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JUDICIAL PARTICIPATION IN PUBLIC DEMONSTRATIONS AND RALLIES

I. Question

May judicial officers ethically participate in public demonstrations and rallies about racial justice and equality, or make public statements about those matters, under the Code of Judicial Ethics?[1]

II. Summary of Conclusions

In view of recent events that have focused attention on concerns regarding racial justice and equality in our communities, judicial officers may feel a moral obligation to support these

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

issues, and other social justice issues, by participating in public demonstrations and rallies, or by making public statements. Chief Justice Cantil-Sakauye has recognized the importance of these issues by acknowledging the need to "continue to strive to build a fairer, more equal and accessible justice system for all." (Cantil-Sakauye, Statement on Racism and Bias (June 8, 2020) <https://newsroom.courts.ca.gov/news/california-chief-justice-speaks-on-removing-barriers-to-justice-addressing-bias-and-racism> (as of July 20, 2020).

At the same time, judges have a paramount duty to comply with the judicial canons to promote the public's confidence in judicial impartiality, which is the foundation of our system of justice. Judges must not allow their conduct outside the courthouse to affect their ability to fulfill their judicial obligations on the bench. For these reasons, before attending or otherwise participating in a public demonstration or rally, or making a public statement on matters of public concern, judges must examine whether their conduct is ethically permissible, under the Code of Judicial Ethics.

Judges may not participate in a public demonstration or rally if: (a) participation might undermine the public's confidence in the judiciary; (b) the event relates or is likely to relate to a case pending before a court, relates to an issue that is likely to come before the courts, or is reasonably likely to give rise to litigation and the judge's attendance might lead to disqualification; (c) participation would or is likely to cause a violation of the law, for example by violating a curfew; (d) participation would create the appearance of speaking on behalf of, or lending the prestige of office to, a political candidate or organization; or (e) participation would interfere with the proper performance of judicial duties.

In determining whether participation would be appropriate, judges should examine the official title of the demonstration or rally, its stated mission, its sponsors, and its organizers. Judges should also take reasonable efforts to determine the messages that will be delivered by other participants and the risks that the demonstration or rally might depart from its original mission. Practically speaking, this may be difficult. Judges must remain vigilant and be prepared to leave if remaining at the demonstration or rally might result in a violation of their ethical duties or interfere with judicial obligations. Judges should also assume that their identity

will likely be known and that their participation will be scrutinized, publicized, and depicted in reports of a demonstration or rally, including in press coverage or on social media.

In addition to or in place of attending and personally participating in a public demonstration or rally, judges also may write a public statement about matters relating to racial justice and equality, as the Chief Justice and the Supreme Court have done. (*See ante* & Section IV.E, *post*.) Since judges can maintain control of the substance and tone of a written statement, a writing that addresses issues of racial justice and equality may present fewer ethical risks than participating in a public demonstration or rally on those same issues.

III. Authorities

A. Applicable Canons

Terminology: "Law, the legal system, or the administration of justice." When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether the activity impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified. [¶] . . . [¶]

"Pending proceeding" is a proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. [¶] . . . [¶]

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

Canon 1: "A judge shall uphold the integrity and independence of the judiciary."

Advisory Committee Commentary following canon 1: ". . . Although judges should be independent, they must comply with the law and the provisions of this code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this code diminish public confidence in the judiciary and thereby do injury to the system of government under law."

Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Advisory Committee Commentary following canon 2A: ". . . A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. [¶] . . . [¶] *The test for . . . impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence."*

Canon 3A: "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."

Canon 3B(9): "A judge shall not make any public comment about a pending* or impending* proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing."

Canon 4A(1), (3) & (4): "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] . . . cast reasonable doubt on the judge's capacity to act impartially [¶] . . . interfere with the proper performance of judicial duties, or [¶] . . . lead to frequent disqualification of the judge."

Advisory Committee Commentary following canon 4A: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives. Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. [¶] . . . [¶] *Because a judge's judicial duties take precedence over all other activities (see Canon 3A), a judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified."*

Canon 5: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. [¶] Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office."

Advisory Committee Commentary following canon 5A: "Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate or a measure not affecting the law, the legal system, or the administration of justice otherwise prohibited by this canon."

B. Other Authorities

California Code of Civil Procedure, section 170.1, subdivision (a)(6)(A)(iii).

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:32, 7:57, 8:32, 10:40, 10:47, and 11:3.

Attending Political Fundraising or Endorsement Events, CJEO Formal Opinion No. 2016-008 (2016).

