Judicial Council of California . Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 23, 2010

Title
Commission for Impartial Courts: Recommendations 1, 4, 15, 16, 18, 19, 24, 27, 31, and 32

Rules, Forms, Standards, or Statutes Affected
See Attachment A

Recommended by
Commission for Impartial Courts
Implementation Committee
Hon. Ming W. Chin, Chair

Agenda Item Type
Action Required

Effective Date
April 23, 2010

Date of Report
March 30, 2010

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Executive Summary

The Implementation Committee (committee) of the Commission for Impartial Courts (CIC) is presenting for Judicial Council action 10 recommendations from the CIC's final report. Those recommendations have been grouped broadly into four overarching categories that correspond to the entities to which the CIC believes those recommendations should be referred for further action— the California Supreme Court, the State Bar of California, the council's Policy Coordination and Liaison Committee (PCLC), and the Administrative Presiding Justices Advisory Committee (APJAC) and the Appellate Advisory Committee (AAC). The recommendations made in this report are consistent with the prioritization plan that the council approved at its February 26, 2010, meeting.

Recommendation

The Commission for Impartial Courts Implementation Committee recommends that the Judicial Council, effective April 23, 2010:

1. Endorse recommendations 1, 4, 15, 24, and 27, and refer those recommendations to the California Supreme Court for consideration by its Advisory Committee on the Code of Judicial Ethics or other action deemed appropriate, as follows:
   - CIC Recommendation 1: The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."
   - CIC Recommendation 4: Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."
   - CIC Recommendation 15: The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.
   - CIC Recommendation 24: Canon 5 of the Code of Judicial Ethics or its commentary should be amended to place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements, to encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations.
   - CIC Recommendation 27: Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" or "judge pro tem" may be properly used.

2. Endorse recommendation 16 and refer that recommendation to the State Bar of California for consideration, as follows:
   - CIC Recommendation 16: Local county bar associations should consider creating independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

3. Refer recommendations 18 and 19 to the Policy Coordination and Liaison Committee for consideration as matters for council-sponsored legislation, as follows:
   - CIC Recommendation 18: The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.
   - CIC Recommendation 19: An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose judicial candidates.

4. Refer recommendations 31 and 32 to the Administrative Presiding Justices Advisory Committee (APJAC) and the Appellate Advisory Committee (AAC) for consideration and, ultimately, a recommendation as to whether the substance of those recommendations should be codified in the Code of Judicial Ethics, the California Rules of Court, or statute, as follows:
   - CIC Recommendation 31: Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

- CIC Recommendation 32: Appellate justices' campaign finance disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State Web site.

Previous Council Action

On December 15, 2009, the Commission for Impartial Courts presented its final report and recommendations to the Judicial Council. On the request of Associate Justice Ming W. Chin, chair of the CIC, the council received and accepted the report, which contained 71 recommendations.[1] The council directed the Administrative Director of the Courts to provide for consideration at the February 2010 Judicial Council business meeting an implementation plan for the recommendations and a prioritization of those recommendations.[2] Chief Justice Ronald M. George appointed Associate Justice Ming W. Chin as chair of the Implementation Committee. The committee's complete roster is found as Attachment D.

The committee presented a report to the council on February 26, 2010, in which the committee recommended that the council endorse three of the CIC's recommendations pertaining to disclosure of, and disqualification resulting from, campaign contributions to judicial candidates. The committee also presented a proposed prioritization plan to the council for approval. At this meeting, the council approved the recommendation regarding campaign contributions—i.e., it endorsed recommendations 29, 30, and 33—and accepted the proposed prioritization plan.

Recommendation 1 (CIC Recommendations 1, 4, 15, 24, and 27: Judicial Candidate Campaign Conduct Matters for Referral to the California Supreme Court)

1. Endorse recommendations 1, 4, 15, 24, and 27, and refer those recommendations to the California Supreme Court for consideration by its Advisory Committee on the Code of Judicial Ethics or other action deemed appropriate, as follows:
   - CIC Recommendation 1: The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."
   - CIC Recommendation 4: Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."
   - CIC Recommendation 15: The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.
   - CIC Recommendation 24: Canon 5 of the Code of Judicial Ethics or its commentary should be amended to place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements, to encourage

[1] The CIC's final report is attached as Attachment B. For ease of reference, a consolidated list of the CIC's final recommendations is attached as Attachment C. In some cases, recommendations have multiple subparts. Those subparts have been identified by lower-case letters in Attachment C for ease of reference.

[2] The council further directed the Administrative Director of the Courts to report to the council by December 2010 on the progress in implementing the CIC's recommendations.

candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations.

- CIC Recommendation 27: Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" or "judge pro tem" may be properly used.

Rationale for recommendation 1 (CIC recommendations 1, 4, 15, 24, and 27)

The California Supreme Court, through the Code of Judicial Ethics, makes rules governing the conduct of judges as well as judicial candidates in the conduct of their campaigns. (Cal. Const., art. VI, § 18(m).) The following eight recommendations from the Commission for Impartial Courts all involve proposed amendments to the Code of Judicial Ethics.[3] Therefore, the CIC recommends that they be endorsed by the Judicial Council and referred to the Supreme Court for consideration by its Advisory Committee on the Code of Judicial Ethics.

Several of the recommendations were developed in response to the U.S Supreme Court's decision in *Republican Party of Minnesota v. White* (2002) 536 U.S. 765. In *White*, the 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. The decision raised concerns about the validity of any provision regulating judicial campaign speech and whether judicial elections should be treated differently from elections for political office.

Recommendation 1. The California Code of Judicial Ethics does not contain a definition of "impartiality," although the term is used frequently in the canons and commentary. In contrast, the American Bar Association Model Code of Judicial Conduct (model code) includes the following definition of "impartiality," which was added in response to *White:*

> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

The CIC agreed that the model code's definition of "impartiality" should be incorporated into the Code of Judicial Ethics. The CIC's rationale for recommending that the model code definition be adopted are that (1) the definition tracks the language in the *White* decision by couching itself in terms of an absence of bias or prejudice toward parties and maintaining an open mind on issues, (2) it would be beneficial to have a uniform definition nationwide, and (3) there appears to be no good reason to diverge from the model code definition.

[3] The numbers of the 10 recommendations correspond to the numbers as they appear in the final report of the Commission for Impartial Courts. As such, they are not consecutive.

Comments from interested parties.[4] One of the four persons to comment on recommendation 1, writing on behalf of the California Judges Association (CJA), disagreed with this recommendation on the ground that it would be superfluous and would invite speculation about the reason for adding it. She noted that the word "impartiality" has the same definition in everyday parlance as it does in the judicial ethics context, so defining it in the Code of Judicial Ethics is unnecessary. The CIC felt, however, that because the term is used so many times throughout the code, and because it tracks the definition used in *White*, it would be useful to include the definition in the terminology section of the code.

Alternatives considered and policy implications. The CIC considered recommending that this definition not be added, but ultimately concluded that it would be helpful, especially because the terms are used frequently in the code.

There are no immediately apparent policy implications associated with this recommendation.[5]

Implementation requirements, costs, and operational impacts. The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the Supreme Court; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the Supreme Court to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the Supreme Court.

Recommendation 4. The CIC believes that canon 5 should be reexamined for consistency in its use of the terms "judge" and "candidate." For example, although canon 5A addresses conduct by "[j]udges and candidates for judicial office," the advisory committee commentary following the canon discusses only conduct by judges.

Comments from interested parties. The only commentator who opposed this recommendation did not address the substance of the recommendation. Rather, she stated that she objects to canon 5 to the extent that it permits campaign contributions at all from those appearing before judges who are involved in election campaigns.

Alternatives considered and policy implications. The CIC did not consider any significant alternatives to this recommendation. There are immediately apparent policy implications associated with this recommendation.

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[4] As with all of the CIC's recommendations, the specific recommendations at issue in this report were sent out for public comment. The comments received, along with the commission's responses, are set forth in Attachment E.

[5] Many of the recommendations discussed in this report have inherent policy implications, i.e., by endorsing the recommendation, the council would implicitly be taking a policy position in favor of that recommendation. Because such policy implications are essentially a part of the recommendations themselves, they are not separately addressed in the report.

Implementation requirements, costs, and operational impacts. The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the Supreme Court; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the Supreme Court to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the Supreme Court.

Recommendation 15. Canon 3B(9) states in part: "This Canon 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, and does not apply to proceedings in which the judge is a litigant in a personal capacity." When a judge responds outside of the enumerated circumstances, it may give the appearance that the judge has resorted to inappropriate means to defend the judge's own rulings, which may negatively affect the perception of fairness. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.) Because there is little direction on how to interpret this provision in canon 3B(9), most judges err on the side of caution and do not make any public statements.

The CIC recommends that the advisory committee commentary to canon 3B(9) be amended to provide guidance to judges on acceptable conduct by adding the following explanatory language:

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

There is a concern that adding the proposed language to the commentary could embolden judges to make statements to bolster their rulings or that go beyond the case. The proposed amendment, however, does not create any new exceptions to the prohibition in canon 3B(9); instead, it clarifies conduct that is already permissible under the rule. A public statement by a judge also remains subject to the other canons governing judicial conduct. To the extent possible, the CIC believes that a court's public information officer should be involved in issuing any public statement in response to an attack on a judge's ruling.

Comments from interested parties. One commentator, writing on behalf of the California Judges Association, noted that there are two conflicting views of this recommendation. One view is that the additional language would help judges determine what constitutes an acceptable response to attacks on pending cases. The other view is that the language is superfluous. The only other commentator objected that allowing the use of transcripts to respond to attacks on rulings would encourage judges to "actively work to create a favorable transcript, for example, by asking questions, or inserting objections where counsel for one party fails to adequately do so."

Alternatives considered and policy implications. The only alternative considered by the CIC was to recommend no changes to the canon or its commentary. The CIC determined, however, that the recommended commentary would be helpful to judges whose rulings in pending cases are under attack.

There are no immediately apparent policy implications associated with this recommendation.

Implementation requirements, costs, and operational impacts. The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the Supreme Court; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the Supreme Court to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the Supreme Court. Finally, this recommendation may result in a minimal increase in the number of reporter's transcripts prepared at court expense.

Recommendation 24. The CIC believes that judicial candidates should be under an affirmative duty to control the actions of their campaigns and the content of campaign statements, to encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations. This would include a duty to review and approve campaign statements and materials produced by campaign committees, consultants, campaign volunteers, and members of informal, honorary committees. Because candidates cannot be expected to control the actions of third parties, the amendment would also encourage, rather than require, candidates to take reasonable measures to protect against oral or informal written misrepresentations being made in their support by third parties and would encourage candidates to take appropriate corrective action if they learn of such misrepresentations.

Comments from interested parties. This recommendation originally referred to candidates taking "reasonable measures to control the actions of campaign operatives and the content of campaign statements." One commentator, writing on behalf of the CJA, opposed this recommendation, stating that the terms "operatives" and "reasonable measures" were ambiguous and could subject candidates to discipline even though they may have difficulty controlling campaign consultants or volunteers. The CIC agreed that the term "operatives" was not clear and changed the language of the recommendation to state that candidates must "control the actions of their campaigns and the content of campaign statements."

As to the term "reasonable measures," the CIC noted that the Code of Judicial Ethics contains a definition of the word "require," which is relevant to this comment. It states: "Any Canon prescribing that a judge 'require' certain conduct of others means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control." In light of this definition, the CIC did not agree that the term "reasonable measures" is ambiguous.

With regard to actions taken on the candidate's behalf by third parties, the CIC noted the difficulty of controlling actions of someone not under the candidate's control. The CIC considered and rejected the option of not including any language pertaining to actions by third parties. Rather, it concluded that if a candidate knows that a third party intends to make or has made misrepresentations on the candidate's behalf, it is not untenable to "encourage" the candidate to take reasonable measures to protect against such conduct. Likewise, it would be reasonable to encourage candidates to take appropriate corrective action if they learn of such misrepresentations.

Alternatives considered and policy implications. Alternatives considered by the commission are discussed above in the section on comments from interested parties.

This recommendation in particular presents policy issues for judicial officers that warrant further discussion. If this recommendation is implemented, judicial officers who are candidates in judicial elections (including justices in retention elections) would need to be aware of the obligation to review campaign statements issued by their campaigns and oversee the actions of their campaign committees. Failure to do so could result in disciplinary action by the CJP. The canon would also encourage candidates to take reasonable measures to protect against misrepresentations made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations. Because these latter actions are encouraged, not required, failure to comply would not provide a basis for discipline.

Implementation requirements, costs, and operational impacts. The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the Supreme Court; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the Supreme Court to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the Supreme Court.

Recommendation 27. Typically, the misuse of the title or position of "temporary judge" involves an attorney allowing the title to be used in campaign literature or in a ballot statement. The CIC considered whether canon 6D(8)(c) should be clarified by the Supreme Court. That canon allows an attorney to use his or her judicial title to "show [his or her] qualifications." This open-ended statement has resulted in attorneys using the title as if it were an occupation, such as "deputy district attorney." Canon 6D(9)(b) permits use of the title or service in a variety of employment application scenarios, including when the title or service is contained in a "descriptive statement submitted in connection with an application . . . for appointment or election to a judicial position . . . ." (Emphasis added.) The CIC recommends that canon 6 be revisited with a view toward clearing up ambiguities on how and when the title may be used.

Comments from interested parties. The original recommendation referred only to the term "temporary judge." The only commentator on this recommendation suggested adding the term "judge pro tem." The CIC agreed and modified the recommendation to include this term.

Alternatives considered and policy implications. The only alternative considered by the CIC was to recommend no analysis of or changes to canon 6. The CIC concluded, however, that it would be helpful to carefully analyze canon 6 to determine whether it needs clarification.

There are no immediately apparent policy implications associated with this recommendation.

Implementation requirements, costs, and operational impacts. The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the Supreme Court; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the Supreme Court to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the Supreme Court.

Recommendation 2 (CIC Recommendation 16: Judicial Candidate Campaign Conduct Issue for Referral to the State Bar of California)

2. Endorse recommendation 16 and refer that recommendation to the State Bar of California for consideration, as follows:
   - CIC Recommendation 16: Local county bar associations should consider creating independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

Rationale for recommendation 2 (CIC recommendation 16)

In making recommendation 16, the CIC considered whether it would be a violation of canon 3B(9) for a judge himself or herself to initiate a public response to an attack on the judge through a third party. Ultimately, the CIC agreed that it would be preferable if each local county bar association would consider creating a standing committee—independent from state or local government—that could respond to inappropriate or unfounded criticism of judges, judicial decisions, or the judicial system, including, but not limited to, criticism made during an election campaign. Such committees would not have active judge members but should have some retired judge members to provide judicial perspective.

The CIC agreed that it would not violate the canon for a judge to file a confidential complaint with such a voluntary standing committee or otherwise to alert such a committee to the fact that someone is attacking a ruling in a pending matter. Voluntary standing committees that respond to attacks on judges by fighting speech with speech also comport with the First Amendment.

There are several reasons for the committee's recommendation that CIC recommendation 16 be endorsed and referred to the State Bar of California for further consideration. First, with regard

to the formation of local committees, the State Bar is best equipped to communicate with local bar associations. To the extent there is a desire for relative consistency in the approaches of the local bar associations, the State Bar is in a position to coordinate the efforts in terms of providing assistance and evaluating proposals. Second, these committees are intended to be independent. The committee believes they will have more credibility with the public if the judiciary is not directly involved in their formation. Third, the State Bar can appoint a working group to develop and promote a model program. The working group can oversee or assist in the formation of the committees.

Comments from interested parties

The original recommendation stated that courts should work with local county bar associations to create independent standing committees to respond to inaccurate or unfounded attacks. One commentator expressed concern that this could lead to improper ex parte communications about pending cases or embroilment by courts in contested matters. After reviewing this comment, the CIC decided to change its recommendation to remove the court from the equation. The recommendation now is that local county bar associations consider establishing committees to respond to attacks.

Alternatives considered and policy implications

The CIC discussed whether active judges should be appointed to the local committees, but concluded that this could create the appearance that the committees are designed to protect the judiciary instead of responding only to *inaccurate or unfounded* attacks.

There are no immediately apparent policy implications associated with this recommendation.

Implementation requirements, costs, and operational impacts

The committee believes that the recommendation can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the State Bar; the time needed to accomplish that task should be minimal. Required external resources will also include the time and staff needed for the State Bar to receive, review, and act on the referred recommendation. Further, additional AOC staff time may be required to receive, review, and address any work that comes back from the State Bar.

Recommendation 3 (CIC Recommendations 18 and 19: Judicial Candidate Campaign Conduct Issue for Referral to the Council's Policy Coordination and Liaison Committee)

3. Refer recommendations 18 and 19 to the Policy Coordination and Liaison Committee for consideration as matters for council-sponsored legislation, as follows:
   - CIC Recommendation 18: The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.
   - CIC Recommendation 19: An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose judicial candidates.

Rationale for recommendation 3 (CIC recommendations 18 and 19)
A number of the CIC's underlying recommendations recommend that the Judicial Council sponsor legislation either amending existing statutory law or enacting new statutes. As the council is aware, the development of council-sponsored legislation is a multi-step process that can take some time to implement in full. To begin that process with respect to two of the CIC's recommendation, the committee is recommending that CIC recommendations 18 and 19 be referred to the council's Policy Coordination and Liaison Committee for consideration as matters for council-sponsored legislation.

Recommendation 18 is that the statutory slate mailer disclaimer be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact. Recommendation 19 is that an amendment to Government Code section 84305.5 be sponsored to apply to organizations that support or oppose judicial candidates.

A slate mailer is defined as a "mass mailing which supports or opposes a total of four or more candidates or ballot measures." (Gov. Code, § 82048.3.) The mailers generally contain endorsements or recommendations for various partisan and nonpartisan offices—including judicial offices—and ballot measures. A candidate can pay to be placed on a mailer, or an organization publishing the mailer can list a candidate without the candidate's permission. The rationale behind recommendations 18 and 19 arises from the ethical concern regarding the potential public perception that a candidate listed on the mailer is endorsing the other candidates or measures on the mailer. Canon 5 requires judges to refrain from inappropriate political activity, and canon 5A(2) prohibits judges from publicly endorsing candidates for nonjudicial office. The judicial candidate has no control over the message or the presence in the mailer of other candidates, whose views may not be consistent with notions of judicial impartiality or whose presence on the mailer may suggest an endorsement by the judge.

Currently, Government Code section 84305.5(a)(2) requires that a notice be placed on slate mailers stating: "Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer." The same section also requires inclusion of the admonition that the sender of the mailer is "not an official political party organization." The CIC has recommended sponsoring a number of amendments to the statute. First, the statute should be amended to require that the slate mailer explicitly cite canon 5 and remind the reader that judges are not permitted to endorse partisan political candidates or causes. Second, the statute should be amended to require that when a judicial candidate is placed on a mailer without his or her consent, the lack of consent be prominently disclosed. Finally, the CIC believes that the Legislature should revisit Government Code section 84305.5 to consider whether it should be expanded so that it applies to organizations that support or oppose *candidates.* Currently, the statute on its face appears to apply only to an "organization or committee primarily formed to support or oppose one or more *ballot measures*." [Emphasis added.]

Comments from interested parties

These recommendations generated two comments. One commentator suggested that the statute should be amended to prohibit inclusion of a judicial candidate on a slate mailer if the candidate specifically objects to being included. The CIC rejected this proposal because of First Amendment concerns with restricting a group from placing on its slate mailer the candidates it favors.

The other commentator—the chair of the Los Angeles County Democratic Party—disagreed with the recommendation that the statute be expanded to apply to organizations that support or oppose candidates rather than just to organizations that support or oppose ballot measures. He argued that proposed amendments would be unconstitutional because they are not narrowly tailored to serve the compelling governmental interest of protecting core political speech. The CIC disagreed that the proposed legislation is unconstitutional. Further, it bears repeating that at this time, the committee is merely recommending referring these proposals to the Policy Coordination and Liaison Committee. That committee can consider the constitutional implications when it reviews the recommendations.

Alternatives considered and policy implications

The alternatives considered are discussed in the section addressing comments from interested parties.

There are no immediately apparent policy implications associated with this recommendation.

Implementation requirements, costs, and operational impacts

The committee believes that the recommendations can be accomplished at moderate cost. Initially, the resources required will include the staff time needed to prepare referral documents to the PCLC; the time needed to accomplish that task should be minimal. Required resources will also include the time and staff needed for the PCLC to receive, review, and act on the referred recommendations. Additional AOC staff time will likely then be required to receive, review, and address any work that comes back from the PCLC regarding the proposed legislation.

Recommendation 4 (CIC Recommendations 31 and 32: Disclosure of Appellate Justices' Campaign Contributions)

4. Refer recommendations 31 and 32 to the Administrative Presiding Justices Advisory Committee (APJAC) and the Appellate Advisory Committee (AAC) for consideration and, ultimately, a recommendation as to whether the substance of those recommendations should be codified in the Code of Judicial Ethics, the California Rules of Court, or statute, as follows:
   - CIC Recommendation 31: Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

- CIC Recommendation 32: Appellate justices' campaign finance disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State Web site.

Rationale for recommendation 4 (CIC recommendations 31 and 32)

In February 2010, the council endorsed CIC recommendations 29, 30, and 33, which relate to the disclosure of—and mandatory disqualification as the result of—certain campaign contributions received by judicial candidates at both the superior court and appellate court levels. Because those recommendations all would ultimately be implemented through amendments to the Code of Judicial Ethics, the council approved referring them to the California Supreme Court for further consideration. The recommendations that were presented in the Implementation Committee's February 2010 report do not, however, address the issue of mandatory disclosure of contributions at the appellate court level. That issue is addressed by recommendations 31 and 32.

The committee did not recommend implementation of recommendations 31 and 32 in February because it felt that further consideration of the mechanics of the recommended disclosure—taking into account the particulars of appellate court administration and procedures—was required, and the committee needed additional time to formulate its recommendation as to which groups should undertake that consideration. Having further discussed that question, the committee now feels that these recommendations (listed above) are ready for council consideration. The committee believes that the APJAC and the AAC are the groups that are best suited to consider the specifics of the recommended disclosure—including how courts will make the required disclosure to parties and how and where justices' electronic disclosure information will be maintained—and how that disclosure would best be codified.

