canon 3E(5)(j) contain a waiver provision for appellate justices. Noting that most appellate courts do not have procedures in place for handling waivers of disqualification, the committee does not propose including waiver procedures in the canon; the committee will instead recommend that the Judicial Council adopt a rule of court specifying how appellate courts can effectuate the waiver provision.

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Canon 3 of the California Code of Judicial Ethics would be amended to read:

CANON 3

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

A. Judicial Duties in General

All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

ADVISORY COMMITTEE COMMENTARY

Canon 3B(1) is based upon the affirmative obligation contained in ~~the~~ Code of Civil Procedure section 170.

(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.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(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 ~~court~~ staff and court personnel under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, ~~or~~ socioeconomic status, or political affiliation, or (2) sexual harassment.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, ~~or~~ socioeconomic status, or political affiliation against parties, witnesses, counsel, or others. This ~~C~~anon does not preclude legitimate advocacy when race, sex, gender, religion,

1 national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic
2 status, political affiliation, or other similar factors are issues in the proceeding.

3
4 (7) A judge shall accord to every person who has a legal interest in a proceeding, or that
5 person’s lawyer, full right to be heard according to law.* Unless otherwise authorized by
6 law,* a judge shall not independently investigate facts in a proceeding and shall consider
7 only the evidence presented or facts that may be properly judicially noticed. This
8 prohibition extends to information available in all media, including electronic. A judge
9 shall not initiate, permit, or consider ex parte communications, or consider other
10 communications made to the judge outside the presence of the parties concerning a
11 pending* or impending* proceeding, and shall make reasonable efforts to avoid such
12 communications, except as follows:

13
14 ~~(a) A judge may obtain the advice of a disinterested expert on the law applicable to a~~
15 ~~proceeding* before the judge if the judge gives notice to the parties of the person~~
16 ~~consulted and the substance of the advice, and affords the parties reasonable opportunity~~
17 ~~to respond.~~

18
19 ~~(b) (a) A judge may consult with court personnel whose function is to aid the judge in~~
20 ~~carrying out the judge’s adjudicative responsibilities or with other judges. A judge may~~
21 ~~also consult with court personnel, so long as the communication relates to that person’s~~
22 ~~duty to aid the judge in carrying out the judge’s adjudicative responsibilities. In any such~~
23 ~~consultation with judges or court personnel, the judge shall make reasonable efforts to~~
24 ~~avoid receiving factual information that is not part of the record or an evaluation of that~~
25 ~~factual information. In such consultations, the judge shall not abrogate the responsibility~~
26 ~~personally to decide the matter. A judge shall not engage in ex parte discussions about a~~
27 ~~case with judges who have previously been disqualified from hearing the matter, or with~~
28 ~~judges who have appellate jurisdiction over the proceeding.~~

29
30 For purposes of Canon 3B(7)(a), “court personnel” includes bailiffs, court reporters, court
31 externs, research attorneys, courtroom clerks, and other employees of the court, but does
32 not include the lawyers in a proceeding before a judge, persons who are appointed by the
33 court to serve in some capacity in a proceeding, or employees of other governmental
34 entities, such as public lawyers, social workers, or representatives of the probation
35 department.

36
37 ADVISORY COMMITTEE COMMENTARY

38 Though a judge may consult ex parte with appropriate court personnel, a judge
39 may do so only on matters that are within the proper performance of that person’s duties.
40 For example, a bailiff may inform the judge of a threat to the judge or to the safety and
41 security of the courtroom, but may not tell the judge ex parte that a defendant was
42 overheard making an incriminating statement during a court recess. A clerk may point

1 out to the judge a technical defect in a proposed sentence, but may not suggest to the
2 judge that a defendant deserves a certain sentence.

3 A sentencing judge may not consult ex parte with a representative of the probation
4 department about a matter pending before the sentencing judge.

5 A judge shall not discuss a case with another judge who has already been
6 disqualified, and also must be careful not to talk to a judge whom the judge knows would
7 be disqualified from hearing the matter. Likewise, a judge who is aware that he or she
8 would be disqualified from hearing the matter shall not discuss the matter with the judge
9 assigned to the case.