Judicial Appearance in an Educational Documentary, CJEO Informal Opinion Summary No. 2014-004 (2014).

IV. Discussion

Recent events have sparked a national conversation about racial justice and equality, with thousands of people joining in demonstrations and rallies in cities throughout the state, often just outside of courthouse doors. As our Supreme Court has acknowledged, judicial officers have a particular duty to "confront the injustices that have led millions to call for a justice system that works fairly for everyone." (Supreme Court of California, Statement on Equality and Inclusion (June 11, 2020) <https://newsroom.courts.ca.gov/news/supreme-court-of-california-issues-statement-on-equality-and-inclusion> (as of July 20, 2020) (Supreme Court Statement). Having devoted themselves to the cause of justice from the bench, judicial officers may feel compelled to attend, speak at, or otherwise participate in demonstrations or rallies to manifest their support for racial justice and equality. (Advisory Com. commentary, foll. canon 4A [judges are not to be isolated from the larger community].) Although such demonstrations and rallies are not necessarily partisan, they address matters that are the subject of current debate and litigation and can relate to subjects over which passions run high. Given the intense societal focus on public events that address these issues, a judge's participation in them is likely to be the subject of public scrutiny. For these reasons, judges must accept certain restrictions that might be viewed

as burdensome by other members of the community. (Advisory Com. commentary, foll. canon 2A [judges must expect to be the subject of constant public scrutiny and must therefore accept restrictions on their conduct; the test judges must apply to all of their conduct is whether a person aware of the facts might reasonably entertain a doubt as to impartiality].)

A. A Judge's Ethical Duties Take Precedence Over Other Considerations

Judicial participation in public demonstrations and rallies necessarily implicates a number of canons that judges are required to uphold, regardless of the merits of the message or the urgency of the cause.[2] For example, canons 1 and 2 require judges to maintain public confidence in the judiciary, while provision 2A forbids them from making "statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Canon 4 requires judges to conduct themselves outside the courtroom so "as to minimize the risk of conflict with judicial obligations." Canon 5 prohibits judges from engaging in political or campaign activity that is inconsistent with their roles in the judiciary.

The proper maintenance and functioning of our system of justice depends on judicial officers following these restrictions, which are based on the principle of public trust in an impartial judiciary. As the Advisory Committee commentary to canon 1 recognizes, "[a]lthough judges should be independent, they must comply with the law and the provisions of this code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this code diminish public confidence in the judiciary and thereby do injury to the system of government under law." (*Id.*) For that reason, when judges consider participating in demonstrations or rallies, among the factors they

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[2] In another restraint on extrajudicial conduct under the code, Judge Rothman has observed that judges are not allowed to solicit on behalf of charitable causes, even if they are causes of extraordinary worth or profound virtue. (Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 10:42, p. 718 (Rothman) [there is no "really-worthy-charity" exception to the fundraising ban].)

should take into account are whether the activity impairs public confidence in the judiciary (canon 2), whether they are allowing the activity to take precedence over judicial duties (canon 3A), and whether engaging in the activity would cause them to be disqualified (canon 4A(4)). (Terminology [defining "[l]aw, the legal system, or the administration of justice"].)

B. Deciding Whether to Attend a Demonstration or Rally

When participating in a public demonstration or rally, judges should always assume that their attendance will be known and that their conduct may be subject to comment and reporting in press coverage or on social media. In small gatherings, for example, it is likely that the judge will be recognized by other participants. In larger demonstrations, it is likely that there will be members of the public or press present recording the event, and modern facial recognition technology makes it difficult to remain anonymous in a crowd. As a result, judges should always conduct themselves at a demonstration or rally as if their presence will become known, and they must consider the public perception of their participation before deciding whether to attend.

a. Promoting Public Confidence in the Judiciary

While the canons recognize that judges "are not required to surrender their rights or opinions as citizens," a judge's obligation to promote public confidence in the judiciary is paramount. (Canon 2A; canon 5 [prohibiting judges from engaging in political activities that may create an appearance of political bias].) In fulfilling this duty, a key determination judges should make before deciding whether to attend a demonstration or rally is whether a person aware of their presence at the event might reasonably entertain a doubt that they would be able to act in their official capacity with impartiality. (Advisory Com. commentary, foll. canon 2A.) For that reason, before attending, judges should investigate the agenda for the demonstration or rally, including the objectives of the event's organizers, and evaluate the risk that organizers or supporters will express views that might reasonably be perceived to compromise the judge's independence and impartiality. (California Supreme Court Committee on Judicial Ethics Opinions, CJEO Formal Opinion No. 2016-008, Attending Political Fundraising or Endorsement