Having established the rationale for presenting recommendations 31 and 32 to the council for action at this time, we turn now to the rationale underlying the substance of each of those recommendations. As with disclosure of superior court judges' campaign contributions, the CIC believes that mandatory disclosure by appellate justices of all reportable campaign contributions would enhance public trust and confidence in an impartial judiciary without the need for contribution limits. Thus, the rationale behind recommendations 31 and 32 is to provide for a similar level of disclosure at both the appellate and trial court levels, while at the same time recognizing that differences in court administration and procedure between the two would make identical disclosure recommendations impractical. For example, because parties and counsel involved in the appellate process are typically not in court for the first time until oral argument, it would not be feasible to delay disclosing campaign contributions until that first appearance.

Accordingly, the CIC has recommended that when the appellate courts send both a first notice and a notice of oral argument to the parties, they also be required to send information on how the parties may learn of the justices' campaign contributions. Further, with respect to the actual information to be sent, the CIC has recommended that all justices' campaign contributions be maintained electronically in a manner that makes them easily accessible via the Web. The CIC has not, however, made any specific recommendations as to the following:

- When the requirement to give notice to parties should arise, e.g., whether it should begin at some specific point in time prior to the next retention election for an affected justice or whether the requirement should always exist, with the notice not being related to any particular justice;
- How long the notice requirement should last, e.g., whether a court should be required to give notice until some specific time after an affected justice's last retention election, or whether the notice instead should be more general and should always exist; and
- The specific mechanics for making justices' disclosures available on the Web, including, among other things, which entity or entities should host those disclosures, in what format, and for how long.

In the CIC's view, the above issues are appropriate for further and more detailed discussion by bodies with significant experience and expertise in matters of appellate court procedure and administration. Therefore, the committee recommends that CIC recommendations 31 and 32 be endorsed and then referred to the APJAC and AAC for consideration and a future recommendation to the council regarding codification of mandatory disclosure at the appellate level.

Comments from interested parties

CIC recommendations 31 and 32 did not receive any specific negative comments during the comment period. Rather, the comments to those recommendations were directed more generally to the CIC's overall recommended approach to mandatory disclosure of, and disqualification as a result of, campaign contributions received by judicial candidates.

Alternatives considered and policy implications

Whether to require affirmative disclosure of appellate justices' campaign contributions at all. The CIC considered not making any recommendation at all with respect to the disclosure of appellate justices' campaign contributions. As candidates for statewide office, appellate justices are already required to electronically file their disclosures with the Secretary of State; those disclosures are then available electronically on the Secretary of State's Cal-Access Web site. Thus, requiring additional disclosure to the parties in appellate proceedings could be viewed as duplicative. Ultimately, the CIC concluded that because parties may not know to look on Cal-Access—and to maintain a parallel between the superior and appellate courts—that some sort of affirmative disclosure action on the part of the appellate courts was warranted to maximize the public's trust and confidence in the impartiality of the appellate bench. The CIC's intent was not, however, to require the disclosure of more or different information than is currently required to be reported to the Secretary of State.

Timing and mechanics of appellate campaign contribution disclosures. As discussed above, the CIC considered—but ultimately made no recommendations regarding—both the timing and the mechanics of the recommended mandatory disclosure of appellate justices' campaign contributions. Rather than making any specific recommendations on these points, the CIC felt

that those issues should be further considered by bodies with more expertise and experience with appellate court administration and procedures. The CIC did examine a number of options, however, including recommending that notice always be required, but that it not be tied to specific justices. To illustrate, such a notice would simply inform parties that all justices' campaign finance disclosures are available on a particular Web site.

Policy implications of disclosure of appellate justices' campaign contributions. Because Court of Appeal and Supreme Court justices already are required to file their campaign contribution reports electronically, the recommendations regarding disclosure to the parties do not represent a policy shift with respect to what information must be reported. Rather, the policy implications arise from the fact that the recommendation espouses an affirmative action on the part of the appellate courts, namely that they provide notice to all parties of the electronic availability and location of justices' disclosures. A court that fails to give the required notice could potentially be in violation of whatever authority is ultimately recommended as the most appropriate means of codifying the notice requirement.

Implementation requirements, costs, and operational impacts

The committee believes that the recommendations can be accomplished at reasonable cost. Initially, the resources required will include the staff time needed to prepare referral documents to the appropriate entities; the time needed to accomplish that task should be minimal.

Required resources will also include the time and staff needed for those entities to receive, review, and act on the referred recommendations. For recommendations 31 and 32, which involve Advisory Committees that are staffed by AOC staff members, this will include reviewing the substance of the recommendations and reporting to the APJAC and AAC as required, as well as conducting whatever work those Advisory Committees deem necessary ultimately to codify the recommendations.

Attachments

1. Attachment A: Authorities Affected by Recommendations
2. Attachment B: Commission for Impartial Courts: Final Report
3. Attachment C: Consolidated List of Final Recommendations
4. Attachment D: Commission for Impartial Courts Implementation Committee Roster
5. Attachment E: Public Comments Received and Responses on Recommendations 1, 4, 15, 16, 18, 19, 24, 27, 31, and 32

Attachment A

Authorities Affected by Recommendations

Listed below are the authorities that would be affected by the recommendations of the Commission for Impartial Courts Implementation Committee in the report to which this is attached. The list includes both currently existing authorities, as well as new authorities that would need to be promulgated in response to the recommendations. The recommendations are listed below in the order in which they appear in the report.

Recommendation 1
Code of Judicial Ethics (addition of new definition)

Recommendation 4
Code of Judicial Ethics, Canon 5

Recommendation 15
Code of Judicial Ethics, Canon 3B(9)

Recommendation 24
Code of Judicial Ethics, Canon 5

Recommendation 27
Code of Judicial Ethics, Canon 6

Recommendation 16
None

Recommendation 18
Government Code section 84305.5

Recommendation 19
Government Code section 84305.5

Recommendation 31
Code of Judicial Ethics (possible new canon); or
California Rules of Court (possible new rule); or
Possible new statute

Recommendation 32
Code of Judicial Ethics (possible new canon); or
California Rules of Court (possible new rule); or
Possible new statute

Attachment B

Commission for Impartial Courts: Final Report

RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA

DECEMBER 2009

JUDICIAL COUNCIL OF CALIFORNIA

COMMISSION FOR IMPARTIAL COURTS

Commission for Impartial Courts: Final Report

Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California

December 2009

JUDICIAL COUNCIL OF CALIFORNIA

COMMISSION FOR IMPARTIAL COURTS

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Contents

Executive Summary **1**
Problem Statement 1
Judicial Accountability 2
Structure of the Commission 3
Public Forum 6
Public Comment on the Draft Report 7
Commission Findings 7
Recommendations **12**
Judicial Candidate Campaign Conduct 12
Amendments to the Code of Judicial Ethics 12
Voluntary Codes of Conduct and Judicial Campaign Conduct Committees 17
Judicial Candidate Training and Advisory Opinions 20
Public Comment on Pending Cases 23
Slate Mailers, Endorsements, and Misrepresentations 25
Judicial Campaign Finance 32
Contribution Limits 32
Mandatory Disclosure and Disqualification 34
Limitations on Corporate and Union Financing of Judicial Elections 44
Electronic Filing of Judicial Candidate Campaign Finance Disclosures 45
Independent Expenditures 48
Public Financing of Judicial Elections 55
Public Information and Education 60
Public Outreach and Response to Criticism 60
Education 66
Voter Education 71
Education of Potential Applicants for Judgeships 73
Accountability and Judicial Self-Improvement 74
Judicial Selection and Retention 77
Merit Selection and Judicial Selection Under the JNE Process 77
Diversity of the Judiciary 87
California's Electoral Process at Both Trial and Appellate Court Levels 90
Consolidated List of Recommendations **97**
Judicial Candidate Campaign Conduct 97
Judicial Campaign Finance 100
Public Information and Education 102
Judicial Selection and Retention 105

Appendixes.....108
A. Commission for Impartial Courts Steering Committee Roster.....109
B. Task Force on Public Information and Education Roster.....111
C. Task Force on Judicial Candidate Campaign Conduct Roster.....113
D. Task Force on Judicial Campaign Finance Roster.....115
E. Task Force on Judicial Selection and Retention Roster.....117
F. Steering Committee and Task Force Charges.....119
G. Background Analysis of *Republican Party of Minnesota v. White* and Its Aftermath.....121
H. National Ad Hoc Advisory Committee on Judicial Campaign Oversight, Advisory Memorandum Dated July 24, 2008.....132
I. Rapid Response Plan: A Model Guideline for Responding to Unfair Criticism of the Judicial Branch.....135
J. Responding to Press Inquiries: A Tip Sheet for Judges.....139
K. Proposed Strategic Plan to Improve Civics Education.....141
L. Organizations With Civics Education Programs for California Schools.....143
M. American Bar Association, Standing Committee on Judicial Independence; National Conference of State Trial Judges; Appellate Judges Conference; Ohio State Bar Association, Report to the House of Delegates.....146
N. Drafts of Proposed Implementing Provisions Regarding Judicial Selection and Retention.....157
O. Length of Interim Appointment.....163

Executive Summary

The Commission for Impartial Courts was formed by Ronald M. George, Chief Justice of California and Chair of the Judicial Council, in September 2007. The commission's overall charge was to study and recommend ways to ensure judicial quality, impartiality, and accountability for the benefit of all Californians. The commission's membership included not only appellate justices and trial court judges but also court executive officers; prominent former members of the Legislature; and leaders of the bar, media, law schools, business community, educational institutions, and civic groups.

Problem Statement

California's courts have long been recognized as among the finest in the country. Under the leadership of Chief Justice George, the California judiciary has implemented a number of far-reaching improvements over the past several years. During that time, there have been few threats to the impartiality of California's judiciary. This is not the case elsewhere, however. As has been widely reported in the press, many states have seen a rise in attacks on courts and judges by partisan and special interests seeking to influence judicial decisionmaking. Likewise, in many states, judicial elections have increasingly taken on the qualities of elections for other political offices in that they are becoming more expensive, negative, and politicized.

At a two-day summit convened by the Judicial Council in November 2006, California's judicial leaders concluded that unless the Judicial Council took decisive action, the trends seen in other states would inevitably spread to California. Summit participants identified four basic approaches to preserving the impartiality of and the public's confidence in California's judiciary: (1) changes to improve judicial candidate campaign conduct, (2) changes to improve the financing of judicial campaigns, (3) activities to improve voter information about judicial candidates and public understanding of the role of the courts and the nature of judicial decisionmaking, and (4) modification of the current method of judicial selection and retention. Chief Justice George thereafter established the 88-member commission—divided into a steering committee and four separate task forces—to study and report on each of the approaches the summit identified.

The commission's overall goal was to identify the specific problems that are either currently facing California or that could arise here in connection with the four substantive areas listed above and then to make recommendations to the Judicial Council to allow it to exercise leadership effectively in addressing California's need for a nonpartisan and impartial judiciary. The work of the commission focused on furtherance of the public good and finding solutions that serve the long-term and common interests of all Californians.

Judicial Accountability

Among the commission's principal objectives, the concepts of judicial quality and judicial impartiality may be better understood by the general public than the concept of judicial accountability. Thus, accountability warrants further preliminary discussion before turning to the particulars of the commission's recommendations.

Under the rule of law, all governmental power and authority, including the judicial power, is derived from the will of the people as expressed in the laws and constitutions of our nation. The courts hold others accountable to the laws and constitutions and are themselves accountable to those same authorities. The roles and decisionmaking processes of judges differ, however, from the roles and decisionmaking processes of other governmental officials, and, as a consequence, the mechanisms through which judges are held accountable for their conduct and decisions differ from the mechanisms through which other governmental officials are held accountable. The constitutional duties of a judge sometimes require the judge to make decisions that go against the will of other governmental officials, special interests, or even a majority of the people. Judges are to be guided in their decisions solely by the law and constitution—not by any partisan or political considerations—and must be free from any undue influence from special interests or public opinion.

Because judges' decisions are to be based solely on the law, those decisions are not subject to review by other branches of government based on popular or political considerations. Rather, they are subject to review solely by other judges, learned in the law and legal procedure, who serve on higher courts as established by the laws and constitutions. This does not mean, of course, that judicial decisions are not an appropriate subject of public comment, debate, and criticism or that decisions cannot be changed through legal processes. To the contrary, they certainly should be debated and can be changed. But it does mean that in deciding cases judges are accountable to the current laws and constitutions, not to political or special interests or public opinion as it exists at the moment. Attempts to use judicial elections to hold judges accountable to political or special interests—rather than to the law and constitutions—for their judicial decisions threaten the impartiality of our courts.[1]

There are two other aspects of judicial accountability. Given the unique and critical role of the judiciary, it is imperative that judges serve with the utmost integrity and that, in both fact and appearance, their personal conduct conforms to the highest ethical and professional standards. The conduct of judges—as opposed to the substance of their judicial decisions—is therefore regulated by some of the toughest ethical rules in the

[1] Of course, judges can properly be held accountable through the judicial election process for their conduct on or off the bench, including, for example, their integrity, demeanor, fairness, communication skills, temperament, professionalism, community involvement, and the manner in which they handle their many administrative responsibilities as a judge.

world and, in California, by a special constitutional body established to hear and rule on public complaints of judicial misconduct. The California Code of Judicial Ethics covers judges' conduct both on and off the bench and is enforced by the California Commission on Judicial Performance (CJP), a majority of whose 11 members are neither judges nor lawyers but lay members of the public. On a finding of misconduct, the CJP has the authority and responsibility to impose discipline, up to and including removal from office.

The third aspect of judicial accountability refers not to the decisions or conduct of an individual judge but to the overall performance of a court or the judicial branch as an institution with respect to issues of administration and management. Such issues include the treatment of court users with courtesy and respect, the timely and expeditious handling of cases, the provision of helpful information and effective services, continuing judicial education, resource acquisition and management, personnel policies, accessibility, facility safety and convenience, and the handling of court records. The California judicial branch is publicly accountable for its administrative performance through such mechanisms as transparency, media coverage, the budget process, adoption of performance standards and measures, and regular reporting to the public and to other branches of government. Although this report contains several recommendations designed to enhance this aspect of judicial accountability (see, e.g., recommendation 48), generally the report and recommendations focus on the first two aspects of judicial accountability in the context of judicial election campaigns.

Structure of the Commission

The commission was composed of a steering committee and four task forces:[2] Judicial Candidate Campaign Conduct, Judicial Campaign Finance, Public Information and Education, and Judicial Selection and Retention. The membership of the steering committee and the task forces is detailed in Appendixes A–E.

Steering committee

The steering committee was chaired by Associate Justice Ming W. Chin of the California Supreme Court and was charged with overseeing and coordinating the work of the commission's four task forces, receiving periodic task force reports and recommendations, and presenting its recommendations in a report to the Judicial Council.[3]

[2] Task force chairs also served as members of the steering committee.
[3] The charges to the steering committee and the four task forces are attached as Appendix F to this report.

Task forces and working groups

Each task force was given a charge pertaining to one of the commission's primary focus areas. The task forces in turn divided into a number of working groups to address specific subject matter areas.

Task Force on Judicial Candidate Campaign Conduct

This task force, chaired by Associate Justice Douglas P. Miller of the Court of Appeal, Fourth Appellate District, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding proposals to promote ethical and professional conduct by candidates for judicial office, including through statutory change, promulgation or modification of canons of judicial ethics, improving mechanisms for the enforcement of the canons, and promotion of mechanisms that encourage voluntary compliance with ethics provisions by candidates for judicial office.[4] The task force broke into two working groups, charged with (1) considering whether the task force should recommend that the Supreme Court amend the California Code of Judicial Ethics[5] or that the judicial branch should seek changes to the disqualification provisions in the Code of Civil Procedure in response to *Republican Party of Minnesota v. White*[6] and its progeny and (2) addressing the types of campaign conduct that are permissible and desirable.

Task Force on Judicial Campaign Finance

This task force, chaired by Judge William A. MacLaughlin of the Superior Court of Los Angeles County, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to better regulate contributions to, financing of, or spending by candidates on campaigns for judicial office or to improve or better regulate judicial campaign advertising, including through enhanced disclosure requirements.[7] The task force broke into two working groups, responsible for proposals to (1) better regulate contributions to, financing of, or spending by candidates on campaigns for judicial office and (2) improve or better regulate judicial campaign advertising and financial reporting, including through enhanced disclosure requirements. The issue of public financing was not specific to either working group and was considered by the task force as a whole.

Task Force on Public Information and Education

This task force, chaired by Administrative Presiding Justice Judith D. McConnell of the Court of Appeal, Fourth Appellate District, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to improve public information and education concerning the judiciary—both during judicial election campaigns and otherwise. Such proposals could include methods

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[4] See Appendix F.

[5] The Code of Judicial Ethics is alternatively referred to as "the code" throughout this report.

[6] *White* (2002) 536 U.S. 765. (See Appendix G for background analysis.)

[7] See Appendix F.

to improve voter access to accurate and unbiased information about the qualifications of judicial candidates and to improve public understanding of the role and decisionmaking processes of the judiciary.[8] The task force broke into four working groups, which focused on (1) public outreach and response to criticism, (2) education, (3) voter education, and (4) accountability.

Task Force on Judicial Selection and Retention

This task force, chaired by Associate Justice Ronald B. Robie of the Court of Appeal, Third Appellate District, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals (1) to improve the methods and procedures of selecting and retaining judges and (2) regarding the terms of judicial office and timing of judicial elections.[9] The task force broke into two working groups on (1) judicial selection and (2) judicial retention.

Consultants

Each task force was assigned a consultant with expertise within the area of the task force's charge.

Charles Gardner Geyh, a national expert on judicial independence, accountability, administration, and ethics, served as consultant to the Task Force on Judicial Candidate Campaign Conduct. Mr. Geyh has been a professor at Indiana University Maurer School of Law since 1998. He is the author of *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press, 2006) and co-author of *Judicial Conduct and Ethics* (4th ed., Lexis Law Publishing, 2007) with James J. Alfini, Steven Lubet, and Jeffrey Shaman. In addition, Mr. Geyh was co-reporter to the American Bar Association (ABA) Joint Commission to Evaluate the Model Code of Judicial Conduct.

Deborah Goldberg served as consultant to the Task Force on Judicial Campaign Finance. Ms. Goldberg was formerly the director of the Democracy Program at the Brennan Center for Justice, a nonpartisan public policy and law institute that is a part of the New York University School of Law, and currently serves as a managing attorney with Earthjustice, a nonprofit public interest law firm dedicated to environmental issues. Ms. Goldberg is the principal author and editor of *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* and a co-author of three editions of *The New Politics of Judicial Elections* (covering election cycles 2000, 2002, and 2004). She is a graduate of Harvard Law School and served as law clerk to Justice Stephen G. Breyer, then on the United States Court of Appeals for the First Circuit, and to Judge Constance Baker Motley, United States District Court for the Southern District of New York.

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[8] *Ibid.*
[9] *Ibid.*

Bert Brandenburg served as consultant to the Task Force on Public Information and Education. Mr. Brandenburg is the executive director of the Justice at Stake Campaign, a national partnership working to keep courts fair, impartial, and independent. He serves on the board of directors of the National Institute on Money in State Politics and on the National Ad Hoc Advisory Committee on Judicial Campaign Conduct.

Seth S. Andersen served as consultant to the Task Force on Judicial Selection and Retention. Mr. Andersen is the executive vice-president of the American Judicature Society (AJS). Founded in 1913, AJS is a national, nonpartisan organization of judges, lawyers, and members of the public who work to maintain the independence and integrity of the courts and to increase public understanding of the judiciary. Among its primary areas of focus are judicial independence and judicial selection. Mr. Andersen was assisted by Malia Reddick, Ph.D., director of research and programs at AJS.

Public Forum

The commission held a public forum in Sacramento on July 14, 2008. It was attended by more than 150 members of the public and the media and had the goal of exploring the political pressures that threaten the fairness and impartiality of the judicial branch. The commission sought commentary and recommendations from the following prominent government, justice system, academic, and civic leaders:

- Hon. Gray Davis, former Governor of California;
- Hon. Pete Wilson, former Governor of California;
- Hon. Don Perata, former President pro Tempore of the California Senate;
- Hon. Thomas J. Moyer, Chief Justice of Ohio;
- Hon. Ira R. Kaufman, then-President, California Judges Association;
- Mr. Jeffrey L. Bleich, then-President, State Bar of California;
- Professor Kathleen M. Sullivan, Stanford Law School;
- Professor Laurie L. Levenson, Loyola Law School, Los Angeles;
- Mr. Manny Medrano, Reporter/Anchor, KTLA News, Los Angeles; and
- Ms. Mary G. Wilson, President, League of Women Voters of the United States.

Chief Justice Moyer, chair of the Conference of Chief Justices' Task Force on Politics and Judicial Selection, spoke about spending on judicial races and the increase in negative campaigning during the past decade in Ohio and other states across the country.

Former California Governors Pete Wilson and Gray Davis both stressed the need for judicial independence and public trust in our judiciary. Governor Wilson was particularly concerned with the abuse of political questionnaires. Governor Davis suggested that more information about all candidates for trial court judicial elections should be available to voters.

Legal scholars Laurie Levenson and Kathleen Sullivan both spoke about the principles of judicial independence and impartiality and about the rule of law by which judges decide cases with regard to law but without regard to personal belief, voter views, and financial support and without fear of reprisals for making unpopular decisions.

The steering committee and task forces reviewed and considered the recommendations made by the above speakers. Where appropriate, those recommendations have informed the recommendations of the task forces.

Public Comment on the Draft Report

The commission developed draft recommendations, which were sent out for public comment from March 23 through July 10, 2009. In all, 413 comments were received from 119 persons and entities. The steering committee reconvened on August 10 and 11, 2009, to discuss the comments and to hear additional, in-person comments from members of the public. The steering committee reviewed each submission and responded to all comments that were specific to the recommendations in the draft report.[10] In many cases, the recommendations were thereafter revised to address concerns or suggestions raised by those who commented. Some recommendations were withdrawn, and one new recommendation (number 38) was developed.

