

California Judges Association
OPINION NO. 35

(Originally issued: September 19, 1987)

PUBLIC COMMENT ON PUBLIC ISSUES

AUTHORITY: Canons 1, 2A, and 4B

I. Background

A justice of the Court of Appeal of the State of California standing for reconfirmation in a General Election was sent an inquiry from an organization purporting to be a California affiliate of a national right-to-life group. The letter noted that the organization's members and associates "want to know the attitudes of the justices of the Courts of Appeal on the legal questions raised by abortion and other life issues," and went on to ask the justices for "information on your views." The letter contained a questionnaire that the justice could use for the answer. These specific questions in the main focused on whether the justice would support legislation at the federal and state level aimed at overturning court decisions that permit abortion and legislation restricting state funding for abortions and family planning.

For example, this is one of the questions:

In recent years, California's annual Budget Act has included restrictions on the use of State funds to pay for abortion under the Med-Cal program. The State courts, however, have thus far blocked implementations of the restrictions. The California Pro Life Council favors passage and implementation of restrictions that limit abortion funding to life-of-the-mother cases.

Will you oppose state funding of abortions except in life-of-the-mother cases?

The judge informally inquired of the Chair of the Ethics Committee concerning the propriety of responding and was told that it was not proper to respond to these questions. The Committee unanimously approved this informal advice and directed that the formal opinion be prepared. The justice wrote a letter to the organization declining to respond to the inquiry.

II. Question

Is it proper for a sitting judge or justice standing for election to make a public comment on the legal issues relating to abortion?

III. Answer

No.

Such questions call for a prejudgment of issues that may come before the judge. To respond would impair the judge's duty to act at all time to promote public confidence in the integrity and impartiality of the judiciary by, at worst, improperly prejudging a pending or impending legal issue, or, at best, appearing to do so.

When asked for such an expression in the course of an election campaign, the judge should state that he or she is prohibited by the California Code of Judicial Ethics from responding to such an inquiry.

IV. Discussion

It is the essence of our system of justice that judges strive not only to be impartial but also to appear impartial in the discharge of their judicial duties. In Canons 1 and 2, the California Code of Judicial Ethics addresses this fundamental proposition thusly:

Canon 1

An independent 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. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code.

Canon 2

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.

Those who come before the courts of justice are entitled to expect that the judge presiding is not also an advocate of one side or the other in the proceedings, or has, in advance, by public declaration, prejudged or decided the case before the court. In this regard, Canon 4B allows judges to "...speak, write, lecture, teach and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code."¹

This opinion is advisory only. The Committee acts on specific questions submitted, and its opinion is based on facts as set forth in the questions submitted.

COMMITTEE ON JUDICIAL ETHICS
September 19, 1987

¹ A judge should also be aware that a public statement could violate Canon 3B(9). It provides in part that "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." Issues involving abortion and right to life have been and are constantly pending before courts in the United States (See, e.g., *Hartigan v. Zbaraz*, et al., Docket 85-673 U.S. Supreme Court). Although Canon 3B(9) relates only to proceedings and not to issues, depending on the nature of the comment, it could be construed as a comment on "pending or impending proceedings in any court."