10
11 ~~(e) A judge may, with the consent of the parties, confer separately with the parties and~~
12 ~~their lawyers in an effort to mediate or settle matters pending before the judge.~~

13
14 ~~(d) (b)~~ A judge may initiate, permit, or consider ex parte communications, where
15 circumstances require, for scheduling, administrative purposes, or emergencies that do
16 not deal with substantive matters provided:

17
18 (i) the judge reasonably believes that no party will gain a procedural or tactical
19 advantage as a result of the ex parte communication, and

20
21 (ii) the judge makes provision promptly to notify all other parties of the substance
22 of the ex parte communication and allows an opportunity to respond.

23
24 ~~(e) (c)~~ A judge may initiate, permit, or consider any ex parte communication when
25 expressly authorized by law* to do so or when authorized to do so by stipulation of the
26 parties.

27
28 (d) If a judge receives an unauthorized ex parte communication bearing upon the
29 substance of a matter, the judge shall make provision promptly to notify the parties of the
30 substance of the communication and provide the parties with an opportunity to respond.

31
32 **ADVISORY COMMITTEE COMMENTARY**

33 An exception allowing a judge, under certain circumstances, to obtain the advice
34 of a disinterested expert on the law* has been eliminated from Canon 3B(7) because
35 consulting with legal experts outside the presence of the parties is inconsistent with core
36 tenets of the adversarial system. Therefore, a judge cannot consult with legal experts
37 outside the presence of the parties. Evidence Code section 730 provides for the
38 appointment of an expert if a judge determines that expert testimony is necessary. A
39 court may also invite the filing of amicus curiae briefs.

40 An exception allowing a judge to confer with the parties separately in an effort to
41 settle the matter before the judge has been moved from this canon to Canon 3B(12).

42 The proscription against communications concerning a proceeding includes
43 communications from lawyers, law* professors, and other persons who are not

1 ~~participants in the proceeding except to the limited extent permitted by the exceptions~~
2 ~~noted in Canon 3B(7).~~

3 ~~This Canon does not prohibit a judge from initiating or considering an ex parte~~
4 ~~communication when authorized to do so by stipulation of the parties.~~

5 ~~This Canon does not prohibit court staff from communicating scheduling~~
6 ~~information or carrying out similar administrative functions.~~

7 ~~An appropriate and often desirable procedure for a court to obtain the advice of a~~
8 ~~disinterested expert on legal issues is to invite the expert to file an amicus curiae brief.~~

9 ~~A judge must not independently investigate facts in a case and must consider only~~
10 ~~the evidence presented, unless otherwise authorized by law. For example, a judge is~~
11 ~~statutorily authorized to investigate and consult witnesses informally in small claims~~
12 ~~cases. Code of Civil Procedure section 116.520(c).~~

13
14 (8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge
15 shall manage the courtroom in a manner that provides all litigants the opportunity to have
16 their matters fairly adjudicated in accordance with the law.*

17
18 **ADVISORY COMMITTEE COMMENTARY**

19 *The obligation of a judge to dispose of matters promptly and efficiently must not*
20 *take precedence over the judge's obligation to dispose of the matters fairly and with*
21 *patience. For example, when a litigant is self-represented, a judge has the discretion to*
22 *take reasonable steps, appropriate under the circumstances and consistent with the law**
23 *and the canons, to enable the litigant to be heard. A judge should monitor and supervise*
24 *cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary*
25 *costs. ~~A judge should encourage and seek to facilitate settlement, but parties should not~~*
26 *~~feel coerced into surrendering the right to have their controversy resolved by the courts.~~*

27 *Prompt disposition of the court's business requires a judge to devote adequate*
28 *time to judicial duties, to be punctual in attending court and expeditious in determining*
29 *matters under submission, and to require* that court officials, litigants, and their lawyers*
30 *cooperate with the judge to that end.*

31
32 (9) A judge shall not make any public comment about a pending* or impending*
33 proceeding in any court, and shall not make any nonpublic comment that might
34 substantially interfere with a fair trial or hearing. The judge shall require* similar
35 abstention on the part of staff and court personnel subject to the judge's direction and
36 control. This Canon does not prohibit judges from making statements in the course of
37 their official duties or from explaining ~~for public information~~ the procedures of the court,
38 and does not apply to proceedings in which the judge is a litigant in a personal capacity.
39 Other than cases in which the judge has personally participated, this Canon does not
40 prohibit judges from discussing in legal education programs and materials, cases and
41 issues pending in appellate courts. This educational exemption does not apply to cases
42 over which the judge has presided or to comments or discussions that might interfere with
43 a fair hearing of the case.