Commission Findings

Informed by the underlying concepts of judicial impartiality, quality, and accountability, the commission made a number of findings, which are presented below and grouped by general subject matter. These findings, which resulted from the work of the commission's four task forces, all lend support to the commission's recommendations.

Findings related to judicial candidate campaign conduct

In arriving at its recommendations concerning judicial candidate campaign conduct, the commission was guided by the following findings:

- Judicial quality and impartiality require that judges and judicial candidates be held accountable to the very highest ethical and professional standards in connection with their campaign conduct.
- Although *White* has raised concerns about the validity of any provision regulating judicial campaign speech and courts in other jurisdictions have taken various views on the scope of *White*, that decision should be interpreted so as not to prohibit restrictions on judicial campaign speech other than the "announce clause."
- One of the greatest threats to judicial independence comes from third-party interest groups making significant campaign contributions and engaging in other campaign-related activity, and many states have responded by creating judicial

[10] A chart summarizing the comments and responses follows this report (see Attachment C).

campaign oversight committees to monitor conduct by these third-party groups and to address misconduct by candidates.

- Judicial candidates should be educated about the differences between judicial elections and elections to political office and about ethical campaign conduct.
- Although judges are prohibited by canon 3B(9) of the Code of Judicial Ethics from publicly commenting on pending cases, this prohibition does not apply to attorney candidates.
- Judicial questionnaires propounded by special interest groups are often designed to elicit "commitments" from candidates on controversial issues; candidates who respond to these questionnaires risk violating canon 5B(1) of the code, which prohibits making statements to the electorate "that commit the candidate with respect to cases, controversies, or issues that could come before the court, . . ." and may be required to recuse themselves from cases in the future that involve those issues.
- The use of slate mailers and endorsements in judicial elections raises several issues related to judicial ethics, including the appearance that a judge is endorsing other candidates or measures listed on the slate mailer in violation of canon 5.
- Misrepresentations by judges or attorney candidates in speeches, advertisements, or mailers can affect public trust and confidence in the judiciary.

Findings related to judicial campaign finance

There have been increasing concerns throughout the country about the impact of money—whether in the form of campaign contributions or independent expenditures—in the elections of public officials. And there has been particular concern both within and from outside the judiciary about the impact of money in judicial elections, given the unique role of the judiciary in our structure of government. The public expects and is entitled to impartiality in judicial decisions and, as a result, the more influence that moneyed interests have or appear to have on judicial candidates, the more harm is done to the public's trust and confidence that judicial decisions are based on the rule of law as opposed to other considerations.

In response to these concerns, the commission has considered and recommended changes that could reasonably be made to reduce the potential influence of money on judicial decisionmaking and to improve the public's confidence in the impartiality of that process. Those recommendations were guided by the following findings:

- Judicial quality and impartiality require that judicial candidates, campaigns, campaign contributors, and others seeking to influence the outcome of judicial elections be publicly accountable for their respective campaign finance activities.
- There has been a significant increase in the amount of campaign contributions and independent expenditures in judicial elections in other states during the past

decade, nearly all of which have occurred in contested supreme court elections.[11]

- Polling data reflect that the public and a significant number of judicial officers perceive that campaign contributions in judicial elections have an effect on judicial decisionmaking.[12]
- Recently, high levels of judicial campaign spending and independent expenditures have occurred in states with contested supreme court elections, but not in states with retention elections.[13]
- The most effective method of promoting the public's trust and confidence in the impartiality of the judiciary is to adopt requirements for effective disclosure of contributions and mandatory disqualification at both the trial and appellate levels.
- California's current statutory and regulatory requirements regarding (1) what information must be disclosed pertaining to contributions and expenditures and (2) the timing of such disclosures are among the most comprehensive in the nation.
- Although disclosures pertaining to judicial candidates' contributions and to expenditures and independent expenditures are public information, it can be difficult or impracticable for the public to access that information.
- The use of treasury funds by corporations and unions for direct political contributions or independent expenditures in judicial elections may undermine the public's trust and confidence in the impartiality of the judiciary.
- There is currently no demonstrated need for public financing of judicial elections in California.

Findings related to public information and education

In reaching its recommendations about public information and education, the commission was guided by the following findings:

- Judicial quality, impartiality, and accountability require transparency on the part of judges and other court officials, mechanisms for public evaluation of judicial and court performance, and that the public have the information and civics education required to make informed decisions on matters affecting the judiciary.
- In California, the public, legislators, students, and voters are not sufficiently educated about the role of the courts and the importance of judicial impartiality.

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[11] See James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign, 2007), available at *www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006*. See also Bert Brandenburg and Roy A. Schotland, *Sandra Day O'Connor Project on the State of the Judiciary: Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns* (2008) 21 Geo. J. Legal Ethics 1229; Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races* (The Institute on Money in State Politics, Aug. 25, 2005), available at *www.followthemoney.org/press/Reports/200508251.pdf*.

[12] Memorandum from Stan Greenberg (chairman and chief executive officer, Greenberg Quinlan Rosner Research) and Linda A. DiVall (president, American Viewpoint) to Executive Director Geri Palast, Justice at Stake Campaign (Feb. 14, 2002), available at *www.gavelgrab.org/wp-content/resources/polls/PollingsummaryFINAL.pdf.*

[13] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, *supra*, at pp. 59–60.

- There is an urgent, immediate, and long-term need to inform and educate the public—particularly students, voters, and the media—about the importance of fair, impartial, and accountable courts.
- Lack of information and misinformation about the role of the courts in a democracy makes the judiciary and judicial institutions more vulnerable to unwarranted attacks.
- Efforts to educate the public should involve not only the provision of information and outreach to the public, but also the solicitation of feedback from the public about issues such as judicial performance, satisfaction with the courts, and the like.
- Civics instruction in the schools has been dramatically limited during the past decades, and while positive efforts have been made in court-community outreach and educational programs, more is needed.
- No consistent response mechanism is in place to deal with unwarranted attacks on the judicial process.

Findings related to judicial selection and retention

In recent years, many states have seen a dramatic increase in threats to both the impartiality of and the public's confidence and trust in state judiciaries. A number of these threats pertain in some way to issues involving the selection and retention of judges, especially the increased politicization and partisanship in judicial selection and the perceived lack of appropriate accountability by some judges to the public they serve.

While California has been fortunate so far in the overall nonpartisan, nonpolitical nature of judicial elections, there seems to be general agreement that the state is not immune to these issues, which could arise at any time. An improved selection process that highlights the importance of merit and seeks to improve the diverse nature of the bench will certainly increase public trust and confidence in the judiciary, as will increasing appropriate accountability of the bench. Finally, removing aspects of the system that might encourage partisanship will reduce the likelihood of a highly politicized judiciary.

Under the present system of judicial selection in California, the State Bar's Commission on Judicial Nominees Evaluation (JNE) evaluates and reports to the Governor on every person before appointment as a trial court judge or an appellate court justice.[14] The California system functions largely in the same manner as the merit selection systems in some other states. The primary difference between California's system and the traditional merit selection system is that in the traditional system the commission screens all applicants for the position and forwards the names of the best qualified to the Governor.

Subject to the above, the commission's recommendations concerning judicial selection and retention are founded on the following findings:

[14] Gov. Code, § 12011.5.

- Judicial quality, impartiality, and accountability require that judicial selection and retention processes be transparent and that voters in judicial elections have sufficient information about the qualifications of the candidates to make informed decisions.
- California's JNE system works well and is partially responsible for the high quality of judicial appointments in California.
- Voters in contested and open elections are often not well informed about judicial candidates. Public opinion surveys and social science research support this finding. According to a 2001 national survey, only 22 percent of Americans know "a great deal" about what their state courts and judges do.[15] Another indicator of the low level of knowledge that voters have about judicial candidates is ballot roll-off, or the percentage of the electorate that casts votes for the major offices on the ballot but does not vote in judicial races. Between 1980 and 2000, the average roll-off in state supreme court elections was 25.6 percent, with the highest levels of roll-off for nonpartisan and retention elections.[16]
- Based on detailed consideration of state-sponsored judicial evaluation programs in other states, mandatory, public judicial evaluation programs are uniquely suited to trial courts that hold retention elections and are not suitable in states like California, in which trial court elections are contested.[17]
- A voluntary, non-governmental program of judicial candidate evaluation would, however, provide voters with valuable information in contested elections.
- California's present system of elections for superior court judges and appellate court justices is working appropriately, although certain specific changes could improve the system.

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[15] Justice at Stake Campaign and Greenberg Quinlan Rosner Research, National Survey of Voters (Oct. 30–Nov. 7, 2001), available at *www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf*. This national figure coincides with results from two recent state polls. According to a 2008 survey by Decision Resources, Ltd., only 5 percent of Minnesotans know "a lot" about the state's court system; according to a 2007 survey by Public Opinion Strategies, only 12 percent of Missourians know "a great deal" about the state's courts and judges.

[16] See Melinda Gann Hall, "Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives" (2007) 69 *Journal of Politics* 1147.

[17] See Rebecca Love Kourlis and Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Accountability* (2007) 90 Judicature 200. As shown in the table on page 204 of that publication, of those states with official judicial performance evaluation (JPE) programs, only those states with retention elections make public the evaluation results for individual judges. Two states in which judges are appointed (Hawaii and New Hampshire) release summary reports for their courts.

Recommendations

The four task forces met individually during a period of 16 months. They each worked with consultants and formed working groups to study the primary focus areas of their charges. Preliminary recommendations were developed and presented to the steering committee at a joint business meeting in February 2009. Those recommendations were sent out for public comment in March 2009 and were revisited by the steering committee in August 2009, following the close of the public comment period. Based on the work of the task forces and the comments received and considered, the steering committee withdrew some recommendations, made changes to others, and consolidated many so that now 71 recommendations are being presented by the commission to the Judicial Council.

Judicial Candidate Campaign Conduct

Amendments to the Code of Judicial Ethics in the Wake of *Republican Party of Minnesota v. White*[18]

As discussed at length in Appendix G, California does not have an announce clause; rather, canon 5B of the Code of Judicial Ethics contains the commit clause, which provides that a judicial candidate must not "make statements to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts . . . ." The *White* case did not address either the commit clause or the pledges and promises clause.

The commission believes that the California Supreme Court reacted reasonably and conservatively to *White* when it amended the Code of Judicial Ethics in 2003. The court amended canon 5B only to delete the phrase "appear to commit" from the commit clause. Before that amendment, the canon prohibited candidates from making statements that "commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts." But while the commission does not believe that any other changes to the canons are mandated by *White,* it recommends that a number of suggestions be made to the Supreme Court.[19]

Recommendation 1

The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."

Discussion: The California code does not contain a definition of "impartiality," although the term is used frequently in the canons and commentary. In contrast, the ABA model

[18] A detailed analysis of the *White* decision was prepared by the Task Force on Judicial Candidate Campaign Conduct and is attached to this report as Appendix G.

[19] The commission is aware that any changes to the Code of Judicial Ethics must be adopted by the Supreme Court, which typically refers proposed amendments to its Advisory Committee on the Code of Judicial Ethics.

code includes the following definition of "impartiality," which was added in response to *White:*

> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

The commission agrees that the model code's definition of "impartiality" should be incorporated into the Code of Judicial Ethics. Reasons for adopting the model code definition are that (1) the definition tracks the language in the *White* decision by couching itself in terms of an absence of bias or prejudice toward parties and maintaining an open mind on issues, (2) it would be beneficial to have a uniform definition nationwide, and (3) there appears to be no good reason to diverge from the model code definition.

Recommendation 2
The commentary to canon 4B of the Code of Judicial Ethics should be amended to encourage judges to educate the public on the importance of an impartial judiciary.

Recommendation 3
The commentary to canon 5B of the Code of Judicial Ethics should be amended to encourage judicial candidates to discuss their qualifications for office and the importance of judicial impartiality.

Discussion of recommendations 2–3: California's Code of Judicial Ethics generally does not use hortatory language. The model code and some state codes, however, expressly encourage certain judicial conduct. For example, comment 2 to rule 2.1 of the model code provides: "Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system." Canon 4 of the Florida Code of Judicial Conduct states: "A judge is encouraged to engage in activities to improve the law, the legal system, and the administration of justice."

Although the Code of Judicial Ethics does not contain hortatory language, standard 10.5 of the California Standards of Judicial Administration encourages judges to participate in community outreach efforts and to serve as guest speakers in the community to educate others about the court system.[20]

[20] Standard 10.5(a) states: "Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice." Standard 10.5(b) provides: "The judiciary is encouraged to . . . (2) Develop local education programs for the public designed to increase public understanding of the court system; . . . (4) Serve as guest speakers, during or after normal court hours, to address local civic, educational, business, and

The commission considered whether hortatory provisions should be added to the Code of Judicial Ethics that would encourage judges to take an active role in educating the community on the meaning of an impartial judiciary.

After initially considering amending the commentary to canon 2A,[21] the commission decided to recommend that the commentary to canon 4B[22] of the Code of Judicial Ethics be amended by adding the following language:

> Public confidence in the judiciary depends, in part, on the public's understanding of the judicial role. A judge is encouraged to educate the public on the meaning and importance of an impartial judiciary.

The commission also considered whether the commentary to canon 4B should be amended to expressly "encourage" judges "to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law." Ultimately this proposal was not pursued because it could be interpreted as encouraging judges to advocate for changes in the law.

The commission agreed that the commentary to canon 5B of the Code of Judicial Ethics, which addresses conduct during judicial campaigns, should be amended by adding the following language:

> When making statements to the electorate, judges and candidates are encouraged to discuss their own qualifications for office and the meaning and importance of judicial impartiality.

It is recommended that the phrase "their own" in the proposed amendment be included to encourage candidates to discuss why they are qualified for office rather than why their opponents are not qualified. Candidates would not be prohibited from talking about their opponents, but under canon 5B(2), a candidate may not "knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent."

Recommendation 4

Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

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charitable groups that have an interest in understanding the court system but do not espouse a particular political agenda with which it would be inappropriate for a judicial officer to be associated . . . ."

[21] Canon 2A states: "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."

[22] Canon 4B states: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code."

Discussion: The commission recommends that the Supreme Court Advisory Committee on the Code of Judicial Ethics reexamine canon 5 for consistency in its use of the terms "judge" and "candidate." For example, although canon 5A addresses conduct by "[j]udges and candidates for judicial office," the advisory committee commentary following the canon discusses only conduct by judges.

Recommendation 5

The Code of Judicial Ethics should be amended by adding a new canon 3E(2), providing 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.

Discussion: In response to *White,* 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 commission agreed that California should adopt a similar provision, but with two distinctions. First, the commission would include an objective standard in the provision. To avoid confusion, the language should track as closely as possible the objective disqualification language of Code of Civil Procedure section 170.1(a)(6)(A)(iii).[23] Second, although the model code provision includes the phrase "appears to commit," the commission 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. Many members also felt that the "appears to commit" phrase is vague and subject to constitutional attack. Finally, the commission 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 commission thus recommends adoption of the following language:

> <u>A judge is disqualified if the judge, while a judge or 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</u>

[23] Code Civ. Proc., § 170.1(a)(6)(A)(iii) provides that a judge is disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

believe commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

The commission recommends that the new rule be added to the Code of Judicial Ethics (as new canon 3E(2)) instead of amending Code of Civil Procedure section 170.1. Placement in canon 3E(2) 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. The committee also recommends that consideration be given to including commentary in the code stating that the "facts" should include, for example, the context of the public statement, how long ago the statement was made, and the entirety of the statement.

Recommendation 6
A definition of "commitment" that includes "pledges" and "promises" should be added to the Code of Judicial Ethics.

Discussion: In *White,* the United States Supreme Court specifically declined to address the constitutionality of the pledges and promises clause. Although California does not have this clause, it existed in the model code until the 2003 revisions and is still contained in many state codes. Rule 4.1(A)(13) of the ABA Model Code of Judicial Conduct currently prohibits judges and judicial candidates from making, in connection with cases, controversies, or issues that are likely to come before the court, "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

When it considered revisions to the Code of Judicial Ethics after *White,* the Supreme Court Advisory Committee on the Code of Judicial Ethics decided against recommending to the court that it add the pledges and promises clause to the code because doing so might fuel speculation about its meaning. The commission considered, however, whether language addressing pledges and promises should be added somewhere in the Code of Judicial Ethics in order to be consistent with the model code and to prevent a distinction from being drawn between statements prohibited by the California code and those prohibited by the model code. It was noted that adding this language may not be necessary because "pledges" and "promises" may already fall within the prohibition on commitments in canon 5B.

The commission recommends that a definition of "commitment" be added to the Code of Judicial Ethics stating that the term includes "pledges" and "promises." This clarification should also be explained in the commentary to canon 5B and in the commentary to the proposed new disqualification provision in canon 3E(2).

Voluntary Codes of Conduct and Judicial Campaign Conduct Committees

There is a growing movement nationwide to establish judicial campaign conduct committees that encourage and support appropriate conduct by judicial candidates. Such committees educate candidates about appropriate campaign conduct and criticize inappropriate campaign conduct. Unlike the Commission on Judicial Performance, they are designed to address allegations of misconduct on an expedited basis. And while they do not have disciplinary authority per se, they may publicly address inappropriate conduct and may report such conduct to the relevant disciplinary authorities.

Recommendation 7

An unofficial statewide fair judicial elections committee should be established to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in statewide and regional elections and in local elections where there is no local committee.

Recommendation 8

The formation of unofficial local fair judicial elections committees to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in local elections should be encouraged.

Recommendation 9

A model campaign conduct code for use by the state and local oversight committees should be developed.

Discussion of recommendations 7–9: In considering the advisability of developing judicial campaign conduct committees in California, the commission agreed that one of the greatest threats to judicial independence comes from significant third-party and special interest group involvement in judicial elections. The commission believes that California should be in the vanguard in aggressively addressing the conduct of third parties and special interest groups during judicial elections, in addition to ensuring that candidates conduct themselves and their campaigns in a manner that ensures judicial integrity, confidence in the judicial process, and judicial independence.

The commission considered two different approaches to this issue. One approach would be to establish an official statewide committee with authority to prescribe ethical rules for all judicial elections and to take action against candidates who violate those rules. Under this approach, there would be a uniform statewide standard of conduct separate from the Code of Judicial Ethics and a single government oversight entity that would address the conduct of all participants, including candidates and third parties, in judicial elections. Such a uniform statewide approach would cover both contested superior court elections and appellate court retention elections. For example, the Legislature could establish a statewide oversight committee with authority to monitor not only candidates' campaign conduct but also the conduct of partisan and special interest groups in judicial elections.

An official committee might be effective because it could be granted authority to take immediate action against a candidate engaged in unethical conduct.

One concern with an official committee, however, is that as a governmental body its actions could provide the basis for First Amendment challenges; any action or enforcement by an official committee may be tantamount to state action that limits political speech. Additionally, an official committee may be perceived as a protection mechanism for incumbents. These concerns have led to the creation of unofficial oversight committees in most instances. In California, there is also a separation of powers issue with a legislatively-created oversight body. Article VI, section 18(m) of the California Constitution grants the Supreme Court, not the Legislature, the authority to regulate the conduct of judges both on and off the bench.

The other approach considered by the commission would be to create unofficial statewide and local oversight committees. Such committees could seek to preserve fair judicial elections by educating candidates, the public, and the media about the differences between judicial and political elections, by mediating conflicts, and, as a last resort, by issuing public statements regarding improper campaign conduct, i.e., a "speech versus speech" approach. These committees could formulate voluntary codes of conduct for all judicial candidates and ask candidates to sign pledges to comply with the codes. Before taking a public position on specific conduct, these committees could discuss questionable conduct with the participants and, if matters cannot be resolved, provide a hearing process.

Ultimately, the commission agreed that the factors favoring unofficial statewide and local committees outweigh those in favor of an official statewide committee. However, because an official committee could potentially be the most effective approach, it should be reconsidered periodically as the constitutional constraints on the regulation of judicial campaign conduct evolve.

Therefore, the commission recommends the creation of an independent, unofficial, statewide campaign conduct committee to be named something such as the "Fair Judicial Elections Committee." This committee would address campaign conduct in appellate retention elections and in superior court elections in counties that do not have a local campaign conduct committee (discussed below). It could create a model voluntary code of campaign conduct and ask all judicial candidates under its jurisdiction to sign a pledge to adhere to the code. The committee would lay the foundation for fair judicial elections by publicly explaining how they fundamentally differ from political elections and how a campaign conduct code helps to ensure the impartiality and integrity of our courts. A network of media relationships could be created to convey this message to the public. The committee's educational sessions would be open to candidates, campaign managers, the media, and the public. All complaints lodged with the committee would be confidential to prevent candidates from using the complaint process as a campaign tool.

And the committee must be capable of employing an expedited procedure that allows it to address conduct in the days immediately preceding an election.

An unofficial statewide committee as recommended should not, however, supplant local campaign conduct committees with local codes of conduct. Because most judicial election controversies in California occur in superior court races, the formation of local committees may be more appropriate as a means of addressing complaints and educating candidates, the public, and the local media. The statewide committee could encourage the formation of local committees and provide resources such as model standards, model codes, and other tools to aid in their development. Where there is no local committee, however, the statewide committee would be available for oversight.

Composition of the unofficial committees, both statewide and local, must be balanced, as their effectiveness will rest largely on their credibility with the public, the judicial candidates, and special interest groups. Such committees should be nonpartisan (or bipartisan) and should include well-respected members of the community such as lawyers, media experts, former judges, ethics experts, community and religious leaders, academics, and representatives of nonpartisan organizations such as the League of Women Voters.

The committees will work best if they are independent, self-governing, and self-perpetuating. Ideally, they would be funded by sources not identified with any group having an interest in judicial election outcomes, e.g., judges, lawyers, or political groups. However, other than grants from such organizations as the National Center for State Courts (NCSC), the League of Women Voters, or the State Justice Institute, it may be difficult to identify funding sources outside the legal community that have an interest in preserving fair judicial elections. The commission also considered obtaining money from judicial election campaign surplus funds, state and local bar associations, bar foundations, or a nonprofit organization created by the Judicial Council but does not make any specific recommendations regarding funding.

