



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

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**JUDICIAL COMMENT AT PUBLIC HEARINGS AND CONSULTATION WITH
PUBLIC OFFICIALS AND OTHER BRANCHES OF GOVERNMENT**

I. Issue Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following question:

What judicial comment and consultation is permitted under the exception in the California Code of Judicial Ethics that authorizes judges to appear at a public hearing or officially consult with the executive or legislative body or public officials on matters concerning the law, the legal system, or the administration of justice?

II. Summary of Conclusions

Canon 4C(1) prohibits judges from appearing at public hearings as a general matter, but excepts from its purview a judge's appearance at public hearings, or official consultations with an executive or legislative body or public official, on "matters

concerning the law, the legal system, or the administration of justice.” By its terms, that exception broadly permits comment and consultation concerning the court system or matters of judicial administration. The exception also applies to legal matters when the subject of the appearance or consultation is one with respect to which the judge’s experience and perspective *as a judge* gives him or her unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public. Even if a particular matter falls within the exception, however, a judge must still ensure that the statements made in the appearance or consultation do not violate any other provisions of the code.

III. Introduction

Canon 4C(1) of the California Code of Judicial Ethics¹ provides that “[a] judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official *except* on matters concerning the law, the legal system, or the administration of justice.” (Italics added.)² The exception unquestionably permits judicial comment before a legislative body, or judicial consultation with other branches of government or with public officials, regarding matters concerning the law, court system and judicial administration. So, for example, comment and consultation authorized by the canon would include testimony regarding the judicial branch’s budget, or a bond measure for court construction, or a bill proposing to replace court reporters with electronic recording, as these matters clearly relate to the administration of justice. (See Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 11.03, p. 571

¹ All further references to canons are to the canons of the California Code of Judicial Ethics unless otherwise indicated.

² The exception also permits appearances and consultation on matters “involving the judge’s private economic or personal interest.” (Cal. Code Jud. Ethics, canon 4C(1).) The committee has not been asked to address the types of comment and consultation that might fall within this language in the exception.

(Rothman).³ The committee has been asked to consider whether comment and consultation is also permissible under the exception in several scenarios involving proposed legislation and political measures that are related to the legal system but that also involve policy considerations. Specifically, the committee has been asked whether a judge may appear at a public hearing to advocate for shorter or longer sentences for drug offenders, or whether such an appearance would be permissible if, instead of advocating for specific legislation or sentences for particular offenders, the judge explained to the public body, from a judicial perspective, the effects of any of these proposed laws. The committee has also been asked whether advocacy on a proposed constitutional amendment to replace the death penalty with life without parole, or advocacy on a proposed amendment to collective bargaining laws would be allowed.

These questions can be answered by understanding how the permissive language of the canon 4C(1) exception, and other similar ethical rules, have been interpreted, and how canon 4C(1) is circumscribed by the other canons.

IV. 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 it 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

³ In connection with this exception, Judge Rothman has expressed concern as to where the line is drawn between proper advocacy and encroaching on legislative and executive prerogatives. (Rothman, *supra*, § 11.03, pp. 569-571.) That narrow question is beyond the scope of what the committee has been asked to address in this opinion. Judge Rothman also notes, however, that “[a]lthough the Trial Court Funding Act may have centralized funding of courts, local courts and judges throughout the state have an important role in advocating for adequate funding to assure access to justice.” (*Id.*, (2014 supp.) § 11.03, p. 2, citing Cal. Com. Jud. Ethics Opns., CJEO Formal Opinion No. 2013-001, pp. 5-8, for its discussion of meeting with and seeking assistance from attorneys in advocating for adequate legislative funding .)

activity would cause the judge to be disqualified (Canon 4A(4)). See Canons 4B (Commentary), 4C(1), 4C(1) (Commentary), 4C(2), 4C(2) (Commentary), 4C(3)(a), 4C(3)(b) (Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(d), 4D(6)(e), 5A (Commentary), 5D, and 5D (Commentary).”

Canon 1: “An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective. . . .”

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.”

Canon 3A: “All of the judicial duties prescribed by law shall take precedence over all other activities of every judge. . . .”

Canon 3B: “(9) A judge shall not make any public comment about a pending or impending proceeding in any court This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.”

Advisory Committee Commentary following canon 3B(9): “[¶] . . . [¶] 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.”

Canon 4A: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge’s capacity to act impartially; [¶] . . . [¶] (4) lead to frequent disqualification of the judge.”

Canon 4B: “A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code.”

Advisory Committee Commentary following canon 4B: “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. . . .”