1 **ADVISORY COMMITTEE COMMENTARY**

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

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

13 *Although this canon does not prohibit a judge from commenting on cases that are*
14 *not pending* or impending* in any court, a judge must be cognizant of the general*
15 *prohibition in Canon 2 against conduct involving impropriety* or the appearance of*
16 *impropriety.* A judge should also be aware of the mandate in Canon 2A that a judge*
17 *must act at all times in a manner that promotes public confidence in the integrity* and*
18 *impartiality* of the judiciary. In addition, when commenting on a case pursuant to this*
19 *canon, a judge must maintain high standards of conduct, as set forth in Canon 1.*

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

29
30 (10) A judge shall not commend or criticize jurors for their verdict other than in a court
31 order or opinion in a proceeding, but may express appreciation to jurors for their service
32 to the judicial system and the community.

33
34 **ADVISORY COMMITTEE COMMENTARY**

35 *Commending or criticizing jurors for their verdict may imply a judicial*
36 *expectation in future cases and may impair a juror’s ability to be fair and impartial* in a*
37 *subsequent case.*

38
39 (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties,
40 nonpublic information* acquired in a judicial capacity.

1 **ADVISORY COMMITTEE COMMENTARY**

2 *This Canon makes it clear that judges cannot make use of information from*
3 *affidavits, jury results, or court rulings, before they become public information, in order*
4 *to gain a personal advantage.*

5
6 (12) A judge may participate in settlement conferences or in other efforts to resolve
7 matters in dispute, including matters pending before the judge. A judge may, with the
8 consent of the parties, confer separately with the parties and their lawyers during such
9 resolution efforts. At all times during such resolution efforts, a judge shall remain
10 impartial* and shall not engage in conduct that may reasonably be perceived as coercive.

11
12 **ADVISORY COMMITTEE COMMENTARY**

13 *While the judge plays an important role in overseeing efforts to resolve disputes,*
14 *including conducting settlement discussions, a judge should be careful that efforts to*
15 *resolve disputes do not undermine any party's right to be heard according to law.**

16 *The judge should keep in mind the effect that the judge's participation in dispute*
17 *resolution efforts may have on the judge's impartiality* or the appearance of*
18 *impartiality,* if the case remains with the judge for trial after resolution efforts are*
19 *unsuccessful. Accordingly, a judge may wish to consider: (1) whether the parties and*
20 *their counsel have requested or objected to the participation by the trial judge in such*
21 *discussions; (2) whether the parties and their counsel are relatively sophisticated in legal*
22 *matters or the particular legal issues involved in the case; (3) whether a party is*
23 *unrepresented; (4) whether the case will be tried by the judge or a jury; (5) whether the*
24 *parties will participate with their counsel in settlement discussions and, if so, the effect of*
25 *personal contact between the judge and parties; and (6) whether it is appropriate during*
26 *the settlement conference for the judge to express an opinion on the merits or worth of*
27 *the case or express an opinion on the legal issues that the judge may later have to rule*
28 *upon.*

29 *If a judge assigned to preside over a trial believes participation in resolution*
30 *efforts could influence the judge's decision making during trial, the judge may decline to*
31 *engage in such efforts.*

32 *Where dispute resolution efforts of any type are unsuccessful, the judge should*
33 *consider whether, due to events that occurred during the resolution efforts, the judge may*
34 *be disqualified under the law* from presiding over the trial. See, e.g., Code of Civil*
35 *Procedure section 170.1(a)(6)(A).*

36
37 **C. Administrative Responsibilities**

38
39 (1) A judge shall diligently discharge the judge's administrative responsibilities
40 impartially,* on the basis of merit, without bias or prejudice, free of conflict of interest,
41 and in a manner that promotes public confidence in the integrity* of the judiciary. A
42 judge shall not, in the performance of administrative duties, engage in speech, gestures,
43 or other conduct that would reasonably be perceived as (i) bias or prejudice, including but

1 not limited to bias or prejudice based upon race, sex, gender, religion, national origin,
2 ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status, or
3 political affiliation, or (ii) sexual harassment. A judge shall maintain professional
4 competence in judicial administration, and shall cooperate with other judges and court
5 officials in the administration of court business.