Discussion of nonbinding standards and campaign guidelines for judicial candidates
In October 2006, the Oregon judiciary adopted a resolution titled “Resolution Regarding Professionalism and Fairness in Judicial Election Campaigns.” The resolution states nonbinding standards and campaign guidelines for judicial candidates. The Constitution Project issued a similar document titled “The Higher Ground: Standards of Conduct for Judicial Candidates.” It explains that judges are not politicians and states principles for judicial candidates to follow in judicial elections.

The commission rejects the idea of the California judiciary, either alone or jointly with the State Bar, adopting and issuing a similar resolution because it would be ineffectual and subject to accusations of protectionism by the public and special interest groups.

Rather, the type of information contained in these documents should come from the independent oversight committees and through other kinds of public education.

Judicial Candidate Training and Advisory Opinions

Recommendation 10

The Code of Judicial Ethics should be amended to require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct.

Discussion: The commission recommends that all candidates for judicial office, including incumbents, be required to complete training in ethical campaign conduct. This would apply only to candidates who appear on the ballot. Thus, superior court judges who are unopposed when their terms expire and who do not therefore appear on the ballot would not be required to complete the training. Appellate justices, however, appear on the ballot in retention elections, so this provision would be applicable to them.

Other states, including New York and Ohio, have mandatory judicial candidate ethics training. In California, article VI, section 18(m) of the California Constitution appears to authorize the Supreme Court to require this type of training. It provides that the Supreme Court "shall make rules for the conduct of judges . . . and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics." Based on this provision, the commission believes the training requirement should be incorporated into the Code of Judicial Ethics, as opposed to a rule of court, because attorney candidates are governed by the code but not by court rules.

The Administrative Office of the Courts (AOC) Education Division/Center for Judicial Education and Research (CJER) and the State Bar could collaborate to develop a training program that would be made available online so that candidates in remote counties need not travel to attend a course. The training should include an interactive component so participants can ask questions. Judges and attorneys who complete the training program should receive continuing legal education credit.

Recommendation 11
Judicial candidate training on ethical campaign conduct should include:

- Identifying issues raised by judicial candidate questionnaires;
- Distributing a model letter and a model questionnaire that candidates can use in lieu of responding to an interest group questionnaire;
- Using the advisory memorandum on responding to questionnaires prepared by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight;
- Encouraging candidates to give reasoned explanations for not responding to improper questionnaires rather than simply citing advisory opinions;
- Using candidate Web sites; and
- Explaining why partisan activity by candidates is disfavored.

Discussion: Judicial questionnaires propounded by special interest groups are often designed to elicit commitments from candidates on controversial issues that could come before the courts. Candidates who respond to these questionnaires, which are increasingly popular, may be seen as indicating to the electorate how they will rule on these issues if they are elected. Canon 5B(1) prohibits a judicial candidate from making statements to the electorate "that commit the candidate with respect to cases, controversies, or issues that could come before the courts . . . ." Judicial candidate training should involve alerting candidates to the issues raised by questionnaires and highlighting the parameters of the *White* decision. The training should not, however, involve advising candidates on whether or how to respond to questionnaires.

The commission agreed that it would be helpful to develop a model letter and a model questionnaire that could be used by judicial candidates in lieu of responding to interest group questionnaires. A model letter could clearly explain why a judicial candidate should not express personal views on controversial or high-profile issues and the fundamental importance of the impartial and independent application of the law to each case that comes before the court. A model questionnaire would contain questions designed to elicit relevant information about a judicial candidate's background, qualifications, and suitability for the bench but would not ask for the candidate's views on controversial issues.

Consideration was given to asking organizations such as the NCSC, the American Judicature Society, the State Bar, or the California Judges Association (CJA) to distribute to judicial candidates the model letter and model questionnaire. No decision was reached as to which organizations to approach. There was agreement, however, that these materials could be disseminated by local or statewide fair judicial elections committees or through mandatory judicial candidate training programs. The NCSC could be involved in some manner so that similar materials could be made available in other jurisdictions.

The National Ad Hoc Advisory Committee on Judicial Campaign Oversight, which was established by the NCSC, issued an advisory memorandum on July 24, 2008, containing advice on how to respond to questionnaires. (See Appendix H.) It contains the following recommendations:

- Do not be rushed in deciding how to handle the questionnaire.
- Never use the preprinted answers provided on the questionnaire.
- Consider responding with a letter.
- Never use a judicial canon to justify a decision to not respond.
- Distinguish general interest, nonadvocacy groups from special interest advocacy groups and be consistent.

The commission concluded that the memorandum is useful but limited because it does not provide candidates with a framework for crafting a response. The memorandum contains information that could be used as part of a comprehensive approach to dealing with this issue; for example, it could be included in mandatory candidate training materials or made available to fair judicial elections committees.

The commission discussed the likelihood that the new Supreme Court Committee on Judicial Ethics Opinions will issue advisory opinions to judicial candidates concerning questionnaire-related issues. In addition, the CJA's Judicial Ethics Committee operates a hotline that offers ethics advice to sitting judges and candidates for judicial office. The commission agreed that it would be preferable for a judicial candidate who decides to not respond to a judicial questionnaire or a particular question to give a reasoned explanation for why he or she believes it would be inappropriate to respond, rather than simply citing an advisory opinion.

In addition to training on judicial questionnaires, the commission recommends that the creation and content of Web sites by judicial candidates be included as a component of mandatory candidate training.

Finally, the training should cover why partisan elections are disfavored and why partisan activity among judicial candidates is discouraged.

Possible constitutional or legislative amendment

The commission considered a proposal made by former Governor Pete Wilson at the July 14, 2008, public forum to amend the California Constitution by adding a provision that expresses the public's desire that judicial candidates refrain from stating their positions on controversial issues. Similar proposals for a new statute or legislative resolution that would encourage judges not to comment on issues that could come before the courts were also considered. The commission determined not to pursue these proposals at this time because the other options discussed should be adequate for handling questionnaire-related issues and would be easier to implement.

Recommendation 12

Both the California Judges Association's Judicial Ethics Hotline and the new Supreme Court Committee on Judicial Ethics Opinions should be publicized as resources that judicial candidates can use to obtain advice on ethical campaign conduct.

Discussion: The CJA's Judicial Ethics Committee operates a hotline that offers ethics advice to judicial officers and candidates for judicial office. It is rare, however, for an attorney candidate to contact the hotline for ethics advice. Given that CJA already provides ethics advice to all judicial candidates, the commission agreed that efforts should be made to publicize the existence of CJA's service rather than create a new hotline. Further, once the new Supreme Court Committee on Judicial Ethics Opinions has been formed, efforts should also be made to publicize the existence of this body, which will provide ethics opinions to both sitting judges and attorney candidates.

Recommendation 13
Collaboration among the Administrative Office of the Courts, State Bar, California Judges Association, and National Center for State Courts should be recommended to develop brochures to educate judicial candidates.

Discussion: The commission agrees that brochures should be developed and distributed to candidates to educate them on how judicial elections differ from other elections and on appropriate campaign conduct. The brochures also should be provided to county registrars for distribution to candidates. In addition, the brochures should be provided to campaign consultants and campaign managers. The AOC, State Bar, CJA, and NCSC should be asked to develop the brochures.

Public Comment on Pending Cases

Recommendation 14
The sentence "This 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" should be added to the commentary following canon 3B(9) of the Code of Judicial Ethics, but the prohibition against public comment on pending cases should not be extended to attorney candidates for judicial office.

Discussion: Canon 3B(9) prohibits a judge from making any public comment about a pending or impending proceeding in any court, or any nonpublic comment that might substantially interfere with a fair trial or hearing. There is no similar prohibition applicable to attorney candidates in the Code of Judicial Ethics or the California Rules of Professional Conduct.[24]

[24] Rule 1-700 of the California Rules of Professional Conduct requires an attorney candidate for judicial office to comply with canon 5 of the Code of Judicial Ethics.

The commission considered whether the prohibition against public comment on pending cases should be extended to attorney candidates in order to avoid public debate on pending matters that could interfere with fair hearing procedures or subject a judge to calculated, groundless attacks to which he or she could not respond. Ultimately, the commission opted against such an extension to attorney candidates because it could be subject to a successful attack on First Amendment grounds. Nevertheless, the commission agreed that it would be useful to judges to add the following sentence to the commentary following canon 3B(9): "This 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."

Recommendation 15
The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

Discussion: The commission considered whether to recommend revising canon 3B(9) to allow a judge to respond to an attack on a ruling in a pending case. Canon 3B(9) states in part: "This Canon 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, and does not apply to proceedings in which the judge is a litigant in a personal capacity." When a judge responds outside of the enumerated circumstances, it may give the appearance that the judge has resorted to inappropriate means to defend the judge's own rulings, which may negatively affect the perception of fairness. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.) Because there is little direction on how to interpret this provision in canon 3B(9), most judges err on the side of caution and do not make any public statements.

The commission recommends that the advisory committee commentary to canon 3B(9) be amended to provide guidance to judges on acceptable conduct by adding the following explanatory language:

> <u>"Making statements in the course of their official duties" and "explaining for public information the procedures of the court" include providing an official transcript or partial official transcript of a court proceeding open to the public and identifying and explaining the rules of court and procedures used in a decision rendered by a judge.</u>

There is a concern that adding the proposed language to the commentary could embolden judges to make statements to bolster their rulings or that go beyond the case. The proposed amendment, however, does not create any new exceptions to the prohibition in canon 3B(9); instead, it clarifies conduct that is already permissible under the rule. A public statement by a judge also remains subject to the other canons governing judicial

conduct. To the extent possible, a court's public information officer should be involved in issuing any public statement in response to an attack on a judge's ruling.

Recommendation 16
Local county bar associations should consider creating independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

Discussion: The commission considered whether it would be a violation of canon 3B(9) for a judge to initiate a public response to an attack on the judge through a third party. It agreed that each local county bar association should consider creating a standing committee—independent from state or local government—that can respond to inappropriate or unfounded criticism of judges, judicial decisions, or the judicial system, including, but not limited to, criticism made during an election campaign. These committees should not have active judge members but should have some retired judge members to provide judicial perspective.[25]

The commission agreed that it would not violate the canon for a judge to file a confidential complaint with such a voluntary standing committee or otherwise to alert such a committee to the fact that someone is attacking a ruling in a pending matter. Voluntary standing committees that respond to attacks on judges by fighting speech with speech also comport with the First Amendment.

Recommendation 17
The California Judges Association's Response to Criticism Team and its network of contacts should be publicized.

Discussion: A judge who has been attacked may also contact the CJA's Response to Criticism Team, which maintains contacts with local bar groups, or a fair judicial elections committee if one exists. Thus, there should be increased publicity of CJA's Response to Criticism Team and its network of contacts.

Slate Mailers, Endorsements, and Misrepresentations

Recommendation 18
The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.

[25] This recommendation may overlap with recommendations 17 and 42, which address other methods of responding to criticism of the judiciary or its members.

Recommendation 19
An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose judicial candidates.

Discussion of recommendations 18–19: A slate mailer is defined as a "mass mailing which supports or opposes a total of four or more candidates or ballot measures." (Gov. Code, § 82048.3.) The mailers generally contain endorsements or recommendations for various partisan and nonpartisan offices—including judicial offices—and ballot measures. A candidate can pay to be placed on a mailer, or an organization publishing the mailer can list a candidate without the candidate's permission. One ethical concern with these mailers is the perception that a candidate listed on the mailer is endorsing the other candidates or measures on the mailer. Canon 5 requires judges to refrain from inappropriate political activity, and canon 5A(2) prohibits judges from publicly endorsing candidates for nonjudicial office. The judicial candidate has no control over the message or the presence in the mailer of other candidates, whose views may not be consistent with notions of judicial impartiality or whose presence on the mailer may suggest an endorsement by the judge.

Government Code section 84305.5(a)(2) requires that a notice be placed on slate mailers stating: "Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer." The same section also requires inclusion of the admonition that the sender of the mailer is "not an official political party organization."

The commission recommends sponsoring a number of amendments to the statute. First, the statute should be amended to require that the slate mailer cite explicitly to canon 5 and remind the reader that judges are not permitted to endorse partisan political candidates or causes. Second, the statute should be amended to require that when a judicial candidate is placed on the mailer without his or her consent, the lack of consent be prominently disclosed. Finally, the commission recommends that the Legislature revisit Government Code section 84305.5 to consider whether it should be expanded so that it applies to organizations that support or oppose *candidates.* Currently, the statute on its face appears to apply only to an "organization or committee primarily formed to support or oppose one or more *ballot measures*." [Emphasis added.]

Recommendation 20
Judicial campaign instructional materials providing best practices regarding the use of slate mailers should be developed.

Discussion: The commission concluded that it would be useful to develop judicial campaign instructional materials to inform candidates that they may run afoul of certain canons if they allow their names to be placed on mailers espousing certain views. Candidates should be instructed that not only the title of the mailer but the context,

layout, and inclusion of other messages and individuals in the mailer may combine to make the mailer an inappropriate vehicle for a judicial race.

The commission considered a proposal that would require judicial candidates to inspect a slate mailer before agreeing to purchase a place on it. That proposal was rejected as unworkable because the mailers are assembled quickly, there are many prospective purchasers, and the contents can change without notice.

Recommendation 21
Judicial candidates should be advised to obtain written permission before using an endorsement and to clarify which election the endorsement is for, to honor any request by an endorser to withdraw an endorsement, and to request written confirmation of any oral request to withdraw an endorsement.

Discussion: The commission recommends that judicial candidates be advised to (1) obtain written permission before using an endorsement and to clarify whether the endorsement is for the primary or general election or both; (2) honor any request by an endorser, oral or written, to withdraw an endorsement; and (3) request written confirmation of any oral request to withdraw an endorsement. These best practices could be included in precampaign instructional material and in voluntary pledges signed by the candidates.

Regarding the types of individuals or entities that a candidate should accept as endorsers, elected public officials and persons holding partisan political office, such as a local senator, are permissible. The candidate should be alerted, however, to the consequence that such an endorsement could lead to subsequent recusals in the courtroom.

Recommendation 22
Judicial candidates should be prohibited from seeking or using endorsements from "political organizations," as defined in the terminology section of the Code of Judicial Ethics.

Discussion: The commission concluded that there should not be a statute, rule, or canon amendment that would prohibit judicial candidates from (1) publicly identifying themselves or their opponents as members of a political organization or (2) running on a slate associated with a political organization. There are constitutional concerns with such prohibitions.

Despite some expressed reservations about constitutionality, the commission does, however, recommend that judges be prohibited from *seeking or using* endorsements from political organizations. Rule 4.1(A)(7) of the ABA Model Code of Judicial Conduct contains such a prohibition, providing that "a judge or judicial candidate shall not seek, accept, or use endorsements from a political organization." To allay concerns about

constitutionality due to vagueness, the commission agreed that the scope of the term "political organization" should be limited by referencing the definition of that term in the terminology section of the Code of Judicial Ethics, which states: "'Political organization' denotes a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office."

Underlying this proposed prohibition is the concept that all judicial offices in California are nonpartisan. (Cal. Const., art. II, § 6(a).) Barring judicial candidates from seeking or using such endorsements would help maintain the nonpartisan nature of judicial elections. Although political parties are free to endorse or oppose judicial candidates (see *Unger v. Superior Court* (1984) 37 Cal.3d 612); *Geary v. Renne* (9th Cir. 1990) 911 F.2d 280 (en banc); *California Democratic Party v. Lungren* (N.D. Cal. 1994) 860 F.Supp. 718), there is no controlling authority for the proposition that a judicial candidate must be permitted to seek and use those political party endorsements.[26]

In contrast to the model code language, however, the commission does not recommend that judicial candidates be prohibited from *accepting* such endorsements, as that would require the candidate proactively to reject an endorsement. The commission concluded that banning candidates from seeking and using political organization endorsements would sufficiently meet the objective of keeping judicial elections nonpartisan.

Recommendation 23
Instructional materials about the importance of truth in advertising should be developed.

Discussion: Canon 5B(2) provides that a candidate shall not "knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent." To promote compliance with this canon, the commission recommends that the precampaign instructional material discussed above include information about the importance of truth in advertising. In addition, voluntary pledges signed by the candidates should include a commitment to the goal of truth in advertising.

[26] In *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d 738 (en banc), cert. denied *sub nom. Dimick v. Republican Party of Minnesota* (2006) 546 U.S. 1157, the United States Court of Appeals for the Eighth Circuit declared unconstitutional a clause in the Minnesota Code of Judicial Conduct that prohibited judges from seeking, accepting, or using endorsements from a political organization.

Recommendation 24
Canon 5 of the Code of Judicial Ethics or its commentary should be amended to place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements, to encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations.

Discussion: The commission recommends that canon 5 or its commentary be amended to require candidates to control the actions of, and the content of any statements issued by, their campaigns. This would include a duty to review and approve campaign statements and materials produced by campaign committees, consultants, campaign volunteers, and members of informal, honorary committees. Because candidates cannot be expected to control the actions of third parties, the amendment would also encourage, rather than require, candidates to take reasonable measures to protect against oral or informal written misrepresentations being made in their support by third parties and would encourage candidates to take appropriate corrective action if they learn of such misrepresentations.

Recommendation 25
The Code of Judicial Ethics should be amended to add a list of prohibited campaign conduct.

Discussion: After reviewing rule 4.1 of the ABA model code,[27] which contains an exhaustive list of prohibited campaign conduct, the commission agreed to recommend

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[27] Rule 4.1, titled "Political and Campaign Activities of Judges and Judicial Candidates in General," is provided here as a stylistic example California may wish to follow. It states:
"(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
(1) act as a leader in, or hold an office in, a political organization;
(2) make speeches on behalf of a political organization;
(3) publicly endorse or oppose a candidate for any public office;
(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
(6) publicly identify himself or herself as a candidate of a political organization;
(7) seek, accept, or use endorsements from a political organization;
(8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
(10) use court staff, facilities, or other court resources in a campaign for judicial office;
(11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

that the canons be amended to include a list—similar in style to rule 4.1—of improper campaign conduct.

Recommendation 26
A letter—to be sent by the courts to county registrars before each election cycle—should be developed addressing permitted use of the title "temporary judge" or "judge pro tem" by candidates.

Recommendation 27
Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" or "judge pro tem" may be properly used.

Discussion of recommendations 26–27: The commission considered the issue of misuse of the title or position of "temporary judge." Typically, the misuse involves an attorney allowing the title to be used in campaign literature or in a ballot statement. Although temporary judges receive mandatory ethics training under rule 2.812(c) of the California Rules of Court, the commission recommends that a letter from the local court containing a set of instructions and explanations about the permitted use of the title also be provided to the registrar of voters before each judicial election cycle. This letter could be developed by the Judicial Council.

The commission also considered whether canon 6D(8)(c) should be clarified by the Supreme Court. That canon allows an attorney to use his or her judicial title to "show [his or her] qualifications." This open-ended statement has resulted in attorneys using the title as if it were an occupation, such as "deputy district attorney." Canon 6D(9)(b) permits use of the title or service in a variety of employment application scenarios, including when the title or service is contained in a "descriptive statement submitted in connection with an application . . . for appointment *or election* to a judicial position . . . ." (Emphasis added.) The commission recommends that canon 6 be revisited with a view toward clearing up ambiguities on how and when the title may be used.

Recommendation 28
The State Bar should be encouraged to discipline attorney candidates who engage in campaign misconduct.

Discussion: Unsuccessful attorney candidates who engage in misconduct are under the jurisdiction of the State Bar, not the CJP. According to State Bar officials, no California attorney has been disciplined for misconduct in connection with a campaign for judicial office. Consequently, the commission recommends that voluntary fair judicial elections

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(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A)."

committees emphasize addressing attorney candidate misconduct. In addition, the State Bar should be urged to pursue disciplinary actions against attorneys who violate the Code of Judicial Ethics during judicial campaigns. It should be stressed that an attorney's conduct during a campaign can have a major effect on public perception of the judiciary.

Judicial Campaign Finance

Contribution Limits

While the commission ultimately did not make recommendations as to contribution limits in judicial elections, it is necessary to begin this section of the report with a discussion of contribution limits as a foundation for the recommendations that follow.

Under California law, there currently are no limits on the amount one can contribute to a judicial candidate. The commission considered whether to recommend imposing limits on contributions to judicial candidates by various persons or entities but decided instead to recommend that a system of mandatory disclosure and disqualification be adopted to enhance the public's trust and confidence that judicial decisionmaking will not be affected by monetary contributions. Had the commission recommended the imposition of contribution limits, it likely would have recommended that those limits be uniform across all types of contributors, whether individual or entity.[28]

Imposing contribution limits on judicial candidates

One way to limit the influence of money on judicial decisionmaking is to limit the amount that a person or entity may contribute to a judicial candidate. The commission recognized that the current lack of contribution limits applicable to judicial candidates in California could lead to a public perception that judges can be "bought." Indeed, data support that both the public and a number of sitting judges believe that contributions to judges, especially in large amounts, can affect judicial decisionmaking.[29] Thus, even if not needed to prevent actual high-dollar spending in California, the lack of contribution limits might itself negatively affect the public's trust and confidence in an impartial judiciary. That is, the mere presence of contribution limits arguably could enhance the public's perception of a judiciary free from outside moneyed influence.

On the other hand, studies also show that most attempts to influence judicial decisionmaking through campaign contributions occur in contested elections at the supreme court level.[30] In California, however, Court of Appeal and Supreme Court justices are subject only to nonpartisan retention elections, where large spending amounts arguably have less of an impact than they would in partisan or contested elections. Thus, there is a question of whether contribution limits are necessary given California's judicial election system.

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[28] The commission concluded that restricting contributions from attorneys who appear before a judge candidate is inadvisable and impractical because it would impair a sitting judge's ability to raise money while not subjecting attorney challengers to the same restriction. In addition, to the extent that campaign contributions to judicial candidates may create the appearance that the successful candidate is beholden to the contributors, this concern can be addressed through disclosure and disqualification requirements. Therefore, the commission did not recommend restricting contributions from attorneys who appear before a judge candidate.