Events, at p. 10 (CJEO) [judge's attendance at political event would be prohibited if it could reasonably be construed to constitute a public endorsement of a political candidate or organization or otherwise create the appearance of political bias].) For example, if a demonstration or rally is promoted using derogatory or disrespectful references to individuals, groups of people or communities, the judge should not attend. (Canons 4A, 5D.) Furthermore, if an invitation or other promotional materials use unfamiliar terms, symbols or abbreviations, judges should make reasonable efforts to determine their meaning and should decline to participate if they cannot do so.

b. Avoiding Demonstrations and Rallies that Relate to Matters Pending Before a Court or that Are Likely to Come Before a Court

Judges cannot comment on any pending[3] or impending[4] legal proceedings, and as a result they must avoid demonstrations and rallies concerning current and future cases. (Canons 3B(7), 3B(9) [prohibiting judges from making public comments about proceedings in any court that might substantially interfere with a fair trial and requiring them to make reasonable efforts to avoid communications in matters before them].) The fundamental reason for these prohibitions is the duty to maintain impartiality and avoid conduct that might influence the outcome or impair the fairness of the proceeding. Further, if a judge participates in a demonstration or rally on an issue that may involve litigation, for example, if a demonstration lacks proper permits, the judge's presence at the event could lead to disqualification. (Canons 3E(3)(a), 3E(4)(c) [appellate justice disqualification required when a reasonable person aware of the facts would doubt the justice's ability to remain impartial]; Code Civ. Proc., § 170.1(a)(6)(A)(iii) [trial judge disqualification required if a person aware of the facts might

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[3] A "pending proceeding" is a proceeding or matter that has commenced. A matter remains pending within the meaning of the code if there is sufficient time for a party to petition the United States Supreme Court seeking review of the appellate decision. (Terminology; CJEO Oral Advice Summary No. 2018-024, Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter, pp. 2-3.)

[4] An "impending proceeding" is a proceeding or matter that is imminent or expected to occur in the near future. (Terminology.)

reasonably entertain a doubt that the judge would be able to be impartial].) If a demonstration or rally is sponsored or organized by individuals or entities that regularly appear in state court proceedings, a reasonable person may have cause to question the judge's independence and impartiality when making decisions about those individuals or entities in subsequent cases, which may result in frequent disqualification and violate the judge's duty to avoid extrajudicial activities that may lead to disqualification. (Canon 4A(4); Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7:57, p. 476 (Rothman) [judges must consider whether potential disqualification requires them to avoid public activities].)

If it seems likely that a demonstration or rally might result in a confrontation between participants and others, including law enforcement, and might lead to unlawful acts by either side, the judge should likewise not participate or be a witness to such events. A judge's appearance at such demonstrations or rallies could create future disclosure and disqualification issues.

c. Minimizing the Risk of Breaking the Law

A judge should not attend a demonstration or rally if it is reasonably foreseeable that by doing so the judge may violate the law. For example, if a rally is scheduled to begin at a time that makes it possible that the event will not conclude before a lawful curfew, judges should not attend unless they can be certain that they will be able to leave early to comply with the law. (Canon 2A [requiring judges to respect and comply with the law].)

d. Avoiding Endorsements at Politicized Events

Although demonstrations and rallies for racial justice and equality are often nonpartisan, in certain circumstances they may be sponsored by or associated with a political party, politician or candidate for political office, or relate to a political measure. Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of, or lend the prestige of office to, a nonjudicial candidate or a political measure not affecting the law, the legal system, or the administration of justice otherwise prohibited by the code. (CJEO Formal Opinion No. 2016-008, *supra*,

Attending Political Fundraising or Endorsement Events, at p. 6 [judges attending political event must consider whether their presence may create the appearance of endorsement or bias]; Advisory Com. commentary, foll. canons 2A & 5A.)

e. Ensuring that Judicial Duties Are Unaffected

As noted, a judicial officer should not attend any demonstration or rally that might lead to disqualification because the subject matter, sponsors, organizers, or the event itself is or is likely to be the subject of litigation. (Canon 4A(4); Advisory Com. commentary, foll. canon 4A [judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified].) In addition, any participation should be avoided that might interfere with any of the judge's other official duties. (Canon 4A(3); Advisory Com. commentary, foll. canon 4A ["a judge's judicial duties take precedence over *all other activities*." (emphasis added)].) For example, if a demonstration is scheduled for a time that conflicts with the judge's duties on the bench, the judge may not reschedule his or her official duties in order to attend the demonstration. (Rothman, *supra*, § 8:32 p. 517 [before engaging in any extrajudicial activity, judges must test whether it will interfere with the proper performance of their judicial duties]; *id.* at § 10:40, p. 716 [judicial activities have priority over extrajudicial activities].)