6
7 **ADVISORY COMMITTEE COMMENTARY**

8 *In considering what constitutes a conflict of interest under this Canon, a judge*
9 *should be informed by Code of Civil Procedure section 170.1(a)(6).*

10
11 ~~(2) A judge shall require* staff and court personnel under the judge's direction and~~
12 ~~control to observe appropriate standards of conduct and to refrain from manifesting bias~~
13 ~~or prejudice based upon race, sex, religion, national origin, disability, age, sexual~~
14 ~~orientation, or socioeconomic status in the performance of their official duties. A judge~~
15 ~~shall maintain professional competence in judicial administration, and shall cooperate~~
16 ~~with other judges and court officials in the administration of court business.~~

17
18 ~~(3) A judge with supervisory authority for the judicial performance of other judges shall~~
19 ~~take reasonable measures to ensure the prompt disposition of matters before them and the~~
20 ~~proper performance of their other judicial responsibilities. A judge shall require* staff and~~
21 ~~court personnel under the judge's direction and control to observe appropriate standards~~
22 ~~of conduct and to refrain from manifesting bias or prejudice based upon race, sex, gender,~~
23 ~~religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or~~
24 ~~socioeconomic status, or political affiliation in the performance of their official duties.~~

25
26 ~~(4) A judge shall not make unnecessary court appointments. A judge shall exercise the~~
27 ~~power of appointment impartially* and on the basis of merit. A judge shall avoid~~
28 ~~nepotism and favoritism. A judge shall not approve compensation of appointees above~~
29 ~~the reasonable value of services rendered. A judge with supervisory authority for the~~
30 ~~judicial performance of other judges shall take reasonable measures to ensure the prompt~~
31 ~~disposition of matters before them and the proper performance of their other judicial~~
32 ~~responsibilities.~~

33
34 **~~ADVISORY COMMITTEE COMMENTARY:~~**

35 ~~*Appointees of a judge include assigned counsel, officials such as referees,*~~
36 ~~*commissioners, special masters, receivers, and guardians, and personnel such as clerks,**~~
37 ~~*secretaries, court reporters,* court interpreters,* and bailiffs.* Consent by the parties to*~~
38 ~~*an appointment or an award of compensation does not relieve the judge of the obligation*~~
39 ~~*prescribed by Canon 3C(4).*~~

40
41 ~~(5) A judge shall perform administrative duties without bias or prejudice. A judge shall~~
42 ~~not, in the performance of administrative duties, engage in speech, gestures, or other~~
43 ~~conduct that would reasonably be perceived as (1) bias or prejudice, including but not~~

1 ~~limited to bias or prejudice based upon race, sex, religion, national origin, disability, age,~~
2 ~~sexual orientation, or socioeconomic status, or (2) sexual harassment~~ A judge shall not
3 make unnecessary court appointments. A judge shall exercise the power of appointment
4 impartially,* on the basis of merit, without bias or prejudice, free of conflict of interest,
5 and in a manner that promotes public confidence in the integrity* of the judiciary. A
6 judge shall avoid nepotism and favoritism. A judge shall not approve compensation of
7 appointees above the reasonable value of services rendered.

8
9 ADVISORY COMMITTEE COMMENTARY:

10 Appointees of a judge include assigned counsel and officials such as referees,
11 commissioners, special masters, receivers, and guardians. Consent by the parties to an
12 appointment or an award of compensation does not relieve the judge of the obligation
13 prescribed by Canon 3C(5).

14
15 **D. Disciplinary Responsibilities**

16
17 (1) Whenever a judge has reliable information that another judge has violated any
18 provision of the Code of Judicial Ethics, the judge shall take ~~or initiate~~ appropriate
19 corrective action, which may include reporting the violation to the appropriate authority.

20
21 (2) Whenever a judge has personal knowledge* that a lawyer has violated any provision
22 of the Rules of Professional Conduct or concludes that a lawyer has committed
23 misconduct, the judge shall take appropriate corrective action, which may include
24 reporting the violation to the appropriate authority.

25
26 ADVISORY COMMITTEE COMMENTARY

27 Appropriate corrective action could include direct communication with the judge
28 or lawyer who has committed the violation, other direct action, such as a confidential
29 referral to a judicial or lawyer assistance program, or a report of the violation to the
30 presiding judge, appropriate authority, or other agency or body. Judges should note that
31 in addition to the action required by Canon 3D(2), California law imposes mandatory
32 additional reporting requirements on judges regarding lawyer misconduct. See Business
33 and Professions Code section 6086.7.

34 “Appropriate authority” denotes the authority with responsibility for initiation of
35 the disciplinary process with respect to a violation to be reported.