[29] Greenberg and DiVall memorandum to Palast, Feb. 14, 2002, *supra*.

[30] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006, supra*.

In examining the potential need for contribution limits, the commission recognized that judicial candidates—unlike candidates for legislative or executive office—do not generally have an established voter base from which they can readily obtain campaign funding. Thus, judicial candidates are likely to find it more difficult than other candidates to raise the money needed to run a campaign for contested office at the trial court level or to run a retention campaign where significant independent expenditures (IEs) are being made to unseat the incumbent. The ability to raise needed sums of money from what could be a limited number of contributors would be hindered if those contributors were faced with contribution limits.

In addition to concerns over unduly limiting the ability of judicial candidates to raise necessary funds, there are other bases for the commission's decision. For example, data from recent California Fair Political Practices Commission (FPPC) hearings addressing the issue of IEs show that when contribution limits are imposed, spending by IE groups rises dramatically, negatively affecting the public's ability to get accurate data on who is truly funding certain election-related efforts.[31] In other words, imposing contribution limits may actually make it more difficult for the public to "follow the money."

There are also practical and logistical obstacles to establishing a workable system of contribution limits applicable to judicial candidates. For example, an ideal contribution limit scheme would somehow account for the fact that the cost of running a judicial election varies widely from county to county in California, based in part on the varying costs of the candidates' statements. Similarly, the system would account for the possibility that the public's perception of the size of a contribution that would cause a judge to appear to lose impartiality could also vary from county to county. While not insurmountable, challenges such as these could require time and resources that would not be necessary if an alternative plan were pursued.

Ultimately, because the issue of concern is not contributions in themselves, but rather the effect that they may have or appear to have on judicial decisionmaking, the commission concluded that there is a better solution—mandatory disclosure coupled with mandatory disqualification—that would be less likely to impair the ability of candidates to finance a campaign, yet that would still address the focal issue of the effect of money on actual or perceived judicial impartiality.

Limitations on a judicial candidate's ability to solicit contributions

The commission noted that several federal appellate courts have held that state provisions prohibiting judicial candidates from personally soliciting campaign funds are unconstitutional. (See *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d

[31] See generally California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance* (June 2008), available at *www.fppc.ca.gov/ie/IEReport2.pdf*.

738; *Weaver v. Bonner* (11th Cir. 2002) 309 F.3d 1312; *Siefert v. Alexander* (W.D.Wis. Feb. 17, 2009, No. 08-CV-126-BBC) 2009 U.S. Dist. Lexis 11999); *Yost v. Stout* (D.Kan. Nov. 16, 2008, No. 06-4122-JAR) 2008 U.S. Dist. Lexis 107557); *Carey v. Wolnitzek* ((E.D.Ky. Oct. 15, 2008, No. 3:06-36-KKC) 2008 U.S. Dist. Lexis 82336); but see *Wersal v. Sexton* (D.Minn. Feb. 4, 2009, No. 08-613 ADM/JSM) 2009 U.S. Dist. Lexis 10900) (court upheld constitutionality of canon prohibiting a candidate from personally soliciting campaign contributions except from groups of more than 20 persons or by signing a letter); *Simes v. Judicial Discipline and Disability Commission* (2007) (247 S.W.3d 876) (the Arkansas Supreme Court held that a prohibition on candidates personally soliciting campaign contributions is constitutional).) Because the constitutionality of such a provision is questionable and because this would unfairly restrict a judicial candidate's ability to raise funds, the commission opted not to recommend pursuing such a prohibition.

Mandatory Disclosure and Disqualification

Recommendation 29

A system should be adopted under which each trial court judge is required to disclose to litigants, counsel, and other interested persons appearing in the judge's courtroom all contributions of $100 or more made to the judge's campaign, directly or indirectly. Specifically:

- The commentary to the disclosure provision in canon 3E(2) of the Code of Judicial Ethics should be amended to require a trial judge to maintain an updated list of campaign contributions of $100 or more and to disclose to litigants appearing in court that the list is available for viewing in the courthouse and online;
- The commentary to canon 3E(2) should be amended to state that the obligation to disclose campaign contributions continues for a minimum of two years after the judge assumes office; and
- The commentary to canon 5B should be amended to cross-reference the proposed new commentary to canon 3E(2).

Recommendation 30

Each trial court judge should 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 judge's campaign, directly or indirectly, subject to the following:

- The contribution level at which disqualification shall be mandatory shall be the same as the level, specified in Code of Civil Procedure section 170.5(b), at which a judge is considered to have a "financial interest" in a party, requiring disqualification;

- Notwithstanding the above mandatory disqualification amount, trial court judges shall continue to disqualify themselves based on contributions of lesser amounts when doing so would be required by Code of Civil Procedure section 170.1(a)(6)(A);
- The Judicial Council should recommend that the amount specified in Code of Civil Procedure section 170.5(b)—which, as of the date of this recommendation, is $1,500—be periodically reviewed and adjusted as appropriate;
- The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
- The obligation to disqualify shall begin immediately on receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

Recommendation 31
Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

Recommendation 32
Appellate justices' campaign finance disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State Web site.

Recommendation 33
Each appellate justice should 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, subject to the following:

- For justices of the Courts of Appeal, the contribution level at which disqualification shall be mandatory shall be the same as the level, stated in canon 3E(5)(d) of the Code of Judicial Ethics, at which a justice is considered to have a "financial interest" in a party requiring disqualification;
- For justices of the Supreme Court, the contribution level at which disqualification shall be mandatory shall be the same as the contribution limit, stated in Government Code section 85301(c) and California Code of Regulations title 2, section 18545, in effect for candidates for Governor;
- Notwithstanding the above mandatory disqualification amounts, appellate justices shall continue to disqualify themselves based on contributions of lesser amounts when doing so would be required by canon 3E(4) of the Code of Judicial Ethics;
- The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and

- The obligation to disqualify shall begin immediately on receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

Discussion of recommendations 29–33: Issues associated with disclosure and with mandatory disqualification at all court levels are addressed below.

Disclosure at the trial court level

In the commission's view, mandatory disclosure by judges and appellate justices of all contributions of $100 or more—the level at which contributions are reportable—would enhance public trust and confidence in an impartial judiciary without the need for contribution limits.[32] 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 judicial officer by the litigant's opponent or another interested party, then the public will have a "check" to help ensure that money given to judges and justices will not result in biased decisions.

However, disclosure alone—i.e., without mandatory disqualification based on some level of contribution—would not sufficiently bolster public trust and confidence in judicial decisionmaking free from the influence of campaign contributions. In recent high-profile instances in other states, judges have disclosed accepting millions of dollars from interested litigants or lobbies, yet have not disqualified themselves.[33] When the public becomes aware of extreme examples like this, trust and confidence in the integrity of judges as a whole declines.

The concept of disclosure raises logistical issues as to how, when, and for how long the recommended disclosures must be made. The commission noted that canon 3E(2) of the Code of Judicial Ethics provides: "In all trial court proceedings, a judge shall disclose on

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[32] Further, the commission believes that the disclosure obligation (and the resulting mandatory disqualification, as discussed below) should be triggered by both direct contributions and "indirect" contributions. While the exact parameters of what constitutes an "indirect" contribution are best decided on implementation—and while the commission's intent is not to impose significantly more stringent disclosure requirements than those already imposed by the FPPC—the commission contemplates that one example of such an indirect contribution would include a contribution by a person or entity to a third party, which is either reported to the FPPC or otherwise made public (e.g., via advertising), and which third party then makes the contribution directly to the candidate. In such an instance, if the judge knows or reasonably should know the identity of the original, "indirect" contributor, the disclosure obligation would be triggered as to that contributor. The commission also anticipates that, in many instances, independent expenditures that clearly support a judge will qualify as "indirect" contributions.

[33] The most notable example is from West Virginia. There, as reported in the recent U.S. Supreme Court opinion *Caperton v. A.T. Massey Coal Co., Inc.* (2009) --- U.S. ---, 129 S.Ct. 2252, a recently elected justice of West Virginia's Supreme Court refused to disqualify himself from a case involving Massey Coal, despite the fact that that company's chief executive officer had contributed a reported $3 million on independent expenditures tending to support the justice's election campaign and oppose his opponent. The Supreme Court held that under the facts of the *Caperton* case, the justice's disqualification was required under constitutional due process principles.

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." In determining whether a particular campaign contribution amount should trigger a disclosure requirement, the commission agreed that a judge should disclose any contribution from an attorney, law firm, party, witness, or other interested party appearing before the judge in an amount equal to or greater than the amount that must be reported to the FPPC. Currently, the minimum amount a candidate must report to the FPPC is $100. (See Gov. Code, § 84211(f).) Tying the amount to the figure in section 84211(f) would allow for an increase if the statute is later amended. Notably, the $100 figure is also consistent with CJA's Formal Ethics Opinion #48 (1999), which states that a judge should disclose on the record any contribution of $100 or more when the contributor is involved in a case before the judge.

Regarding how long a judge must continue to disclose a contribution to parties appearing before him or her, the commission concluded that the required disclosure period should continue for a minimum of two years after the date on which the judge assumes office. The recommendation is consistent with CJA Opinion #48, which recommends a period of two years, and also with the commission's recommendation, discussed below, that the obligation to disqualify last for two years.

Finally, the commission considered how disclosure should be made. First, judges should be required to maintain a list of contributors of $100 or more, updated weekly or as soon after receipt of the contribution as practical. In some circumstances, a judge might be able to comply with the disclosure requirement by orally advising the parties on the record that the list of contributions is available for viewing at a specified, accessible location in the courthouse. A judge could also advise the parties that the list is available on the court's Web site if such posting is feasible. The commission also considered whether posting a list in the courtroom would be more effective than oral disclosure, but some concerns were raised about the coercive effect this may have on litigants and attorneys, who may feel compelled to make a contribution. For this reason, the commission ultimately decided not to recommend a specific, or even a preferred, method of disclosure.

Under this proposal, a judge who knowingly receives a campaign contribution from a party or attorney in between the weekly updates would be obligated to disclose that contribution as soon as practical. Depending on the circumstances, this may require disclosure before the next weekly update is prepared. 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 circumstance warranting disclosure on the record in open court, the judge cannot rely on referring the parties to the list and must directly disclose.

In light of the above, the commission recommends that the following language be placed in the advisory committee commentary following canon 3E(2):

> A judge shall disclose to the parties any judicial election campaign contribution received, directly or indirectly, from a person or entity appearing before the judge in a proceeding if the contribution is in an amount required to be reported to the Fair Political Practices Commission (FPPC) pursuant to Government Code section 84211(f). A judge is not required to disclose a contribution below the FPPC threshold amount unless there are other circumstances that would mandate such disclosure in accordance with this Code.
>
> Except as set forth below, a judge may satisfy the disclosure requirements under this Canon by advising the parties that a list of all contributions to the judge's election campaign of $100 (or the current minimum amount required by the FPPC) or more is available for viewing at a specified, accessible location in the courthouse and, if feasible, on the court's Web site. A judge must update the list on a weekly basis or as soon after receipt of the contribution as practicable.
>
> A judge will not satisfy the disclosure requirements under this Canon if the judge has reason to believe that disclosure of a particular campaign contribution will not effectively be communicated to a party by reference to a list of FPPC–reported contributions or there is some other circumstance warranting disclosure of a specific contribution on the record in open court.
>
> The obligation to disclose a judicial campaign contribution continues from the date on which the contribution is received until a minimum of two years after the date on which the judge assumes office following election.

In addition, the advisory committee commentary to canon 5B, which addresses conduct during judicial campaigns, should include a cross-reference to this proposed new commentary to canon 3E(2) because some candidates may look to canon 5 for information on campaign conduct.

Disclosure at the appellate court level

Ultimately, the commission's goal was to provide for a similar level of disclosure at both the appellate and trial court levels, although the commission recognized that differences in court administration and procedure between the two levels would make identical disclosure recommendations impractical. For example, the commission discussed whether the requirements of canon 3E(2), which applies only to trial court judges, should apply to justices of the Courts of Appeal and the Supreme Court; it ultimately concluded

that it would be difficult to impose a disclosure requirement on the appellate courts because the parties typically are in court for the first time at oral argument. In addition, disclosure does not have the same practical effect at the appellate level because there is no existing mechanism for a litigant to disqualify an appellate justice following disclosure. Nevertheless, the commission recommends that appellate courts be required in some fashion to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming election or there was a recent election. This could, for example, be accomplished by a rule of court promulgated by the Judicial Council.

Disqualification at the trial court level

The commission is of the view that mandatory disqualification of judicial officers at all levels, in conjunction with mandatory disclosure, would be more effective than contribution limits, i.e., it would enhance the public's confidence that the system has safeguards in place to prevent judicial decisionmaking from being influenced by monetary contributions. While the commission considered whether disqualification should be left entirely to the discretion of the judicial officer—albeit perhaps subject to more detailed benchmarks than are currently provided for by law[34]—it ultimately concluded that some objective standard should be adopted for the sake of greater public confidence in the impartiality of the judiciary as well as to avoid the unlikely potential of a Massey Coal–type situation (see footnote 33) in which a judicial officer fails to recuse even when he or she has received significant economic support from a party appearing before the court.

Mandatory disqualification raises a number of subissues, including the threshold amount at which the disqualification must occur, how to determine whether the disqualification threshold has been met with respect to multiple contributions made by individuals employed by or affiliated with the same entity, the need for the disqualification to be waivable in order to prevent "gaming" of the system—i.e., making contributions to a judicial officer for the express purpose of causing his or her disqualification—and the length of time for which the disqualification obligation exists. These same issues, as well as additional ones discussed below, exist not only for the trial courts but also at the Court of Appeal and Supreme Court levels.

Disqualification threshold amount. Concerning the dollar level at which disqualification should be mandatory, the commission considered whether to recommend a fixed amount

[34] Currently, when trial court judges receive contributions from persons or entities appearing before them, they must look to Code Civ. Proc., § 170.1(a)(6)(A) to determine whether they are disqualified. Section 170.1(a)(6)(A) provides that a judge is disqualified if (1) the judge believes his or her recusal would further the interests of justice, (2) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (3) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Rule 2.11(A)(4) of the ABA model code addresses this situation specifically by mandating disqualification if a judge accepts a campaign contribution of a certain amount, leaving the amount for each state to determine.

or whether instead to recommend a variable amount such as some percentage of a candidate's total contributions received. Ultimately the commission determined that a uniform, fixed amount would be the most efficient and effective solution. With respect to what that amount should be, a variety of factors were considered, including the public's perception of the effect of certain sums of money on judicial decisionmaking and the need of judicial candidates to raise sufficient sums to allow them to campaign effectively. The commission also recognized a concern that an increased need for fundraising by judges who are already on the bench, which could be the result if the threshold were set too low, has the potential to be both a burden and a distraction affecting judicial productivity.

In arriving at its recommended threshold for trial court judges, the commission observed that Code of Civil Procedure section 170.5—which defines a "financial interest" mandating disqualification as, among other things, a financial interest in a party of $1,500 or more—arguably reflects a legislative determination that that amount is meaningful with respect to a judge's ability to be impartial, or at least to give the appearance of impartiality.[35] The commission was concerned, however, that that dollar figure has not changed in recent years and thus has recommended that while mandatory disqualification be tied to the level at which a judge must disqualify himself or herself because of a financial interest, the actual dollar figure at which that occurs should be reexamined periodically and amended accordingly. Further, the commission crafted its recommendation to emphasize that while $1,500 is the current amount at which it recommends that disqualification be mandatory, that recommendation in no way is meant to supplant the requirements of Code of Civil Procedure section 170.1(a)(6)(A). That code provision may require disqualification in additional circumstances relating to contributions—including the receipt of a contribution in an amount lower than the recommended threshold—if, for example, the contribution would cause a reasonable person to question whether the judge who received the contribution can be impartial.[36]

Effect of multiple contributions on the disqualification threshold. The commission also

[35] In reaching this conclusion, the commission consulted the results of a database that was commissioned and prepared under the guidance of the Task Force on Judicial Campaign Finance for the purpose of examining whether actual fundraising differed from expected norms. That database was created by obtaining and inputting information from all available campaign disclosure/reporting statements, from 2000 through 2006, filed by candidates for judicial office in the counties of Alameda, Orange, Los Angeles, and Sacramento. The database was programmed to permit the compilation, per candidate, of the (1) highest contribution received, (2) mean contribution amount received, (3) total number of contributions received, and (4) total expenditures. The database also contains limited information about the source of each contribution. Having reviewed the average contribution amounts received by the judicial candidates examined, as well as the relatively small number of contributions received in excess of $1,500, the commission was persuaded that setting the mandatory disqualification amount at that level would not significantly impede the right of potential contributors to participate in the political process nor the ability of judicial candidates to raise the necessary level of campaign funding.

[36] Likewise, Code Civ. Proc., § 170.1(a)(6)(A) might, in some circumstances, require disqualification beyond the two-year period recommended by the commission and discussed below.

recognized the potential issues that could arise if a candidate were to receive multiple contributions from individuals who are employed by or otherwise affiliated with the same entity. The commission's intent is that its recommendation would mandate disqualification if such individual contributions meet or exceed the recommended disqualification threshold. The commission acknowledges, however, that it may not always be apparent to a judicial officer whether contributions are indeed coming from individuals within the same entity, and the intent is not to impose an additional burden on judicial officers to go beyond the readily ascertainable information pertaining to the contributions they receive. Rather, the commission intends that a judicial officer disqualify himself or herself if he or she knows or reasonably should know that multiple individual contributions that would, in the aggregate, amount to the recommended threshold are all affiliated with the same entity.

Waiver of mandatory disqualification. Mandatory disqualification carries with it the possibility of a litigant gaming the system, i.e., making a large contribution to a particular judge for the express purpose of forcing that judge to disqualify himself or herself. Thus, any mandatory disqualification system, at any court level, must account somehow for this possibility. The commission concluded that the best means of doing so is through a provision under which the noncontributing party may waive a disqualification that would otherwise occur because of another party's or counsel's campaign contributions.

Length of the mandatory disqualification obligation. The commission considered when the obligation to disqualify should arise and how long it should last. For incumbents, it is logical for the obligation to arise as soon as the contribution is received; any other result would undermine the purpose of the disqualification, which is to prevent a judge from adjudicating a matter involving a contributor of $1,500 or more. For candidates who are elected, the obligation would arise on taking office. In terms of how long the obligation should continue, the commission agreed that two years is reasonable—given, for example, the length of time it takes for matters to move through the courts and the logistical burden if judges were subject to the obligation for too long a period of time—although it considered alternatives ranging from one year to the entire election cycle (currently six years for trial court judges). The commission also agreed that the two years should be measured from the date that the candidate takes office or from the date that the contribution is received, whichever is later.

Disqualification at the Court of Appeal level

The issue of whether appellate justices at both Court of Appeal and Supreme Court levels should be subject to mandatory disqualification at all gave rise to considerable discussion, as such a requirement would present unique challenges at the appellate level. For example, appellate justices currently are not subject to a peremptory challenge the way that trial court judges are, which arguably reflects a policy decision that appellate justices should not be subject to disqualification on the same bases as trial court judges. On the other hand, canon 3E(5)(d) of the Code of Judicial Ethics requires disqualification at the appellate level when a justice has a financial interest of $1,500 or more in a party, which parallels the law applicable to trial court judges.

Ultimately, the commission agreed that public trust and confidence is even more an issue with appellate decisions because of their considerably greater impact and the attention and scrutiny that they receive. Thus, the commission has recommended that justices at both Court of Appeal and Supreme Court levels be subject to mandatory disqualification based on contributions, the same as trial court judges.[37]

Turning to the disqualification subissues discussed in connection with trial court judges above, the same concerns about waivers and timing exist at the appellate level, so the commission's recommendations on those subissues are parallel across all court levels. The issue of the monetary level at which Court of Appeal justices (and, as discussed below, Supreme Court justices) must disqualify themselves is more complex at the appellate level, however. For example, campaign contribution data obtained from the California Secretary of State's Cal-Access database suggests that while Court of Appeal justices standing for retention often raise no money (e.g., when they are not subject to any effort to defeat their retention bid through the making of independent expenditures), when those justices are required to raise money, it is often in greater amounts than at the trial court level.[38] This may be because of the higher dollar amounts that appear to be spent to unseat retention candidates, because of the larger jurisdiction served by justices of the Courts of Appeal, or both. Regardless, the commission carefully considered whether Court of Appeal justices should be subject to a higher disqualification threshold than trial court judges.[39]

However, the commission ultimately concluded that the $1,500 threshold strikes the best balance between the competing values of maintaining public trust and confidence in impartial judicial decisionmaking and allowing judicial candidates to engage in necessary

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[37] The chair of the Task Force on Judicial Campaign Finance reported that he conducted an informal survey of Court of Appeal justices on this issue and that the overwhelming majority of them favored the idea of mandatory disqualification at the appellate level.

[38] The Cal-Access database can be searched online, by candidate and year, at *http://cal-access.ss.ca.gov /campaign/candidates*.

[39] For example, the threshold disqualification amount for Court of Appeal justices could be tied to the current contribution limit for candidates for statewide office other than the Governor or for candidates for the Legislature.

fundraising and should apply to both the trial courts and the Courts of Appeal,[40] especially given that the parallel "financial interest" provisions of the Code of Civil Procedure and the Code of Judicial Ethics use the same $1,500 figure for disqualification at both the trial and appellate levels.[41] It bears noting that the recommended threshold would not necessarily prohibit a potential contributor from instead making independent expenditures in support of a retention candidate, although such an expenditure could possibly be considered an indirect contribution or could trigger a disqualification requirement—albeit not mandatory—under the Code of Judicial Ethics.

Disqualification at the Supreme Court level

Mandatory disqualification at the Supreme Court level raises many of the same issues discussed above in connection with the trial courts and Courts of Appeal. Rather than revisiting those issues, the discussion in this section will focus on issues unique to the commission's recommendations about the Supreme Court.