Canon 4C: “(1) A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge’s private economic or personal interests.”

Advisory Committee Commentary following canon 4C(1). . . “When deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of this code. For a list of factors to consider, see the explanation of ‘law, the legal system, or the administration of justice’ in the terminology section. See also Canon 2B regarding the obligation to avoid improper influence.”

Canon 5D: “A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.”

B. Other Authorities

Rothman, California Judicial Conduct Handbook (3d ed. 2007 & 2014 supp.), section 11.03

American Bar Association, Model Code of Judicial Conduct

V. Discussion

A. Law, the Legal System, or the Administration of Justice

While canon 4C(1) prohibits judges from appearing at public hearings as a general matter, it contains an exception that permits judges to appear at a public hearing or officially consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice. The phrase “the law, the legal system, or the administration of justice” appears in several places in the

canons and in the related Advisory Committee Commentary. For example, in commenting on the provision in canon 4B that “[a] judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code,” the Advisory Committee Commentary notes that, “[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.” (Advisory Com. Com., foll. canon 4B.) This suggests that the reason the canons permit a judge to speak publicly or consult officially with other branches of government on matters concerning the law, the legal system, or the administration of justice, is that it benefits the lawmaking process, and thus society, for judges to share their expertise in the law and the justice system with the other branches of government in a manner other than simply performing the duties of their office.

This is consistent with authority from outside of California. For example, the Comment to rule 3.2 of the American Bar Association’s Model Code of Judicial Conduct -- a rule that is similar to California’s canon 4C(1)⁴ -- notes that “[j]udges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.”

Although canon 4C(1) does not include the language in rule 3.2 specifying that comment and consultation is permissible if it is made “in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties,” the committee agrees that it is the judge’s experience and perspective *as a judge*

⁴ American Bar Association Model Code of Judicial Conduct rule 3.2 provides that “[a] judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except: [¶] (A) in connection with matters concerning the law, the legal system, or the administration of justice; [¶] (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties; or [¶] (C) when the judge is acting pro se in a matter involving the judge’s legal or economic interests, or when the judge is acting in a fiduciary capacity.”

that justifies allowing the judge to appear before or consult with representatives of the other two branches of government on matters within the judge's area of expertise -- i.e., matters concerning the law, the legal system, and the administration of justice. This is so because judges are uniquely qualified to speak on law-related matters from the perspective they have gained by virtue of their judicial experience. Thus, the committee concludes that legislative appearances by a judge are generally permissible where the subject matter may reasonably be considered to merit the attention and comment of a judge as a judge. The clearest examples of permissible activities are those addressing the legal process; however, comment and consultation about substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group would also be permissible.

Indeed, the purpose of benefiting the legal system rather than particular causes or groups supports the conclusion that substantive law-related comment and consultation is permissible under canon 4C(1) when it is that made from a judicial *perspective*. While all judges have experience and legal knowledge acquired as attorneys prior to taking the bench, that experience is usually the result of representing particular groups or clients. But law practice experience is not unique to judges and attorneys are able to provide the Legislature and the public with advocacy and knowledge of the law from an advocate's perspective. A judge is permitted to be an advocate only on behalf of the legal system—focusing on court users, the courts, or the administration of justice. Where a judge has both judicial and attorney experience (or only attorney experience) in an area of law, the judge's comment and consultation should therefore be presented from a purely judicial perspective.

As guidance, when determining whether anticipated comment and consultation is permissible, judges should ask themselves what they have experienced in their role as a judge that provides information to the decision makers about the legal matter on which they intend to speak. If there is a nexus between the judge's role as a judge and what is being said, the comment and consultation will fall within the canon 4C(1) exception and is permissible. Speaking from a judicial perspective will provide that nexus and still

allow the judge to draw from his or her entire experience with the law when commenting at public hearings or consulting with public officials.

For instance, a judge who was formerly an environmental attorney is not disqualified from expressing her views in support of a new CEQA settlement process merely because she was a former advocate in that arena; however, she must be careful to express herself solely from her viewpoint as a judge who (for example) is seeking to unburden the court's docket by resolving CEQA cases earlier in the judicial process. Or, a judge who was a former prosecutor but with no criminal *judicial* experience could express support for proposed legislation to reduce the number of peremptory challenges permitted in misdemeanor cases; his views might be informed by his experience as a prosecutor but should be expressed in terms of how the law would affect the legal system or the administration of justice (for example) by improving juror satisfaction, enhancing jury diversity, and saving court costs, while still providing the full panoply of due process. Regarding advocacy on a proposed constitutional amendment to replace the death penalty with life without parole, a judge could comment (for example) on the dysfunction of the present system from a judicial perspective, but judicial advocacy for or against the wisdom or morality of the death penalty as a policy matter would fall outside the scope of the exception.