36
37 (3) A judge shall promptly report in writing to the Commission on Judicial Performance
38 when he or she is charged in court by misdemeanor citation, prosecutorial complaint,
39 information, or indictment, with any crime in the United States as specified below.
40 Crimes that must be reported are: (1) all crimes, other than those that would be
41 considered misdemeanors not involving moral turpitude or infractions under California
42 law; and (2) all misdemeanors involving violence (including assaults), the use or
43 possession of controlled substances, the misuse of prescriptions, or the personal use or

1 furnishing of alcohol. A judge also shall promptly report in writing upon conviction of
2 such crimes.

3
4 If the judge is a retired judge serving in the Assigned Judges Program, he or she shall
5 promptly report such information in writing to the Chief Justice rather than to the
6 Commission on Judicial Performance. If the judge is a subordinate judicial officer,* he
7 or she shall promptly report such information in writing to both the presiding judge of the
8 court in which the subordinate judicial officer* sits and the Commission on Judicial
9 Performance.

10
11 ~~ADVISORY COMMITTEE COMMENTARY:~~

12 ~~Appropriate corrective action could include direct communication with the judge~~
13 ~~or lawyer who has committed the violation, other direct action if available, or a report of~~
14 ~~the violation to the presiding judge, appropriate authority, or other agency or body.~~
15 ~~Judges should note that in addition to the action required by Canon 3D(2), California~~
16 ~~law imposes additional reporting requirements regarding lawyers.~~

17
18 (4) A judge shall cooperate with judicial and lawyer disciplinary agencies.

19
20 ADVISORY COMMITTEE COMMENTARY

21 See Government Code section 68725, which requires judges to cooperate with and
22 give reasonable assistance and information to the Commission on Judicial Performance,
23 and rule 104 of the Rules of the Commission on Judicial Performance, which requires a
24 respondent judge to cooperate with the commission in all proceedings in accordance with
25 section 68725.

26
27 (5) A judge shall not retaliate, directly or indirectly, against a person known* or
28 suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

29
30 **E. Disqualification and Disclosure**

31
32 (1) A judge shall disqualify himself or herself in any proceeding in which disqualification
33 is required by law.*

34
35 (2) In all trial court proceedings, a judge shall disclose on the record as follows:

36
37 (a) Information relevant to disqualification

38
39 A judge shall disclose information that is reasonably relevant to the question of
40 disqualification under Code of Civil Procedure section 170.1, even if the judge believes
41 there is no actual basis for disqualification.

1 (b) Campaign contributions in trial court elections

2
3 A judge shall make the following disclosures regarding contributions to or in support of
4 the judge's campaign for judicial office:

5
6 (i) All contributions to a candidate or the candidate's campaign committee that are
7 required to be disclosed under the Political Reform Act of 1974 (Government
8 Code sections 81000 et seq.) and the regulations of the Fair Political Practices
9 Commission; and

10
11 (ii) All contributions that are required to be disclosed under the Political Reform
12 Act of 1974 (Government Code section 81000 et seq.) of which the judge has
13 actual knowledge made to or by persons, entities, organizations, or committees
14 that support the candidate or oppose the candidate's opponents, which are not
15 controlled by the candidate. The judge shall make reasonable efforts to be
16 informed of contributions under this subsection.

17
18 (c) Nature, content, and timing of disclosures under Canon 3E(2)(b)

19
20 (i) Disclosures required by Canon 3E(2)(b), whether written or oral, shall contain
21 all of the information required by the Fair Political Practices Commission for
22 filings by the candidate.

23
24 (ii) Disclosures under Canon 3E(2)(b) shall be made as follows. The judge shall
25 cause a written list of contributions under Canon 3E(2)(b) and (c) to be placed in
26 the office of the clerk of the court in the courthouse where the judge presides or
27 another accessible location in that courthouse, and on the court's website if
28 placement on the website is feasible. The judge shall cause notice to be posted
29 prominently outside the judge's courtroom advising the public that a written list of
30 contributions required to be disclosed under Canon 3E(2)(b) and (c) is available
31 for review in the designated location in the courthouse.

32
33 Unless a judge believes that the circumstances require disclosures to be made in
34 open court in the presence of the parties, the written disclosures made under
35 Canons 3E(2)(b) and (c) are deemed to be on the record as required by Canon
36 3E(2).

37
38 (iii) Disclosures under Canon 3E(2)(b) shall be made for a period of two years
39 after the candidate takes the oath of office, or two years from the date of the
40 contribution, whichever event is later.