The primary issue of difference is the dollar level of the disqualification threshold for the Supreme Court. As noted above, a reasonable position is that Supreme Court justices—like all other judicial officers—should be subject to mandatory disqualification based on a contribution of $1,500 or more. However, the commission agreed that in actual practice that amount would be too low and likely would not be workable.

As has been noted, data from other states show that most spending in judicial elections—particularly high-dollar spending—occurs at the Supreme Court level.[42] Thus, when a Supreme Court justice's retention bid is challenged, there is a strong possibility that spending against that justice would be in the millions of dollars. As such, the commission considered the amount of money that Supreme Court justices reasonably could be expected to need to raise in determining the appropriate disqualification threshold. In other words, assuming that the amount that a Supreme Court justice would need to raise exceeds that of a trial court judge or Court of Appeal justice by a significant factor, it would not make sense to subject the former to the same disqualification threshold as the latter.

In the commission's view, which is supported by spending trends in other states, a higher disqualification threshold at the Supreme Court level is reasonable and will permit necessary fundraising while at the same time ensuring judicial impartiality. Thus, the commission has recommended that the disqualification threshold amount for Supreme

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[40] Again, this is the level at which mandatory disqualification applies. A justice may still be required to disqualify himself or herself based on a lower contribution amount in accord with canon 3E(4) of the Code of Judicial Ethics.

[41] It is true that, under this rationale, it could be argued that justices of the Supreme Court also should be subject to disqualification based on a $1,500 contribution. That issue, including the commission's rationale for recommending a higher disqualification threshold at the Supreme Court level, is discussed below.

[42] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006, supra*, at p. 15.

Court justices should be the same as the contribution limit amount applicable to candidates for Governor.[43] That amount arguably reflects a legislative and administrative determination about the appropriate upper level of contribution for a candidate for statewide office. While a disqualification is not the same as a contribution limit, the two are functional equivalents with respect to limiting the effect of money on subsequent political behavior.

Limitations on Corporate and Union Financing of Judicial Elections

The commission considered whether to recommend limiting direct and/or indirect corporate and union financing of judicial candidates or of independent expenditures.[44]

Recommendation 34

Legislation should be sponsored prohibiting corporations and unions from expending treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with campaigns for judicial office.[45]

Discussion: Under current law, it is not permissible to limit the amount that may be spent on independent expenditures, nor is it permissible to limit the overall amount of money that a person or entity engaged in making IEs may raise. It would most likely be legally permissible,[46] however, to limit the ability of corporations and unions to expend treasury funds on IEs and on direct contributions to candidates for judicial office.[47] Instead, corporations and unions would be required to make contributions or spend money through PACs. This would mean, in effect, that all corporate and union spending would represent the will of the individual members of those entities who contributed to the PAC, rather than the will of the board of directors charged with managing shareholders' investments or another controlling body.

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[43] Of course, there is a clear distinction between Supreme Court justices standing in retention elections and gubernatorial and other candidates for statewide political office, and the commission's recommendation is in no way intended to politicize the former or to suggest that Supreme Court retention campaigns should be run in the same manner as campaigns for the office of Governor.

[44] Note that this issue relates to both direct contributions and independent expenditures and thus is relevant to the detailed discussion of the latter below.

[45] This recommendation is not intended to prohibit corporations and unions from forming separate, segregated funds or political action committees (PACs) for these purposes.

[46] The commission notes that, as of the date of this report, the U.S. Supreme Court is preparing to rehear arguments in *Citizens United v. Federal Election Commission*, --- S.Ct. ----, 2009 WL 2486386 (U.S.), 78 USLW 3080, 08-205. At issue in the rehearing is, among other things, whether federal restrictions on the use of corporate treasury funds for electioneering are an unconstitutional burden on free speech. Obviously, if the Supreme Court establishes new constitutional limits on the regulation of corporate (or union) financing of elections, this recommendation could be mooted. Thus, the commission recommends that the *Citizens United* case be carefully followed before this recommendation is implemented.

[47] The commission is not aware of any data indicating that corporations and unions have historically been major sources of IEs targeting judicial candidates in California. As discussed below, most IEs are made at the appellate level. However, in a system such as California's, where appellate elections are nonpartisan retention elections—meaning that moneyed interests seeking to unseat an incumbent justice have no ability to affect who that justice's successor will be—it may be the case that corporations and unions have not viewed it as cost-effective to spend money on IEs targeted at retention candidates.

The commission is of the opinion that such a limitation would increase the public's trust and confidence that judicial decisionmaking is free from moneyed influence. Corporations and unions typically are far better poised than individuals to infuse substantial amounts of money into elections. Requiring contributions and expenditures to be made through PACs prevents corporate and union management from seeking influence in the courts without oversight by shareholders, employees, and members of those organizations.

The commission is aware that some judicial candidates may rely on endorsements by and funding from certain public unions and corporations, particularly at the trial court level. Again, however, this recommendation would not limit such support. Rather, the recommendation would require only that corporate and union funding be made through PACs, as opposed to coming directly from treasury funds. Indeed, given federal tax laws, it may already be the case that tax-exempt organizations such as unions cannot or do not spend treasury funds on candidate campaigns. Thus, this recommendation may be viewed as leveling the playing field as between corporations and unions by requiring that both types of entities have individual members' support for whatever political expenditures they make in the entities' names.

Electronic Filing of Judicial Candidate Campaign Finance Disclosures

Judicial candidates, like candidates for other elective office, are required by law to report certain financing information, at specified times, to the California FPPC.[48] Issues arising from those requirements include what must be reported and when, as well as the means by which information is reported and, therefore, made accessible to the public. For the latter, the commission considered whether to recommend that judicial candidates be required to electronically file (e-file) their mandatory disclosures, and, if so, with what agency and at what aggregate contribution/expenditure level.

[48] The statutes and regulations governing disclosure reporting are detailed and complex, and a full discussion of those authorities is beyond the scope of this report. Manuals explaining the disclosure requirements can be found on the FPPC Web site at *www.fppc.ca.gov/index.html?id=505#cam*.

Recommendation 35
Legislation should be sponsored to require that all candidates for judicial office—regardless of their total dollar amount of contributions received and/or expenditures made—be required to file in some electronic format with the California Secretary of State's office all campaign disclosure documents that they would also be required to file in paper form.[49]

Discussion: In arriving at this recommendation, the commission first considered what recommendations, if any, to make with respect to the content and timing of judicial candidates' reports regarding contributions received and expenditures made. The current state of California's disclosure law has received praise for its comprehensiveness, suggesting that no changes are necessary. Specifically, in a survey of all 50 states done by the Campaign Disclosure Project, a collaboration of the University of California at Los Angeles School of Law, the Center for Governmental Studies, and the California Voter Foundation, California was ranked second overall (after Washington State) in terms of disclosure of campaign finance information.[50] Significantly, California ranked first overall in terms of the substance of the law itself. As noted by the Campaign Disclosure Project:

> California maintained the number one ranking in the law category, and has earned an A in this area in each of the five assessments. Strengths of the law include detailed contributor disclosure, including occupation and employer data; last-minute contribution and independent expenditure reporting; and strong enforcement provisions.[51]

Based on the recognized excellence of California's current legal scheme regarding disclosure reporting, the commission decided that it was not necessary to recommend any amendments or additions to that body of law.

The commission has recommended, however, that legislation be pursued to require that judicial candidates at all levels electronically file their campaign finance disclosures. In addressing its charge, and particularly in connection with preparing the limited database described in footnote 35 above, the Task Force on Judicial Campaign Finance desired to review a number of disclosure reporting statements filed by judicial candidates in certain counties for certain election cycles. However, in attempting to obtain those documents—which are public information—the task force discovered that actually accessing them can be logistically difficult and time-consuming. One challenge comes from the fact that

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[49] The commission has not made any recommendation about the exact electronic format—e.g., scanned PDF file, entry into the fields of the Secretary of State's Cal-Access database—that judicial candidates should be required to use when filing their disclosure documents and instead recommends that that issue be referred to an appropriate group for detailed consideration and further recommendation.
[50] See *www.campaigndisclosure.org/gradingstate/ca.html.*
[51] *Ibid.*

while judicial candidates are required to submit this information both to their local county registrars of voters and to the California Secretary of State's office, some candidates do not know of the latter requirement. Thus, some judicial candidates' information must be obtained from local county registrars, and the availability of information and practices for obtaining it vary from county to county.

Further, even reports that are properly submitted to the Secretary of State's office can be difficult for the public to access. One reason for that difficulty appears to result from the fact that superior court judges are not defined as statewide officers under the Political Reform Act. Thus, unlike appellate court retention candidates, trial court judges are not required to e-file their disclosure reports. As a result, even if a trial court judicial candidate has properly filed reports with the Secretary of State's office, a member of the public must still request a paper copy of the disclosures and pay the copying and mailing costs. And if the disclosures were made in a past election cycle, it may be necessary to obtain the reports not from the Secretary of State's office, but rather from the State Archives, which can add an additional layer of complication and delay. In short, the public's right of access, while legally guaranteed, is very difficult to exercise in actual practice.

In light of the above, the commission agreed that some system of e-filing of all judicial candidates' disclosure reports would greatly enhance the public's ability to access information about who is contributing to judicial campaigns and in what amounts, as well as what judicial candidates are spending their campaign funds on and in what amounts. This, in turn, would increase the public's trust and confidence that the judiciary is not subject to influence by monetary contributions. Informal conversations with Secretary of State staff suggested that there would be little resistance from either the Secretary of State's office or the local county registrars if the Secretary of State's office were made the official host agency for these e-files. And it appears that the actual statutory changes that would be needed in order to require superior court judicial candidates to e-file would be relatively minimal, with no major legislative rewrites required.

One change that would be required, however, relates to the threshold at which the e-filing requirement is triggered. Under current law, candidates who are required to e-file do not have to do so until they reach an aggregate contribution and expenditure amount of $50,000. Judicial races, however, often do not reach this $50,000 e-filing threshold, which would mean that maintaining that threshold for judicial candidates could result in no actual improvement in the public's ability to access those candidates' disclosure reports. Thus, the commission has recommended eliminating the threshold for judicial candidates and requiring all contribution and expenditure reports to be e-filed.

In considering what form the e-filing should take, the commission considered Cal-Access, the online e-filing database that the Secretary of State's office maintains for, among other things, candidates for statewide office. In informal conversations, Secretary

of State staff suggested that the cost, in both dollars and staff required, of adapting Cal-Access to accept e-filing by trial court judicial candidates would likely be low.

The commission also considered the results of meetings that the Task Force on Judicial Campaign Finance had with actual campaign treasurers to get their perspective on Cal-Access and whether it would be an appropriate vehicle for e-filing trial court judicial candidates' disclosure reports. In those meetings, it was noted that while the Secretary of State's office makes available free software that can be used to e-file on Cal-Access, that software does not include other necessary functionality such as ledgers. Thus, a candidate who uses the free software may also need to use third-party ledger software. In practical effect, this may mean that instead of inputting data twice, candidates may opt to use third-party software instead of the free software from the Secretary of State's office, which in turn means that many or most candidates may see a cost associated with being required to e-file on Cal-Access. And while that cost may not be considered expensive in the context of many campaigns, given the relatively low cost of a judicial campaign, it could be financially burdensome on a candidate to have to spend limited funds on e-filing in addition to other expenses.

A second option would be to have judicial candidates simply submit scanned electronic copies (e.g., PDF files) of their reports to the Secretary of State's office. The benefit of this option is that there would be no cost and little effort associated with the submission; the paper reports could simply be scanned and e-mailed to the Secretary of State's office for posting to a searchable Web site. One drawback is that the data in reports e-filed in this manner would not be subject to all of the search and cross-reference functions that are available with a true electronic database such as Cal-Access.

Ultimately, the commission decided not to make a recommendation about what form of e-filing would best balance the public's need for access and candidates' need for an efficient, cost-effective filing system. Instead, that issue should be considered further by the appropriate implementation group.

Independent Expenditures

Before addressing specific issues relating to independent expenditures,[52] this report provides some general background information that will serve as a framework for the discussion below. Data show that groups making IEs in judicial elections often have substantial resources with which to influence the campaign process; sometimes they can bring more money to the table than the actual candidates running for judicial office.[53] This phenomenon raises particular concerns when appointed judges who have never run

[52] Recall that the recommendation above concerning limits on corporate and union treasury spending also affects IEs.
[53] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006, supra*, at p. 21.

campaigns are standing for retention. But the problems posed by substantial "independent" spending in judicial elections are not limited to that context.

Justices who are up for retention are at a special disadvantage for two reasons. First, unlike some trial court judges, they did not need to raise funds to support their initial selection, so they may not have preexisting contributor lists to which they can turn if they are attacked. That problem is exacerbated when opponents of appointed judicial officers wait until late in the election season to launch opposition campaigns, as IE sponsors often do.

Second, IE groups with substantial monetary resources may be able to buy up large chunks of available airtime in the days before an election, making it difficult even for candidates who do have resources or outside support to respond to their opposition. The candidates may have to use less-effective or more time-consuming means of communication. As a result, the message of the IE may be far more likely to reach voters than would any information coming from the sitting judge.

These features of independent expenditures undermine public confidence not only in the fairness of judicial elections but also in the fairness and impartiality of judicial decisionmaking. When incumbent judicial officers face the threat of attack by high-spending IE groups, the public may come to believe that decisions by those judges will be influenced by their desire to avoid such attacks. That is, the public may conclude that judges and justices are susceptible to the influence of money not only through the contributions to those judicial officers, but also through the threat of large IEs being made against those officers if they render decisions contrary to the interests of the groups funding the IEs.

Another concern raised by IEs is that they may greatly influence the public's perception through advertising or other means of information dissemination that presents false or misleading information about judges, judicial decisionmaking, and the role of the judicial branch generally. Put another way, IE groups seeking to unseat an incumbent judge may, depending on how they paint that judge or his or her actions, give the public an entirely incorrect impression of the role of the judiciary, and the incumbent may be unable to raise sufficient money to counter any such advertising. The public may be left with an incorrect impression, and this misunderstanding could damage the public's perception of the judicial branch as a whole.

The above concern is related to two additional issues relating to independent expenditures. First is the difficulty that the public may face in understanding exactly who the persons or entities are behind IE groups, which often have bland, nondescriptive names like "Californians for Better Justice." While little can be done to regulate the content of IE-funded advertising, greater transparency may be achievable through disclosure of major contributors to the group making the expenditure. If the public could

more easily learn whose financial interests were funding IEs targeted at unseating or defeating judicial candidates, any negative comments about those candidates could be put into a more accurate context.

Second is the fact that in some states IE groups have targeted judges as candidates who can be attacked fairly easily and cheaply as a means of motivating a voter base for some unrelated purpose. For example, in a district with a close congressional race, an attack on a justice who has ruled on a controversial issue may be used to motivate a political constituency upset with the ruling on that issue to the polls, where they will also vote in the congressional race.

Against the above background, the commission considered whether to recommend sponsoring amendments to relevant statutes and/or regulations to broaden California's definition of what constitutes an IE—and therefore is subject to, among other things, laws relating to disclosure and corporate/union spending limits—to the extent permissible under the Constitution. The commission also considered whether to recommend sponsoring legislation to (1) expand the scope of what information must be reported by IE groups under applicable campaign finance reporting laws or that must appear in the disclaimers on the face of advertisements funded by IE groups or (2) make changes affecting the timing of disclosures regarding IEs.

California's legal definition of what constitutes an independent expenditure

Initially, the commission considered whether to recommend sponsoring amendments to appropriate California statutes and regulations so that California's definition of an independent expenditure—one subject to, e.g., disclosure laws—is as broad as possible under current case law.[54] While the commission's draft report included such a recommendation, on further consideration—resulting in part from comments received during the public comment period—the commission ultimately decided not to make that recommendation. The decision not to go forward with the recommendation was based primarily on the concern that it could have unintended political consequences outside of the judicial branch, i.e., the contemplated amended definition would affect not only races for judicial office but for all political offices in California. Nonetheless, and for the reasons discussed below, the commission remains concerned about the effect on judicial elections of the fact that California's current statutory/regulatory definition is not in line with federal law and is narrower than is legally permitted.

Generally speaking, the regulation—whether through disclosure requirements or limits on corporate and union contributions—of independently funded campaign advertising raises potential First Amendment concerns, in that overly restrictive regulation may be held to

[54] Such case law includes *McConnell, United States Senator, et al. v. Federal Election Commission* (2003) 540 U.S. 93 [124 S.Ct. 619], and *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007) 551 U.S. 449 [127 S. Ct. 2652] (*WRTL II).*

have an unconstitutional chilling effect on political speech. Historically, most courts have distinguished between communications that may or may not be regulated by considering whether the ads constituted "express advocacy" (regulation permitted) or "issue advocacy" (protected by the First Amendment). The test for express advocacy was the so-called "magic words" test, under which a communication was considered express advocacy that could be constitutionally regulated only if it used specific magic words such as "vote for," "vote against," and the like. Otherwise, a communication was considered issue advocacy and was not subject to the same disclosure requirements, contribution limits, and other limits applicable to express advocacy.[55] As discussed below, however, the United States Supreme Court in the *McConnell* case recently rejected the idea that the distinction between express advocacy and issue advocacy is constitutionally required.[56] Therefore, it is now constitutionally permissible to regulate a wider scope of electioneering communications than in the past.

In California, the statutory and regulatory definitions of "independent expenditure" on the books were drafted in accord with the opinion of the United States Court of Appeals for the Ninth Circuit in *Federal Election Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857.[57] That opinion, however, which was alone among federal circuit decisions in rejecting the magic words test for express advocacy, was expressly rejected by the Court of Appeal, First Appellate District, in 2002 in *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449. Under the latter, California adopted the magic words test for campaign advertising subject to regulation in California.

Notwithstanding the *Governor Gray Davis* opinion, the California statutes and regulations defining an IE for purposes of, for example, disclosure laws, were never formally amended to add a magic words test. Nevertheless, the FPPC continues to regulate campaign advertising in a manner consistent with that decision. As noted above, however, subsequent United States Supreme Court opinions allow for California's statutory and regulatory provisions in this area to be revisited.

Specifically, the current constitutional jurisprudence about the permissible definition of an IE is set forth in the *McConnell* and *WRTL II* opinions, cited above. Those opinions allow for a broader definition of an IE than that in *Governor Gray Davis*. Specifically, the *McConnell* court rejected the notion that only advertising that uses magic words may be regulated without running afoul of constitutional principles by holding that the distinction between express advocacy and issue advocacy is not constitutionally mandated. Thus, under *McConnell*, it was held permissible to impose restrictions on corporate and union treasury spending on "electioneering communications"—which

[55] These regulations do not include limits on how much money IE groups may spend or on what; such limitations are not constitutionally permissible.
[56] It must also be noted, however, that the constitutionality of the *McConnell* decision is one of the issues presently before the United States Supreme Court in the *Citizens United* case, discussed *supra*.
[57] See, e.g., Gov. Code, § 82031; Cal. Code Regs., tit. 2, § 18225.

restrictions the task force has recommended above—and to impose certain disclosure and reporting requirements in connection with spending on those communications. Notably, it was held constitutional for a statute to define an electioneering communication as encompassing far more than simply ads using magic words; an "electioneering communication" was defined under the statutory scheme in question as an ad that referred clearly to a candidate (for federal office), targeted that candidate's constituents, and ran within a specified time period before an election. Such a definition clearly would encompass far more than merely ads using magic words.

The *McConnell* holding was scaled back by the court in *WRTL II*, in that the ban on the use of corporate treasury funds for electioneering communications was held unconstitutional as applied because the ads in question were found not to be express advocacy or its functional equivalent. Nonetheless, even with the limits imposed under *WRTL II*, the current state of the law allows for spending bans on something more than solely magic words–type express advocacy. Moreover, *WRTL II* did not affect the federal disclosure requirements with respect to electioneering communications.

Based on the above, the current interpretation given to California's regulations and statutes—an interpretation that is in line with the *Governor Gray Davis* magic words holding—is narrower than would be legally permissible under current constitutional jurisprudence. Thus, it would be possible to seek legislative and regulatory amendment to broaden the definition of what constitutes an IE in California.

While the commission is of the view that California's statutory and regulatory schemes should be updated to reflect accurately the current state of the law—and that public trust and confidence in the impartiality of the judiciary would increase if the public were better able to track the sources of monies spent in connection with judicial elections—the commission ultimately decided not to recommend pursuing statutory or regulatory amendments. As noted above, the commission's primary reason for withdrawing its earlier recommendation on this issue was the concern that such a recommendation, if implemented, would have significant implications for all elections in California, i.e., its effect would not be limited to judicial elections. Such a recommendation is outside the scope of this commission.

Content and timing of disclosures pertaining to advertising in judicial elections
The commission also considered whether to recommend sponsoring amendments to appropriate California statutes and/or regulations to affect both the content and timing of disclosures pertaining to advertising in connection with judicial elections, whether funded independently or by a candidate. Although, as discussed below, the commission did not recommend any amendments affecting the content of those disclosures, it did initially recommend amendments requiring that the disclosures be made earlier than currently required, at the time that any person or entity makes a contract for that advertising. On further consideration, however, the commission decided to withdraw that

recommendation. The commission's concern was that the recommendation, while sensible in theory, could prove unworkable in actual practice. Further, the commission also noted a similar concern to that discussed above in connection with the definition of an independent expenditure, namely that the recommendation could have unintended consequences on campaigns other than for judicial office and would therefore be outside of the commission's purview. Although it has been withdrawn, the concerns that supported the recommendation are discussed below.

Before addressing the timing of disclosure, however, the commission first considered the specific content of what must be disclosed in advertising in judicial campaigns. The commission noted that sometimes contributions to one IE group come from yet another IE group, making it more difficult for the public to trace the source of the money that is being spent on certain communications. Situations like this arguably would make it desirable to sponsor amendments to current reporting requirements to mandate reporting of information at a deeper level, i.e., reporting not only which groups are contributing to groups that make IEs, but also to require reporting of groups that are contributing to those contributor groups, all in the same report.