These examples illustrate that like permissible judicial comments concerning the court system and the administration of justice, which inherently include a judicial perspective, judges may broadly comment on legal matters to provide the public, the Legislature, and the executive branch with their unique perspective as judicial officers. Relying on the Advisory Committee Commentary to canon 4B, the committee construes the exception in canon 4C(1) as permitting *official* speech from the “judges’...unique position [‘as a judicial officer and person specially learned in the law’] to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.” Thus, the committee views canon 4C(1) as containing an inherent limitation; that limitation is to preclude judges from telling the legislative or executive branches, in a

public hearing or official context, the judiciary's (or judge's) views as to whether a law or proposed law is good or bad social or economic or scientific policy, which is akin to the prohibition on political activity. Limiting judicial comment to the judicial perspective promotes the public's trust in impartiality by avoiding the use of judicial title to insert a judge's views on economics, science, social policy, or morality into the official public discourse on legislation. It also avoids the judiciary's encroachment into the political (policy making) domain of the other branches. Conversely, the committee views the goal of the canon as broadly allowing judges to provide legal expertise, from the judicial perspective, to improve both substantive legislation and the administration of justice.

In sum, in the committee's opinion, canon 4C(1) is most reasonably understood as allowing a judge to appear at a public hearing or to officially consult with an executive or legislative body or public official when the subject of the appearance or consultation is one relating to the law, the legal system, or the administration of justice where the judge's experience and perspective as a judge gives the judge unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public.

B. Consideration of Other Code Provisions

The committee cautions, however, that even if a matter concerns the law, the legal system, or the administration of justice within the meaning of canon 4C(1), it still may not be proper for a judge to make an appearance at a public hearing or provide an official consultation on that matter because of other provisions of the canons. This point is made clear in several parts of the California Code of Judicial Ethics. For instance, the Terminology section of the code explains as follows:

“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 it 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 (Canon 4A(4)).” (Cal. Code Jud. Ethics, Terminology, “Law, the legal system, or the administration of justice.”)

Additionally, the Advisory Committee Commentary to canon 4C(1) advises that “[w]hen deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of this code.” Finally, canon 5(D) specifies more broadly that “[a] judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.”

These limitations, imposed by other parts of the code, may preclude a judge from appearing at a public hearing or providing an official consultation on a matter relating to substantive law even though canon 4C(1) alone would permit such an appearance or consultation. For example, an appearance at a public hearing of a legislative committee to advocate for longer sentences for certain drug offenders would appear to qualify as an appearance on a matter “concerning the law” within the meaning of the canon 4C(1) exception; however, advocacy for longer sentences for only a particular type of offender could undermine public confidence in the impartiality of the judge with respect to such cases and thus run afoul of canons 1, 2A, 3B(9), and 4A(1). Accordingly, such an appearance would not be permissible notwithstanding its apparent consistency with canon 4C(1) unless the judge’s presentation relates to the impact of such sentences on the courts or the adjudicatory process. However, a judge may appear to advocate for improvements in the administration of justice that would seek to reduce recidivism based on the judge’s expertise. This could include (for example) information about collaborative court programs the judge had presided over or administered that employ alternative sentencing or probation periods for drug offenders. A judge could advocate for statewide use of alternative programs based on the judge’s experience without commenting on the outcome of cases involving particular offenders, and without implying that the judge will be ruling in a particular way in a class of cases.

Similarly, proposed death penalty and collective bargaining measures are all matters “concerning the law” within the meaning of canon 4C(1); however, judicial advocacy for specific legislation on these matters could contravene the canon 2A prohibition against making statements that commit a 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 duties. Appearing before a public body to explain, from a judicial perspective, the effects of any of these proposed laws on the judicial process or judicial administration, would be permissible under canon 4C(1), as concluded above, and would appear to be consistent with the other provisions of the code.

VI. Conclusion

So that the public at large -- not to mention the members of the executive and legislative branches of government -- may benefit from the unique experience and perspective of judges in matters concerning the law, the legal system, and the administration of justice, a judge may appear at a public hearing or officially consult with an executive or legislative body or public official on matters within the scope of that experience and perspective, provided that the appearance or consultation does not contravene any other provisions of the Code of Judicial Ethics, for example, by commenting on pending or impending proceedings in any court, or by taking a position that could be understood as a commitment with respect to the outcome of cases.



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)).