1 (iv) The written disclosures under this canon shall be updated once per week until
2 16 days immediately preceding the election in which the judge is a candidate.
3 During that 16-day period, the written disclosures shall be updated once per court
4 day. Following the election, the written disclosures shall be updated weekly if a
5 contribution requiring disclosure has been made during that week. Where the
6 candidate was not a judge preceding the election in which he or she was a
7 candidate, the written disclosures under this canon shall be made within 24 hours
8 of the first court day after taking the oath of office.

9
10 ADVISORY COMMITTEE COMMENTARY

11 *Disclosure of campaign contributions by candidates for judicial office* is*
12 *designed to assure that litigants and lawyers appearing before a judge during and after a*
13 *judicial campaign have easy access to information about campaign contributions that*
14 *could affect the fairness and impartiality* of the judge without requiring the judge to*
15 *make extensive disclosures in every instance in open court. These provisions, in part, are*
16 *tailored to make sure full disclosure is readily accessible to those who come before the*
17 *court without such disclosure being perceived by the public as a way for a judge to raise*
18 *additional funds. To this end, a judge should not make disclosure information available*
19 *in the courtroom unless the judge believes that the nature of the contributions and/or*
20 *involvement of the contributor require disclosure in open court. Some of the*
21 *circumstances that might require disclosure in open court or disqualification include the*
22 *size of the contribution, the relationship to the contributor, or the role of the contributor*
23 *in the campaign. Canons 3E(2)(b) and (c) do not eliminate the obligation of the judge to*
24 *recuse where the nature of the contribution and other circumstances require recusal*
25 *under Code of Civil Procedure section 170.1, and particularly section 170.1(a)(6)(A).*
26 *Disclosure of campaign contributions may be required under Canon 3E(2)(a) even*
27 *though disclosure is not required by Canon 3E(2)(b) and (c).*

28 *To advance the goals of Canon 3E(2)(b) and (c), this canon provides for lodging*
29 *of a complete, updated, written statement of contributions in the clerk's office (or some*
30 *other convenient place in the courthouse), and the posting of a notice outside the judge's*
31 *courtroom. The notice outside the courtroom shall substantially contain the following*
32 *language: "Canon 3E(2)(b) and (c) of the California Code of Judicial Ethics require*
33 *candidates for election or re-election to the superior court to make publicly available a*
34 *list of contributions to or in support of his or her campaign. A list of such contributions*
35 *is available for inspection by any member of the public during courthouse hours in the*
36 *office of the clerk of the court in room _____ on the _____ floor, or online at _____."*

37 *In regard to judicial elections, a judge should also refer to the obligations*
38 *contained in Canon 5B as well as the requirements of the Political Reform Act of 1974*
39 *and the regulations of the Fair Political Practices Commission.*

40
41 (3) Judges shall disqualify themselves in accordance with the following:
42
43

1 (a) Statements that commit the judge to a particular result

2
3 A judge is disqualified if the judge, while a judge or candidate for judicial office,* has
4 made a public statement, other than in a court proceeding, judicial decision, or opinion,
5 that a person aware of the facts might reasonably believe commits the judge to reach a
6 particular result or rule in a particular way in a proceeding.

7
8 (b) Bond ownership

9
10 Ownership of a corporate bond issued by a party to a proceeding and having a fair market
11 value exceeding ~~one thousand five hundred dollars~~ \$1,500 is disqualifying. Ownership of
12 government bonds issued by a party to a proceeding is disqualifying only if the outcome
13 of the proceeding could substantially affect the value of the judge's bond. Ownership in
14 a mutual or common investment fund that holds bonds is not a disqualifying financial
15 interest.

16
17 *ADVISORY COMMITTEE COMMENTARY*

18 *The distinction between corporate and government bonds is consistent with the*
19 *Political Reform Act (see Gov. Code, § 82034), which requires disclosure of corporate*
20 *bonds, but not government bonds. Canon 3E(3) is intended to assist judges in complying*
21 *with Code of Civil Procedure section 170.1(a)(3) and Canon 3E(5)(d).*

22
23 (4) An appellate justice shall disqualify himself or herself in any proceeding if for any
24 reason:

25
26 (a) the justice believes his or her recusal would further the interest of justice; or

27
28 (b) the justice substantially doubts his or her capacity to be impartial;* or

29
30 (c) the circumstances are such that a reasonable person aware of the facts would doubt
31 the justice's ability to be impartial.*

32
33 (5) Disqualification of an appellate justice is also required in the following instances:

34
35 (a) The appellate justice has appeared or otherwise served as a lawyer in the pending*
36 ~~matter proceeding~~, or has appeared or served as a lawyer in any other ~~matter proceeding~~
37 involving any of the same parties if that other ~~matter proceeding~~ related to the same
38 contested issues of fact and law* as the present ~~matter proceeding~~.