However, the commission ultimately decided not to recommend sponsoring any changes to California's current law regarding the information that must be disclosed in connection with independent expenditures. As discussed above, California's existing law in this area has been nationally recognized for its comprehensiveness, including with respect to requirements for the reporting of IEs.[58]

Likewise, the commission does not recommend sponsoring any amendments to laws that specify the information that must appear in the disclaimers displayed in IE-funded advertising. Under current law, the face of political advertisements must display certain information about the two largest contributors of $50,000 or more to the IE group that funded the ad. Because judicial elections in general tend to generate less spending, it is possible that in those elections there would be no contributors of more than $50,000 to IE groups funding advertising. Thus, it would arguably be desirable from the perspective of informing the public to lower the $50,000 disclaimer threshold for judicial elections.

As noted, however, the commission ultimately decided not to recommend sponsoring such an amendment. Again, the primary basis for this decision was the fact that California law is already very comprehensive and stringent with respect to the disclaimer requirements, so imposing even more stringent requirements could be viewed as unnecessary. Further, the fact that all advertising is expensive, regardless of the type of election involved, makes it likely that, even in judicial elections, if there is advertising, some contributors will have met the $50,000 contribution threshold.

[58] See the Campaign Disclosure Project Web site at *www.campaigndisclosure.org/gradingstate/ca.html.*

Lastly, the commission does not recommend sponsoring changes to the timing of certain IE reporting, although it did initially make such a recommendation. On further consideration, however, including of the public comments received, the commission withdrew that recommendation. It did so primarily for two reasons. First, the commission was concerned whether the recommendation would be reasonably workable in actual practice. Second, the commission was concerned that the recommendation, if adopted and pursued, could have unintended consequences beyond judicial elections—it could affect campaigns for other offices, which was not the commission's intent nor within its scope. Despite withdrawing the recommendation, the commission remains concerned about the current timing of disclosures regarding advertising in judicial elections, for the reasons discussed below.

Candidates for judicial office (particularly in retention elections, where campaign funds are not typically raised as a matter of course) are highly susceptible to last-minute attacks by IE groups,[59] whether in the form of advertising or otherwise. This is because, under current law, reporting is required at the time that the communication is made. In other words, if an independent expenditure is made for a television ad designed to unseat an incumbent justice, the reporting of the sources that funded the IE must be made at the time the ad airs (or later, depending on when the next report is due). Thus, in practical terms, an IE group may spend money on and prepare an attack ad that is not run until very close to the election, at which time the candidate will not have had time to prepare and will have little time in which to respond.

The above scenario may work not only to the detriment of the candidate, but also to the detriment of the public. Such reporting gives the public less time before the election in which to obtain information about the persons or groups who are behind the IE. Indeed, the report for a last-minute attack ad may not be due until after the election, when it is too late to affect the voters' decisions. Earlier disclosure would allow the public more time to try to understand who is funding attack ads and possibly to discern why. In the commission's view, this is a worthy goal, as a public that is well informed about the sources of money being expended both for and against candidates is likely to have more trust and confidence in the system as a whole.

The difficult question, however, is when that earlier reporting should be required to occur. One possibility would be to require reporting at the time a contract for advertising or other public efforts is signed. Ultimately, however, the commission was concerned that such a requirement could be "gamed" by delaying the signing of a contract until immediately before the advertisement is to air. Thus, the commission's initial recommendation was that reporting be required whenever a contract is "made," which was meant to include any level of commitment to expend IE funds on advertising relating

[59] While discussion on this issue focused primarily on advertising funded through IEs, the commission recognizes that some advertising might be funded by the candidates themselves.

to a judicial election.

The commission was aware, however, that in some instances, just because money is committed to, or even spent on, advertising or other communications does not mean that those ads or communications will ever be made or run. Further, advertisements may be committed to even before the IE group involved has decided exactly who or what issue will be the "target" of those ads. Thus, while the commission agreed in principle that earlier disclosure would be preferable, it ultimately did not make such a recommendation given the logistical hurdles that would have been inherent in implementing and enforcing it.

On a related topic, the commission also considered whether to recommend sponsoring statutory or regulatory amendments to enhance either the mechanisms that are currently available for ensuring compliance with IE disclosure and reporting requirements or the penalties for violations of those requirements. Currently, if a candidate or IE group violates a provision of the campaign finance disclosure and reporting laws, there are a number of options for addressing that violation. For example, the FPPC may impose monetary penalties. There is also a possibility that criminal charges could be prosecuted against the violator, although this is rare in actual practice. Despite these provisions, the commission examined whether to recommend sponsoring amendments to impose even more stringent enforcement or penalty options.

The commission ultimately concluded, however, that the current options are sufficient. If those options are not being exercised to the full extent possible, it is likely because of agency understaffing or underfunding (for example, at the FPPC), not to any deficiencies in the available mechanisms themselves. There may be value, however, in outreach or educational efforts designed to inform the public and campaign personnel about the enforcement and penalty provisions that already exist. The commission's hope is that doing so will both reduce the number of violations and satisfy the public that adequate protections are in place.

Public Financing of Judicial Elections

Recommendation 36

Spending in connection with judicial elections should be closely observed for developing trends that would indicate a need to reconsider whether to sponsor legislation to create a system of public financing at the trial court or appellate court level, but such legislation should not be sponsored at this time.

Discussion: There has been increased nationwide interest in recent years in the public financing of elections. Some states have adopted systems of full or limited public funding, including for judicial elections. The primary purpose of the latter is to reduce or eliminate the potential, actual, or apparent influence of campaign contributions on judicial decisions.

In examining the issue, the commission considered several aspects of public financing generally, including how such systems may be structured, the implications for such a system on judicial elections, and how such a system might be structured in connection with retention elections.

As has been noted in this report, the instances of concern that have occurred elsewhere in the country in connection with judicial elections have been at the appellate level, primarily in supreme court races, and it is quite possible that such instances have not yet occurred in California because of its nonpartisan retention elections for the appellate courts. Whatever the reasons, the commission concluded that there has not been a demonstrated systemic need for public financing in California. That conclusion, when taken together with the limitations of public financing and the state's continuing fiscal problems, caused the commission to recommend not sponsoring legislation establishing public financing of judicial elections at this time. That recommendation is subject to the caveat that future events—such as trends showing increased spending and fundraising in California—may require further consideration of the issue in the future.

Public financing systems in general

The first area of consideration was ways in which public financing systems, all of which are voluntary under constitutional jurisprudence, may be structured. For example, some public financing systems are structured as "clean money" systems, in which candidates collect a certain number of small, qualifying contributions and are then eligible to receive a lump-sum grant to cover the full cost of a basic campaign. In those systems, if one candidate opts in and another does not—and if the nonparticipating candidate raises funds over a certain amount (usually all or a substantial percentage of the participating candidate's spending limit)—the participating candidate gets a one-to-one match in public funds up to a certain specified cap, which is typically two or three times the base spending limit. A similar matching program applies to independent expenditures made in support of a nonparticipating candidate or against a participating candidate.

In considering different potential public financing models, the commission recognized that, under all of the models, nonparticipating candidates remained free to outspend participating candidates. For example, if a wealthy, self-funded candidate or a well-funded IE group were determined to spare no expense to defeat another candidate, it is likely that no public financing system could ever fund the targeted candidate on an equal level. Thus, any recommended system would, at best, increase the ability of a participating candidate to get out his or her message, and certain hot button issues could cause an influx of money in an election in an amount that exceeds a public financing system's ability to address.

Public financing of judicial elections generally
In judicial elections in particular, the commission noted the challenge in convincing the public of the need for and the importance of public financing, especially in light of California's current fiscal crisis. Any recommended system would need to be funded at a level that is both palatable to the public and meaningful to the candidates.

Consideration was also given as to whether a capped public financing system could work in California. Given California's size and the potential amount of money that could be spent on a judicial race here, there is a concern that a cap at any fiscally manageable level would be seen as too limiting, and thus might make public financing an unappealing choice for candidates. On the other hand, no jurisdiction to date has ever implemented a public financing system that did not have some cap in place to limit the overall amount of public funds that any given candidate may receive, and the lack of such a cap could be both politically and financially unworkable.

The commission also discussed more limited forms of public financing for judicial elections. For example, it might be possible to use public funds to offset the cost of judicial candidates' candidate statements, the cost of which are currently set on a county-by-county basis, resulting in a significant disparity in the cost of simply entering a judicial race. As an alternative, public funds could be used to prepare educational biographies or some other means of informing the public about judicial candidates.

Assuming a workable, fiscally sound system could be developed, the commission agreed that public financing generally could have a positive effect in terms of furthering the appearance of judicial impartiality by lessening the influence of outside monetary contributions to judicial candidates. Put another way, public trust and confidence in the impartiality of the judiciary might increase if the public felt that judges and justices could make rulings free from the threat of disproportionate amounts of money being spent to unseat them if they rule in a particular way. On the other hand, the commission recognized that while it is possible and reasonable to distinguish candidates for judicial office from other candidates, it could nonetheless prove difficult to enact a public financing system applicable only to judicial races.

Public financing of trial court (i.e., contested) elections
Preliminarily, the commission noted that the few other states that have public financing of judicial elections do so only at the appellate court level; no state has adopted public financing of trial court elections. Considering the issue in the context of California, the commission agreed that there has not to date been a demonstrated systemic problem of large sums of money being spent in trial court elections sufficient to warrant creating a system of public financing at that level. Further, it is possible that providing public financing at the trial court level could increase the number of candidates, making judicial elections more competitive and resulting in the types of campaign tactics that have undermined public trust and confidence in other states.

Public financing of appellate (i.e., retention) elections

Currently, only a few states have public financing of judicial elections, and then only for contested appellate races. The commission is of the view that in California, with our system of appellate retention elections, public financing would arguably be less effective than in other states. This is due in large part to (1) the potential public perception that such financing unfairly favors the incumbent and (2) the unpredictability of an adequate funding level, given the potential resources of IE groups that would be spending money to oppose a candidate's retention bid.

The commission's first concern was that any system that provides public funds to retention candidates could be seen as unduly favoring incumbents by giving them public monies, while those seeking to unseat them are forced to rely on private funding for their advertising. On the other hand, and as discussed above, appellate justices in California typically do not have an established voter base, so the presence of public financing might instead be seen as leveling the playing field between those candidates and outside moneyed interests. Further, the role of justices—as with all judicial officers—is to make decisions based on the rule of law, even when those decisions may be unpopular. The commission noted that appellate justices, especially those at the Supreme Court level, are particularly susceptible to high-dollar attacks based on rulings that are legally sound yet socially unpopular, which argues in favor of some system of public financing to allow justices to respond at least on some level to campaigns designed to unseat them.[60] One way to alleviate possible concerns about the public financing of retention elections would be to make a candidate's receipt of public funds contingent on that candidate being evaluated—possibly in a nonelection year—by an appropriate body and receiving a rating of a certain level.

The commission's second major concern related to the fact, discussed above, that when spending occurs at all in an appellate election, it is likely to be at a relatively high level, particularly when an IE group makes a concerted effort to unseat an incumbent candidate. Thus, there is a question about whether it would ever be possible in California to fund an appellate-level public financing system at a meaningful level sufficient to meet the needs of participating candidates.

Assuming that a publicly acceptable and adequately funded system could be put into place, questions remain as to the logistics of how that system would work in the retention context, i.e., where there is no actual "opponent" against whom to track and match funds. One possibility would be to put the available public funds into a sort of escrow. As IE spending in opposition to a candidate occurred, the candidate could withdraw money

[60] It is also possible, however, that IEs could be made in support of a justice's retention campaign, as opposed to being contributed directly to the justice himself or herself.

from the escrow according to a certain ratio—e.g., for every dollar spent against a candidate, the candidate could withdraw a dollar from the escrow.

The commission ultimately concluded that there has not to date been evidence of a systemic problem in California with respect to large sums of outside money being spent in appellate elections. This is likely due in large part to the fact that appellate elections in California are nonpartisan retention elections. Nonetheless, the possibility exists that even though moneyed interests have no ability to select the replacement for a justice who is defeated in a retention bid, such interests might still decide it is worthwhile to spend significant amounts of money in an effort to unseat a justice. This is particularly true with respect to social issues. Given California's budget, it is uncertain whether any system of public financing could ever truly address, on a fiscal level, concerted attacks designed to unseat appellate justices.

However, the commission recommends that spending trends in California be closely monitored on an ongoing basis and that this issue be revisited if the trends seen in other parts of the country become more prevalent in California's appellate elections. In the face of such spending trends, even the mere presence of a public financing system could curtail certain attack campaigns and would likely increase public trust and confidence by creating a safety net so that justices would not appear to be reluctant to make unpopular decisions simply as a way to avoid having to raise money to respond to such campaigns.

Public Information and Education

The commission's recommendations in this section of the report address the need to improve transparency and better inform the public of the role and operations of the state court system. They also provide practical guidance for receiving input from the public, working with the media, providing information to voters, and responding to public comments and criticism of the judicial branch. The recommendations call for a branchwide leadership group to identify, coordinate, and facilitate court, community, and education outreach efforts; to develop a strategic plan for a meaningful contribution to civics education; and to look for opportunities to educate the public, enhance judicial awareness of the media, and cultivate partnerships with other branches of government.

In arriving at its recommendations on public information and education, the commission focused on ways to respond to unwarranted criticism, personal attacks on judges, and institutional attacks on the judiciary; inappropriate judicial campaign conduct; and other challenges to judicial impartiality arising from unpopular judicial decisions. The commission considered available avenues to develop and strengthen partnerships with other organizations, such as state and local bar associations, educational institutions, and the California Judges Association, which has a program for responding to criticism of judges.

In connection with these recommendations, the commission has provided a model rapid response plan for responding to unwarranted criticism (Appendix I), a tip sheet for judges to use when responding to press inquiries (Appendix J), and a detailed guide on developing a strategic plan to promote and implement quality civics education and education about the courts in public schools throughout California (Appendix K).

Public Outreach and Response to Criticism

Democracy can thrive only with the informed participation of its citizens. State and federal Constitutions have given the three branches of government different roles and responsibilities. Of the three branches, the judiciary is the least understood by the public. As reflected in a survey of the public and attorneys in 2005 and reported in the *Trust and Confidence in the California Courts* report, public knowledge about the courts is low. The goal of each of the recommendations below is to better inform the public about the rule of law and the importance of an independent judiciary in its implementation.

Recommendation 37

To improve transparency and better inform the public of the role and operations of the state court system and to enhance public outreach, the judicial branch should identify and disseminate essential information that would increase both the public's access to justice and its opportunities for input. To that end, the following are recommended:

- A leadership advisory group should be appointed to oversee, identify, and coordinate public outreach programs and opportunities for public input; to establish benchmarks of good practice; and to promote the assembly of local teams to assist courts with local outreach programs;
- The AOC should collect, summarize, and evaluate public outreach resources and methods for public input that are currently available for judges and court administrators and should also collect, summarize, and evaluate educational materials for K–12 teachers and for judges and court administrators making classroom visits;
- The AOC should maintain a list of resources for local courts that will reflect the diversity of the state and explore ethnic media outlets;
- Web sites should be enhanced to include the role of the judicial branch and explain how judges are elected or appointed; information concerning how judges are selected or elected should be placed prominently on the California Courts Web site;
- A compelling video on the role of the judicial branch should be created for use in various venues and should be posted on local court Web sites;
- The judicial branch should view any public gathering place—such as jury rooms or nonjudicial settings—as an opportunity to inform the public about the role and importance of the judiciary in a democracy;
- Courts should be identified to pilot programs dealing with community outreach and education; and
- Information about how judges are elected or appointed should be incorporated into outreach efforts and communications with the media.

Discussion: The commission believes that trust and confidence in the impartiality and accountability of the judiciary as a whole would be greatly increased through better communications, understanding, and outreach between the public and judicial branch entities such as the courts and the AOC. To that end, the commission is of the view that the judicial branch should take an active role in providing helpful information to the public that will not only increase the public's understanding of the branch but also facilitate the public's ability to provide meaningful input back to the branch.

As one step in the process of enhancing community outreach activities, courts should identify and cultivate leaders at the local level.[61] The hope is that these leaders will inspire other judges or local bar members also to engage in public outreach efforts.

[61] Rule 10.603 of the California Rules of Court requires the presiding judge to support and encourage judges to actively engage in community outreach to increase public understanding of and involvement with the justice system and to obtain appropriate community input regarding the administration of justice. In addition, standard 10.5 of the Standards of Judicial Administration provides that judicial participation in community outreach program activities should be considered an official judicial function in order to promote public understanding of and confidence in the administration of justice.

Further, the recommended leadership advisory group should partner with local courts, bar associations, the California Judges Association, the National Center for State Courts, the State Bar, and others to offer outreach and public information programs and media guidelines to courts or regional areas. And bench-bar coalitions should be encouraged to reach out to key stakeholders and interest groups, including political parties, in order to increase awareness and understanding of the judicial branch.

Examples of the type of outreach contemplated include:

- Matching similar courts (e.g., based on geographic location) to partner on outreach programs;
- Posting a court's total outreach hours on a Web site;
- Awarding continuing education credits for involvement in education efforts; and
- Encouraging retired judges to engage in outreach efforts.

Further, the commission recommends that the AOC maintain a list of public outreach options for local courts that will:

- Reflect the diversity of the state's demographic and geographic differences and include descriptions of the programs, the targeted audiences, and where they can be used; and
- Explore ethnic media outlets to reach more audiences and investigate multimedia outreach opportunities, such as the California Courts Web site, local court Web sites, libraries, radio broadcasts, podcasts, public service announcements, public video hosting sites, instant messaging, and the California Channel.

Whenever possible, programs and materials should be provided in languages in addition to English.

Opportunities to inform the public could be done through videos, brief talks, newsletters, or questionnaires. In considering appropriate public settings for such education, the commission considered, for example, jury assembly rooms. Potential jurors could be educated via juror questionnaires or videos in the assembly rooms, by listening to a judge reviewing the process after a trial or dismissal, or by receiving a thank-you postcard. Other opportunities to reach audiences include outreach to attorneys renewing State Bar dues, law students requesting bar applications, law enforcement training programs, business schools, the Department of Motor Vehicles, and other licensing agencies.

The commission agreed that a brief and compelling video that illustrates the critical role an impartial judiciary plays in a democracy should be created. The video should include an explanation of how judges are appointed or elected. The film should address various audiences, including the general public, community groups, jurors, and high school seniors. Incorporating video clips of judges in various courts, including drug court and

peer court, is suggested. Reference to support materials for teachers (e.g., curriculum materials, creative ideas for usage, and online tools) is also recommended to help teachers use the video. The video and support materials should be Internet-based.

Because Web sites serve as the public face of the superior courts, current AOC plans include the development of resources to help interested superior courts redesign their Web sites. Information about how judges are elected should be placed prominently on the California Courts Web site, as is currently provided on the Web sites of the Courts of Appeal. Web traffic to nonpartisan sources of information should be increased by partnering with other groups, such as bar associations. The feasibility of a channel for the judicial branch on one or more public video hosting sites[62] should be studied.

Lastly, and as mentioned above, the commission also suggests that the AOC investigate the possibility of establishing a judicial branch channel on one or more public video hosting sites such as YouTube.[63] One model for possible consideration is the California State YouTube channel that was launched in 2008 by the executive branch. The commission envisions that the judicial branch channel would be dedicated to improving public outreach and education and would feature programming from the AOC, Judicial Council, Supreme Court, and superior courts.

Recommendation 38
To improve the quality of justice and the public's trust and confidence in the judiciary, solicitation of public feedback on issues such as judicial performance and satisfaction with the courts should be encouraged, facilitated, and enhanced at all times.

Discussion: The commission is of the view that effective communication with the public is a two-way street. Emphasis must be placed not only on efforts to provide information *to* the public, but also on receiving information and feedback *from* the public. The AOC has a vehicle in place for facilitating a dialogue between the courts and the public. Three in-depth training workshops were conducted in 2006 to provide court leaders with practical advice and strategies for use in engaging their communities. Specifically, courts used the *California Courts: Connecting With Constituencies* instructional guide and Trial Court Improvement Fund mini-grants to embark on strategic planning efforts. The 2006 program arose from the Judicial Council's short-term strategy to revive community-focused court planning in response to the 2005 Public Trust and Confidence Survey. Currently, program funds are being used to help courts improve their online communications through Web site redesign; with the increase in online usage, superior court Web sites have become the electronic face of the courts and provide a good vehicle for two-way communications with the public.

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[62] One example of such a site is YouTube.
[63] The commission notes that, as of the date of this report, the AOC is investigating how YouTube works and whether there are any problems or issues with posting state videos to that site.

In addition, judicial and bar leaders should be encouraged to inspire others not only to engage in outreach efforts but also to seek out and take advantage of opportunities for public input. Such opportunities will vary by court. For example, exit questionnaires could be used to collect feedback from jurors, litigants, witnesses, and others as they leave the courthouse. This would give courts the public's perspective on what is working and whether it continues over time. Other opportunities include focus groups, which can reveal opinions on specific issues; anonymous suggestion boxes; and Town Hall meetings.

Recommendation 39
Training should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily understood by litigants, their attorneys, and the public.

Discussion: In the commission's view, many judicial opinions are not written in a manner that is easily digestible by nonattorneys. Introductory remarks or paragraphs could summarize a case and the court's decision in a way that can enhance media accuracy.

Recommendation 40
Local and statewide elected officials should be educated on the importance of the judicial branch.

Discussion: Some attacks against the judicial branch come from politicians who lack knowledge or understanding of the judicial branch and its role. The commission believes that many legislators could benefit from a basic introduction to the courts. A number of programs already exist that provide such education; these should be reinforced for local use with area representatives. The following are examples of programs that are run by the AOC Office of Governmental Affairs:

- Legislative–Executive–Judicial Forum—follows the Chief Justice's annual State of the Judiciary address to a joint session of the Legislature;
- Bench-Bar Coalition—members meet with legislators at the state capital during Day in Sacramento activities;
- Day-on-the-Bench—a statewide program in which legislators spend a day visiting a court; and
- New Legislator Orientation Program—affords an opportunity to meet and interact with new members of the Legislature and provide education about the branch.

Recommendation 41
Judges and court administrators should be better trained on how to interact with the media, and training for the media in reporting on legal issues should be supported and facilitated.