C. Maintaining Vigilance While at a Demonstration or Rally

After a judge has determined that he or she might ethically attend a demonstration or rally, the judge should continue to be mindful of any risks that the demonstration or rally might evolve in ways that could violate the judge's ethical duties. In that regard, judges should be sensitive to how much, if any, control they will have over how an event will proceed, whether the organizers or sponsors have the ability to control the event, and whether confrontations between participants and law enforcement or others are likely. After arriving at a demonstration or rally, if a judge sees other participants with signs or hears crowds chanting slogans that are

inflammatory, derogatory, and inconsistent with the judge's own ethical duties, the judge should leave the event.[5]

D. Engaging in Symbolic Gestures or Speaking at a Demonstration or Rally

Even where judges may ethically attend a demonstration or rally, they should consider whether engaging in a symbolic act, carrying a sign, wearing clothing or buttons that might identify them as siding with a particular viewpoint, or making a public statement on even permissible topics would undermine the public's confidence in the judiciary. (CJEO Formal Opinion No 2016-008, *supra*, Attending Political Fundraising or Endorsement Events, at p. 15 [speech relating to the permissible subjects of the legal system or the administration of justice could compromise judicial integrity by creating the appearance of political bias].) Judges must also consider whether there is a risk that, by making a verbal statement or engaging in a symbolic act at a demonstration or rally, they would be lending the prestige of their office to further the personal interests of the individuals or entities organizing the event. (Canon 2B(2) [a judge shall not lend the prestige of judicial office or use the judicial title to advance the interests of others and shall not permit others to convey the impression that they are in a special position to influence the judge]; CJEO Formal Opinion No. 2018-012, Providing Educational Presentations at Specialty Bar Events, Cal. Supreme Ct., Com. Jud. Ethics Opns., at p. 10 [the prestige of the judicial office and judicial title should not be used to advance the interests of a specialty bar association]; CJEO Formal Opinion No. 2017-007, *supra*, at 2 [judges should consider whether speechmaking would create the appearance of lending the prestige of office to a political candidate or organization].)

Judges should avoid engaging in symbolic gestures or wearing apparel likely to be seen as one-sided statements that may call into question their impartiality. (Canons 2A and 5; Advisory Com. commentary, foll. canon 2A [judges should not create a reasonable doubt in the minds of

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[5] Before joining in a group chant, judges should consider whether the substance of the message and the dynamics of delivering the message as part of a crowd are appropriate. (*See* Section IV.D., *post*, [discussing ethical considerations when a judge participates in symbolic gestures or makes a statement at a public event].)

others as to their impartiality].) Similarly, speaking at a demonstration or rally on a topic likely to come before the courts in a way that commits a judge to taking a position is prohibited. (Canon 2A.) Furthermore, a judge should not make any statement or make any symbolic reference at a demonstration or rally about a pending or impending proceeding. (Canon 3B(9); CJEO Informal Opinion Summary No. 2014-004, Judicial Appearance in an Educational Documentary, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 9 [judge may not comment on the substance of pending case]; Rothman, *supra*, § 5:32, pp. 302-03 [noting a judge's discipline for making public comments about cases in which the judge was not involved].)

E. Written Expression of Views

Rather than participating in a public demonstration or rally, judges who wish to make their views known might consider writing a letter or providing a written statement or opinion to the press. By doing so judges may make their views on a subject known while avoiding many of the risks inherent in participating in a public demonstration or rally, and can maintain control over the tone and substance of the message they wish to convey. (Rothman, *supra*, § 10:47 p. 723 [providing examples of permissible and impermissible letters]; *id.* at § 11:3 p. 739 [providing examples of appropriate written advocacy].) The Supreme Court's recent Statement on Equality and Inclusion provides an example of the kind of statement that is ethically permissible:

> We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person. (Supreme Court Statement, *supra*.)

A written statement of this kind advances the cause of racial justice and equality while promoting public confidence in the judiciary, without violating the canons by creating an appearance of partiality, referencing any pending or impending case, or committing the courts to taking a position on an issue likely to come before them.

The need for "equal justice under the law" in our society will always be of manifest concern. (Supreme Court Statement, *supra*.) As judicial officers, committed to the ideals of our constitutional democracy, we must fulfill our role to ensure equal justice under the law to all. This commitment applies to proceedings in our courtrooms and, as this opinion details, in all our extra-judicial activities.

This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).