39
40 (b) Within the last two years, (i) a party to the proceeding, or an officer, director or
41 trustee thereof, either was a client of the justice when the justice was engaged in the
42 private practice of law or was a client of a lawyer with whom the justice was associated

1 in the private practice of law; or (ii) a lawyer in the proceeding was associated with the
2 justice in the private practice of law.

3
4 (c) The appellate justice represented a public officer or entity and personally advised or in
5 any way represented such officer or entity concerning the factual or legal issues in the
6 present proceeding in which the public officer or entity now appears.

7
8 (d) The appellate justice, or his or her spouse or registered domestic partner,* or a minor
9 child residing in the household, has a financial interest or is a fiduciary* who has a
10 financial interest in the proceeding, or is a director, advisor, or other active participant in
11 the affairs of a party. A financial interest is defined as ownership of more than a 1
12 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a
13 fair market value exceeding ~~one thousand five hundred dollars~~ \$1,500. Ownership in a
14 mutual or common investment fund that holds securities does not itself constitute a
15 financial interest; holding office in an educational, religious, charitable, ~~fraternal~~
16 service,* or civic organization does not confer a financial interest in the organization's
17 securities; and a proprietary interest of a policyholder in a mutual insurance company or
18 mutual savings association or similar interest is not a financial interest unless the
19 outcome of the proceeding could substantially affect the value of the interest. A justice
20 shall make reasonable efforts to keep informed about his or her personal and fiduciary*
21 interests and those of his or her spouse or registered domestic partner* and of minor
22 children living in the household.

23
24 (e) The justice or his or her spouse or registered domestic partner,* or a person within the
25 third degree of relationship* to either of them, or the spouse or registered domestic
26 partner* thereof, is a party or an officer, director, or trustee of a party to the proceeding,
27 or a lawyer or spouse or registered domestic partner* of a lawyer in the proceeding is the
28 spouse, registered domestic partner,* former spouse, former registered domestic partner,*
29 child, sibling, or parent of the justice or of the justice's spouse or registered domestic
30 partner,* or such a person is associated in the private practice of law with a lawyer in the
31 proceeding.

32
33 (f) The justice (i) served as the judge before whom the proceeding was tried or heard in
34 the lower court, (ii) has a personal knowledge* of disputed evidentiary facts concerning
35 the proceeding, or (iii) has a personal bias or prejudice concerning a party or a party's
36 lawyer.

37
38 (g) A temporary or permanent physical impairment renders the justice unable properly to
39 perceive the evidence or conduct the proceedings.

40
41 (h) The justice has a current arrangement concerning prospective employment or other
42 compensated service as a dispute resolution neutral or is participating in, or, within the
43 last two years has participated in, discussions regarding prospective employment or

1 service as a dispute resolution neutral, or has been engaged in such employment or
2 service, and any of the following applies:

- 3
- 4 (i) The arrangement is, or the prior employment or discussion was, with a party to
5 the proceeding;
- 6
- 7 (ii) The matter before the justice includes issues relating to the enforcement of
8 either an agreement to submit a dispute to an alternative dispute resolution process
9 or an award or other final decision by a dispute resolution neutral;
- 10
- 11 (iii) The justice directs the parties to participate in an alternative dispute resolution
12 process in which the dispute resolution neutral will be an individual or entity with
13 whom the justice has the arrangement, has previously been employed or served, or
14 is discussing or has discussed the employment or service; or
- 15
- 16 (iv) The justice will select a dispute resolution neutral or entity to conduct an
17 alternative dispute resolution process in the matter before the justice, and among
18 those available for selection is an individual or entity with whom the justice has
19 the arrangement, with whom the justice has previously been employed or served,
20 or with whom the justice is discussing or has discussed the employment or service.

21

22 For purposes of ~~this~~ eCanon 3E(5)(h), “participating in discussions” or “has participated
23 in discussions” means that the justice solicited or otherwise indicated an interest in
24 accepting or negotiating possible employment or service as an alternative dispute
25 resolution neutral or responded to an unsolicited statement regarding, or an offer of, such
26 employment or service by expressing an interest in that employment or service, making
27 any inquiry regarding the employment or service, or encouraging the person making the
28 statement or offer to provide additional information about that possible employment or
29 service. If a justice’s response to an unsolicited statement regarding, a question about, or
30 offer of, prospective employment or other compensated service as a dispute resolution
31 neutral is limited to responding negatively, declining the offer, or declining to discuss
32 such employment or service, that response does not constitute participating in
33 discussions.

