

## TOP STORY

## Ethics Rule Change Unmuzzles Judicial Candidates

By Grant H. Hackley – November 9, 2020

Judicial codes of ethics have long prohibited judges from publicly speaking about pending cases. Responding to “an increase in attacks on judges’ judicial independence,” one state has amended its judicial code to permit judges to comment about the procedural, factual, or legal basis of a decision when criticism of the decision becomes the focus of a judicial campaign or recall election. ABA Section of Litigation leaders suggest that the new provision strikes a balance between protecting an individual judge’s First Amendment rights and the public concern that a judge’s speech could impact the outcome or fairness of a pending proceeding.

### New Judicial Canons Issued

Effective July 1, 2020, the [Supreme Court of California](#) amended Canon 3B(9) of the [California Code of Judicial Ethics](#) relating to impartial discharge of adjudicative duties. The amendment adds new language permitting any judge to speak publicly about a pending case, “provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.”

Specifically, the amendment permits a judge to respond to attacks on particular decisions that become the focus of elections or recall campaigns—even if the decision is made by another judge. According to the Supreme Court of California [Advisory Committee](#) on the Code of Judicial Ethics’ [Invitation to Comment](#), “judges may be reluctant to issue controversial decisions because they will be unable to defend themselves if attacked while the matter is pending.” The amendment also recognizes the tension between the ability to speak publicly and the requirement that judges at all times act to promote public confidence in the integrity and impartiality of the judiciary, as set forth in Canon 2A.

The amendment followed a proposal by the [Judicial Fairness Coalition](#) of the [California Judges Association](#) that aimed to address issues relating to judicial independence, and to allow the public to “get a better understanding of the legal issues involved in a case when a judge may publicly comment on the procedural or factual basis of decisions issued in the course of the judge’s official duties.” The proposal was “[a]pparently prompted by the recall in 2018 of Judge Aaron Persky,” In 2016, Persky sentenced Brock Turner, the Stanford scholar-athlete, to six months in jail and sex offender registration status after his conviction on three counts of felony sexual assault against an unconscious woman. Prosecutors had sought six years in prison. The sentence precipitated Persky’s recall election.

## Should Judges Speak Out?

“I think there is a fundamental issue related to these changes that warrants at least some discussion, which is: do we want judges to be elected?” posits [Robert E. Poundstone IV](#), Montgomery, AL, cochair of the Section’s [Ethics & Professionalism Committee](#). Indeed, in 2015, the [Brennan Center for Justice](#) at [New York University School of Law](#) issued a [review](#) of social science studies on the impact of judicial elections on criminal cases. The review found that without exception, the pressures of upcoming judicial and retention elections caused judges to be more punitive toward criminal defendants.

Given these pressures, “I think it is reasonable to allow judges to exercise their First Amendment rights and respond to criticisms used against them in an election,” adds Poundstone, who is still hesitant to endorse the idea of a judge speaking on a pending case. “I do not see how an attorney for a client who felt a judge’s comments supported the other side would have any choice but to seek recusal,” he cautions. He suggests a preemptive approach may be better. “A detailed opinion setting forth the reasoning for a decision, instead of a cursory order, may be beneficial in explaining a ruling so that an explanation may not be called for during a later judicial campaign.”

“Plainly, the First Amendment lurks over this matter,” notes [John M. Barkett](#), Miami, FL, cochair of the Section’s Ethics & Professionalism Committee. “There is a delicate balance that has been struck here,” he continues, adding that “whether it is the right balance remains to be seen, should a challenge be brought by a judge who wants to be able to say more.”

## What to Say?

“For a pending case, the amendment has a number of limitations that should give a judge pause before speaking about a pending case, especially in an interview context where follow up questions can be asked,” advises Barkett. Echoing the Advisory Committee Commentary to the amended Canon, Barkett suggests both the use of surrogates and careful scripting for judicial campaigns facing backlash over controversial rulings to ensure that the amendments are not violated. However, “if you want to criticize the judge during a reelection campaign, know that the judge may now respond.”

“Judges should tread very carefully,” counsels Poundstone, especially with hot-button cases. He adds, though, that “this amendment increases the possibility the case will remain in the public discussion as judicial elections come around” and suggests that litigators be prepared. “A lawyer should have a plan for if and how he or she may respond to inquiries.”

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**Hashtags:** #ethics, #judiciary, #FirstAmendment

## Related Resources

- Hon. Virginia M. Kendall, “[Sua Sponte: A Judge Comments. A judge comments on the difficulty of devising appropriate sentences,](#)” *Litig.* (Mar. 1, 2015).
- [ABA Model Code of Judicial Conduct](#), Rule 2.10(A).
- [Committee on the American Judicial System](#), Section of Litigation.