34

35 For purposes of ~~this~~ eCanon 3E(5)(h), “party” includes the parent, subsidiary, or other
36 legal affiliate of any entity that is a party and is involved in the transaction, contract, or
37 facts that gave rise to the issues subject to the proceeding.

38

39 For purposes of ~~this~~ eCanon 3E(5)(h), “dispute resolution neutral” means an arbitrator, a
40 mediator, a temporary judge* appointed under section 21 of article VI of the California
41 Constitution, a referee appointed under Code of Civil Procedure section 638 or 639, a
42 special master, a neutral evaluator, a settlement officer, or a settlement facilitator.

1 (i) The justice’s spouse or registered domestic partner *or a person within the third
2 degree of relationship* to the justice or his or her spouse or registered domestic partner,*
3 or the person’s spouse or registered domestic partner,* was a witness in the proceeding.
4

5 (j) The justice has received a campaign contribution of \$5,000 or more from a party or
6 lawyer in a matter that is before the court, and either of the following applies:
7

8 (i) The contribution was received in support of the justice’s last election, if the last
9 election was within the last six years; or
10

11 (ii) The contribution was received in anticipation of an upcoming election.
12

13 Notwithstanding Canon 3E(5)(j), a justice shall be disqualified based on a contribution of
14 a lesser amount if required by Canon 3E(4).
15

16 The disqualification required under Canon 3E(5)(j) may be waived by the party that did
17 not make the contribution.
18

19 *ADVISORY COMMITTEE COMMENTARY*

20 *Canon 3E(1) sets forth the general duty to disqualify applicable to a judge of any*
21 *court. Sources for determining when recusal or disqualification is appropriate may*
22 *include the applicable provisions of the Code of Civil Procedure, other provisions of the*
23 *Code of Judicial Ethics, the Code of Conduct for United States Judges, the American Bar*
24 *Association’s Model Code of Judicial Conduct, and related case law.*

25 *The decision whether to disclose information under Canon 3E(2) is a decision*
26 *based on the facts of the case before the judge. A judge is required to disclose only*
27 *information that is related to the grounds for disqualification set forth in Code of Civil*
28 *Procedure section 170.1.*

29 *Canon 3E(4) sets forth the general standards for recusal of an appellate justice.*
30 *The term “appellate justice” includes justices of both the Courts of Appeal and the*
31 *Supreme Court. Generally, the provisions concerning disqualification of an appellate*
32 *justice are intended to assist justices in determining whether recusal is appropriate and*
33 *to inform the public why recusal may occur.*

34 *However, the rule of necessity may override the rule of disqualification. For*
35 *example, a judge might be required to participate in judicial review of a judicial salary*
36 *statute, or might be the only judge available in a matter requiring judicial action, such as*
37 *a hearing on probable cause or a temporary restraining order. In the latter case, the*
38 *judge must promptly disclose on the record the basis for possible disqualification and use*
39 *reasonable efforts to transfer the matter to another judge as soon as practicable.*

40 *In some instances, membership in certain organizations may have the potential to*
41 *give an appearance of partiality, although membership in the organization generally may*
42 *not be barred by Canon 2C, Canon 4, or any other specific canon. A judge holding*
43 *membership in an organization should disqualify himself or herself whenever doing so*

1 *would be appropriate in accordance with Canon 3E(1), 3E(4), or 3E(5) or statutory*
2 *requirements. In addition, in some circumstances, the parties or their lawyers may*
3 *consider a judge's membership in an organization relevant to the question of*
4 *disqualification, even if the judge believes there is no actual basis for disqualification. In*
5 *accordance with this Canon, a judge should disclose to the parties his or her*
6 *membership in an organization, in any proceeding in which that information is*
7 *reasonably relevant to the question of disqualification under Code of Civil Procedure*
8 *section 170.1, even if the judge concludes there is no actual basis for disqualification.*
9

Item SP11-08 Response Form

Title: Proposed Amendments to Canon 3 of the Code of Judicial Ethics

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: <http://www.courtinfo.ca.gov/invitationstocomment/>

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
455 Golden Gate Avenue, 5th Floor
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Thursday, September 1, 2011

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.