Discussion: The Bench-Bar-Media Committee (BBMC), chaired by Associate Justice Carlos R. Moreno of the California Supreme Court, was appointed by the Chief Justice in March 2008. The purpose of the BBMC is to help foster improved understanding and working relationships among California judges, lawyers, and journalists. The committee will be considering a variety of issues, such as media access to public records and the use of cameras in the court, and will facilitate the creation of local bench-bar-media committees.

In addition to the work of the BBMC, the commission agrees that media training for judges and court administrators should be offered in programs such as New Judge Orientation and the Judicial College, as well as through the Trial Court Presiding Judges, Court Executives, and Appellate Advisory Committees. Such programs currently exist throughout the nation.

A number of resources already exist that could be used in the training. For example, the *California Judicial Conduct Handbook*, published by the CJA, has a section on dealing with the media, and the AOC recently published the *Media Handbook for California Court Professionals.* The National Judicial College, working with the NCSC and the media, has three programs aimed at journalists, judges, and court staff. Referred to as "law school for reporters," these programs exist in various counties.

In addition to those for judges and court leaders, educational efforts should focus on the media. Following research and collaboration with the BBMC, AOC staff should draft an effective practice curriculum for educating the media. Further, current media education programs should be supported and leveraged to educate the media on legal affairs reporting.

The commission believes that all of the recommended programs should be ongoing because of turnover in court leadership and among staff of the media.

Recommendation 42
In order to improve transparency and be responsive to public comments and constructive criticism of the judicial branch, the judicial branch should do the following:

- Adopt both a model method for responding to unwarranted criticism of the judicial branch and a tip sheet for judges to use when responding to press inquiries;[64]
- Create an advisory group to provide ongoing direction and oversight of the recommended response plan and ensure that the services it proposes are provided; and
- Ensure that valid criticisms are referred to the appropriate bodies for response.

Discussion: The commission has adopted guidelines developed by the Task Force on Public Information and Education for responding immediately to unfair criticism of, or unusual media attention toward, either the judicial branch or a judge. The intent is to use the guidelines when unfair criticism or attention threatens to undermine fair and impartial courts. The guidelines also discuss the handling of judicial misconduct claims and other potentially warranted complaints. The rapid response plan is intended to be used by existing local and statewide associations. Through the adoption of a rapid response plan, accurate, consistent, and timely information can be provided while maintaining the public's trust and confidence in the justice system.

In coordination with this plan, the task force also developed Responding to Press Inquiries: A Tip Sheet for Judges. The tip sheet provides guidelines for judges concerning ethical constraints when speaking to the public about cases.

The commission believes that an advisory group should be established to provide ongoing direction and oversight of this plan and to ensure that the services it proposes are provided in an enduring manner.

Education

A fair and impartial court system is vital for maintaining a healthy democracy, protecting individual rights, and upholding the Constitution. The strength of the judiciary requires that each new generation of citizens understand and embrace our constitutional ideals, institutions, and processes. While a focus on K–12 education is a broad and ambitious aspect of the commission's overall charge, the commission agrees that the judicial branch should take a leadership role to ensure that every child in California receives a quality civics education and to encourage and support judges, courts, and teachers in the education of students about the judiciary and its function in a democratic society.

One concern driving the commission's recommendations in this area is the impression that citizens lack the knowledge and skills to participate effectively in government because of inadequate K–12 civics education. Although the federal No Child Left Behind Act of 2001 mentions social studies as a core subject area, its current testing in reading

[64] See Appendix I, Rapid Response Plan: A Model Guideline for Responding to Unfair Criticism of the Judicial Branch; and Appendix J, Responding to Press Inquiries: A Tip Sheet for Judges.

and math has put pressure on school districts to give emphasis to these subjects to the detriment of civics and history. On the most recent U.S. Department of Education's National Assessment of Educational Progress in civics, only a quarter of the high-school students were judged to be proficient.[65]

To learn a subject, children need multiple experiences, not just one, yet there are no civics educational programs that span multiple years of a student's education. Cultural differences due to immigration, coupled with a multiplicity of languages, increase the complexity of reaching children. The commission believes that the judicial branch's attention should be focused on the framework and standards committees that establish what is taught in schools. Programs need to be institutionalized within each county and spearheaded by the branch as a whole, rather than left to the initiative of individual judges. An additional challenge is the requirement for evidence-based evaluation criteria for such programs.

Connecting with ethnic groups is also important, and the commission believes that the best way to reach immigrant populations is by reaching school-age children, who often help their families become familiar with local culture. The commission is concerned, however, that students at high-impact schools may have less opportunity for learning social studies and related topics because of those schools' focus on math, reading, and science. A recent study found that nonwhite students from low-income families who attend high schools in lower socioeconomic areas receive significantly fewer high-quality civics learning opportunities than other students.[66]

The California courts already offer a number of K–12, law-related civics education programs, including the California Supreme Court's special outreach sessions for high school students; the Appellate Court Experience program; the Courts in the Classroom Web site; various youth and peer courts throughout the state; the Peer Courts DUI Prevention Strategies Project; and other programs through the AOC Center for Families, Children & the Courts. These are effective programs that some educators simply do not know exist.

Recommendation 43
Every child in the state should receive a quality civics education, and judges, courts, teachers, and school administrators should be supported in their efforts to educate students about the judiciary and its function in a democratic society. To that end, the following are specifically recommended:

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[65] See Constitutional Rights Foundation in collaboration with the Center for Civic Education and the Alliance for Representative Democracy, Educating for Democracy: The California Campaign for the Civic Mission of Schools, *The California Survey of Civic Education* (2005), *www.cms-ca.org/research.htm.*
[66] Joseph Kahne and Ellen Middaugh, *Democracy for Some: The Civic Opportunity Gap in High School,* CIRCLE Working Paper 59 (The Center for Information & Research on Civic Learning and Engagement, Feb. 2008).

- Strategies for meaningful changes to civics education in California should be supported, and a strategic plan for judicial branch support for civics education should be developed;[67]
- Political support should be sought from leaders in the Legislature, the State Bar, the law enforcement community, and other interested entities to improve civics education;
- Teacher training programs, curriculum development, and education programs on civics should all be expanded to include the courts;
- Presiding justices and presiding judges should be encouraged to grant continuing education (CE) credits to judicial officers and court executive officers who conduct K–12 civics and law-related education;
- The State Bar Board of Governors should be asked to grant Minimum Continuing Legal Education (MCLE) credits to attorneys who conduct K–12 civics and law-related education programs;
- The AOC should be directed to help pilot extensive civics-related outreach in three jurisdictions; and
- Recognition programs that bring attention to teachers, judges, and court administrators who advance civics education should be promoted.

Discussion: The commission believes that the judicial branch should continue to participate in strategies to elevate the importance of civics education—which should begin in kindergarten—and this recommendation is intended to state a number of specific means of helping ensure that that education takes place. The recommended civics education should include broad concepts about democratic and republican forms of government and should not be limited to the importance of courts and their impartiality.

Current civics education programs

The commission notes that numerous training programs already exist in this state. For example, more than 100 K–12 teachers from around the state have participated in California on My Honor: Civics Institute for Teachers, with 60 expected to participate in 2009. The AOC and the State Bar provide teacher stipends for the four-day training. The program has been conducted for three years and has reached more than 15,000 students. The AOC developed Courts in the Classroom, a Web tutorial for students in grades 8–12 focusing on the judicial system. That tutorial includes a teacher's resource manual. Participants of the Civics Institute for Teachers and a few trial courts have reviewed the tutorial and are supportive of its use in the classroom.

Many programs not only influence children, they also educate their parents. The Constitutional Rights Foundation and the Center for Civic Education are nonprofit educational organizations offering programs, publications, videos, and training on many fronts. Bar associations provide ongoing programs for K–12 and adult learners. Appendix

[67] See Appendix K, Proposed Strategic Plan to Improve Civics Education.

L, Organizations With Civics Education Programs for California Schools, indicates the array of organizations involved in civic education efforts. Whenever possible, education programs and materials should be provided in languages in addition to English.

Strategies for change in civics education

Academic standards for civics education already exist, and the Judicial Council should support having the schools honor those standards and strengthen the quality of their instruction. To that end, the commission notes that a meeting was held with Mr. Jack O'Connell, State Superintendent of Public Instruction; Justice Ming W. Chin; Justice Judith D. McConnell; commission member Bruce B. Darling, executive vice-president of the University of California; and commission project director Christine Patton. The meeting was requested to discuss the work of the commission and the lack of in-depth civics education in the K–12 curriculum framework. As a result of this conversation, two letters were prepared and sent to Superintendent O'Connell. One covered the current history and social science framework and its lack of consistent coverage concerning the role of the judicial branch. The second recommended a teacher for appointment to the History–Social Science Curriculum Framework and Evaluation Criteria Committee.

Organized efforts by the judicial branches in other states were reviewed and discussed by the Task Force on Public Information and Education. Justice R. Fred Lewis of the Florida Supreme Court gave a presentation on Justice Teaching, a program developed for the Florida courts in 2006. The program calls on judges and lawyers to serve as resources for teachers and students in 3,000 K–12 schools. Justice Teaching has been successful because Justice Lewis, the Chief Justice at the time of the program's inception, spearheaded the effort, meeting with all presiding judges in the state, developing a governance structure, and establishing partnerships with the county superintendents of schools and each school's principal. The Florida Law Related Education Association provided funding and staff support to the program. The volunteer judges and lawyers are required to attend the Justice Teaching Institute to receive training on the lesson plans and continuing legal education credits.

The task force considered the elements of the Florida program essential to the success of providing education on the judicial system in K–12 schools. The components include enlisting a high-profile champion, appointing an oversight committee to provide support for a sustainable program, developing a strategic plan, developing a governance structure, identifying allies, and establishing partnerships.

Based on these efforts, and in an effort to strengthen civics education in our schools, the Task Force on Public Information and Education developed components to be included in a strategic plan referred to as the Proposed Strategic Plan to Improve Civics Education (see Appendix K). Because a leadership body has yet to be appointed, however, the full development of a strategic plan would have been premature.

Political support for enhanced civics education
Another way to improve civics education is to partner with influential groups such as the Governor's Office, the Legislature, the state Department of Education, and officers of Educating for Democracy: The California Campaign for the Civic Mission of Schools, a project of the Constitutional Rights Foundation in collaboration with the Center for Civic Education and the Alliance for Representative Democracy. The commission notes that California economists were successful in revising curriculum standards to include an economics component and, in connection with this recommendation, suggests that the model used by those economists be researched and possibly duplicated with respect to enhancing civics education about the judiciary.

Currently, the state Department of Education and Board of Education are reviewing the history and social science K–12 curriculum framework and evaluation criteria in 2009 and will move to adopt a new curriculum framework in 2011. The commission urges the Judicial Council and the AOC to take all steps necessary to ensure effective participation in the review of the curriculum framework and evaluation criteria.

Further, Educating for Democracy: The California Campaign for the Civic Mission of Schools, working with the Assembly Committee on Education, introduced Assembly Bill 2544 (Mullin; 2008), a model civic education staff development program. At the request of the Task Force on Public Information and Education, the Judicial Council voted to support the measure, as did the League of Women Voters. While the measure did not pass, the commission recommends that the Judicial Council continue to support it.

Continuing education credits
Presiding justices and judges should be encouraged to grant CE credits to judicial officers and court administrators conducting K–12 civics and law-related education. The Standards of Judicial Administration currently state that judicial participation in community outreach programs should be considered an official judicial function. The system is already in place for judges and court administrators to receive credit for teaching in K–12 classrooms. At the discretion of the presiding judge, a judge or court executive officer conducting classroom teaching may receive credit for up to 7 hours every three years under the category of self-directed study. They are expected to complete a total of 30 hours of education every three years.[68] The commission agreed that most who participate are committed to teaching with or without credits but noted that it would do no harm to create the opportunity for credits.

In addition, the State Bar Board of Governors should be asked to grant Minimum Continuing Legal Education credits to attorneys conducting K–12 civics and law-related programs. Continuing education for attorneys is governed by rule 9.31 of the California Rules of Court and by rule 2.72 of the MCLE Rules and Regulations. The requirements

[68] Cal. Rules of Court, rules 10.451–10.481.

are 25 hours every three years; self-directed study is limited to 12.5 hours every three years. Unfortunately, education activities on legal topics presented to nonlawyers are not considered activities for which MCLE credits can be obtained.

Pilot civics-related outreach programs

The commission recommends that the AOC conduct a pilot program for extensive civics-related outreach in three jurisdictions—to be determined—following collecting and evaluating outreach programs and making them available in a single repository.

Recognition programs

In the commission's view, recognizing individuals who promote civics education will reinforce outreach practices and encourage others to participate.

Additional actions

Additional actions that could be taken in support of these recommendations include seeking judges to comment at the state Board of Education open meetings on curriculum standards and encouraging the courts and bar associations to participate in Law Day, Constitution Day, and Bill of Rights Day. Collaborative efforts should be investigated between the National Archives, California museums, California schools, and the Judicial Council whereby schoolchildren would travel to museums to view important documents on American history.

Voter Education

An engaged and educated electorate is essential to maintaining public trust and confidence in a fair and impartial court system. Voters are entitled to abundant, full, and fair information that will empower them to make informed choices about candidates for judicial office. The commission agrees that the judicial branch needs to play an active role in encouraging a more informed and aware voting public, including affirming for courts and judges the value of providing neutral information to voters, creating resources for the coordination of voter education and outreach efforts by the courts, and advocating for legislative and rule changes that would provide greater and more useful information for voters.

National efforts support that there is a need for enhanced voter education about judicial elections. In 2002, the nonpartisan Justice at Stake Campaign was created by a national partnership of 45 judicial, legal, and citizen groups to educate the public about the importance of fair and impartial courts. That same year, Justice at Stake hired a research and communications firm to conduct focus groups on judicial elections. The focus groups indicated that although voters would like to know how judges would decide particular issues, they are generally satisfied by candidate statements and general information regarding legal and professional experience, work, history, and education. There is a lack of consistency in this state on judicial candidate information provided to voters. Some bar

associations conduct and publish judicial candidate evaluations, but the current candidate information in voter pamphlets was not designed for judicial candidates.

Recommendation 44
To ensure that voters can make informed choices about candidates for judicial office, the following are recommended:

- Voter focus groups should be conducted within California to determine what information to provide in education materials;
- Voter education materials should be developed to inform voters about the constitutional duties and responsibilities of judges and justices and the role of the state court system;
- Judicial candidates should participate in candidate forums and respond to appropriate questionnaires;
- Efforts should be undertaken to determine the most effective uses of multimedia tools to promote voter education;
- Collaboration should be established among the Judicial Council, the League of Women Voters, the California Channel, and other groups to inform and educate voters; and
- Politically neutral toolkits regarding voter information and best practices on public outreach should be developed for use by judicial candidates.

Discussion: The commission recommends numerous actions to help educate voters and better enable them to make informed decisions when voting in judicial elections. As an initial step, the commission believes that it is important to conduct focus groups in California to try to ascertain what type of information would be useful to the voters. In addition to other benefits, the use of voter focus groups in this state would establish credibility in the development of educational materials.

Then—and accounting for the results of the focus groups—there should be a multi-pronged, concerted effort made to better educate voters about judicial elections. Currently, there is no such statewide coordinated effort. The Judicial Council and the AOC should help courts set up communication networks and coordinate and share voter education practices. The recommended collaboration could take the form of outreach videos, voter guides, and public service announcements. By way of example, a video could be created featuring interviews with judicial candidates. Voter education would benefit from pilot projects and recognition programs.

Statements in voter education guides could educate voters about the judicial candidates and their state's court system. The commission noted that the California judicial branch does not provide this type of information in voter guides and that it is important to do so. General descriptions concerning the responsibilities of judges should emphasize that judicial officers must be insulated from public pressure and remain free to decide each

case fairly and impartially based on the law. Placing the responsibility for including these statements on individual judicial candidates is not ideal, as California has the highest candidate statement fees in the country, thus raising issues of fairness, accessibility, and consistency.

On the other hand, the commission agreed that candidates should participate in candidate forums and respond to appropriate questionnaires as other ways to inform and educate the public. One possibility that the commission considered in connection with candidate forums is to approach the Chief Justice about communicating the importance of judicial participation in candidate forums, perhaps in a letter to the state's judges.

Other avenues and opportunities for obtaining information on judicial elections should also be explored and pursued. Possibly, such information could be provided at libraries. A video could be created on the role of the courts in our system of government and include an explanation of how judges are appointed or elected. The video could be hosted on local courts' Web sites. Along those same lines, Web traffic to existing nonpartisan sources of information should be increased by partnering with other groups, such as bar associations. Examples of multimedia tools include the California Courts Web site and possible links to other sites.[69] One-way content delivery systems such as podcasts, YouTube–like platforms, and instant messaging should also be explored.

In addition to the above measures, which are targeted at providing information to voters, the commission recommends that a toolkit be developed for use by judicial candidates. The goal of such a toolkit would be to assist the candidates in ethically, accurately, and helpfully informing the voting public about their campaigns. It is important that the recommended candidate toolkit be neutral, not election specific, and that it be accessible by both judges and candidates. The model toolkit could be developed following focus group input and legal research and could include, for example, the following:

- Campaign conduct guidelines;
- Guidance on completing candidate questionnaires; and
- Inclusion of or links to candidate biographical information.

Education of Potential Applicants for Judgeships

Recommendation 45

The State Bar should be asked to offer an educational course to potential judgeship applicants.

Discussion: The commission considered a proposal regarding education for people who are considering applying for a judicial position that was prepared by the Ohio State Bar

[69] The commission has suggested that an opinion be sought from the AOC Office of the General Counsel on whether it is legally permissible for the California Courts Web site or local court Web sites to include links to election information.

Association and ABA Standing Committee on Judicial Independence. A copy of the proposal is attached to this report as Appendix M.[70] The commission recommends that the State Bar be asked to offer such a course as a trial program. Based on the trial program experience, the course may become part of the regular biennial conference and may also be modified and offered elsewhere.

Accountability and Judicial Self-Improvement

The judicial branch must work to enhance trust and confidence in the courts through access, procedural fairness in court proceedings, and judicial accountability. As discussed earlier in this report, assuring the public that the judiciary is accountable means, among other things, that courts and judges exhibit high standards of impartiality, lack bias, exercise courtesy and professionalism, and promote efficiency and timeliness.

The judicial branch has recognized the importance of these values. The second goal of the judicial branch's long-term strategic plan is "Independence and Accountability." Bert Brandenburg, executive director of Justice at Stake, has said that independence and accountability are of equal importance in the eyes of the public and that the road to independence is through accountability. One of the most significant hurdles, however, is the public's lack of awareness about current accountability measures for courts. The recommendations in this section of the report are designed in part to address that issue.

The commission's recommendations go beyond simply educating the public about current means of ensuring accountability, however. They also recommend the creation of a model judicial self-improvement program for voluntary use by courts or individual judges. Such a program would, in the commission's view, enhance the public's understanding of the concept of judicial accountability, as it would allow court users to formally and officially provide feedback on individual judicial performance and know that it is being considered and acted upon.[71]

Official judicial self-improvement programs—some of which are confidential, some not—that provide feedback to judges on their performance from attorneys, litigants, jurors, witnesses, and members of the public currently operate in at least 16 states.[72] (In many other states or local jurisdictions, state or local bar groups operate judicial evaluation programs providing periodic attorney feedback to judicial officers.) Although many of these official judicial self-improvement programs are conducted in states with appointed judiciaries or retention elections in which the feedback is also used for

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[70] This proposal was originally made at the ABA annual meeting in 2008 but was withdrawn for reintroduction at the midyear meeting in February 2009 in Boston. The revised version of the proposal is the one attached.

[71] Note that several of the CourTools performance measures mentioned in recommendation 48 involve surveys of court users on the court's performance as an institution, just as a judicial self-improvement program would provide public feedback on the work of individual judges

[72] See Institute for the Advancement of the American Legal System, *Shared Expectations: Judicial Accountability in Context* (2006).

retention purposes, in a number of states, including those with contested judicial elections, the feedback is used solely for self-improvement purposes.[73] The American Bar Association's February 2005 Guidelines for the Evaluation of Judicial Performance call on all court systems to develop and implement such programs.[74]

In states with contested judicial elections, the feedback consists of survey responses from attorneys, jurors, litigants, other court users, and sometimes other judges and court staff on qualities such as legal knowledge, impartiality, fairness, communication skills, temperament, calendar management, punctuality, preparation, and efficiency. Survey responses are anonymous and confidential, and responses regarding individual judges are not publicly disseminated. In some states the aggregate survey responses are used to develop appropriate judicial education and professional development programs, and in other states the individual survey responses are communicated to the presiding or administrative judge for judicial assignment or professional development purposes. In many jurisdictions a court coordinating committee oversees the program. In other jurisdictions the programs appear to operate voluntarily and without the benefit of any coordinating committee. The coordinating committees typically consist of judges, attorneys, and public members. Judges who have participated in such self-improvement programs generally praise the programs, note the usefulness of the information collected and that the information is not available from any other source, and have even requested that surveys be expanded to include additional information in the future.

Recommendation 46
A model self-improvement program should be developed for voluntary use by courts and individual judges.

Discussion: The commission engaged in considerable discussion about the use of judicial performance evaluations. Generally, there was a consensus that some sort of confidential evaluation measures would be appropriate for the purposes of judicial self-improvement. However, the commission did not agree on the specifics of such a program. Accordingly, the commission has recommended the development of a model program—possibly along the lines of those used in other states—which would then be made available for voluntary use by courts and judges.

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[73] See, for example, Marcy R. Podkopacz, *Report on the Judicial Development Survey*, Fourth Judicial District of the State of Minnesota (May 2005), *www.courts.state.mn.us/documents/4/public/Research /Judicial_Development.doc.*
[74] American Bar Association, Black Letter Guidelines for the Evaluation of Judicial Performance, Guideline 1.1 (Feb. 2005).

Recommendation 47
The public should be informed that systems are in place to deal with judicial performance issues in fair and effective ways, including elections, appellate review, media coverage, the Commission on Judicial Performance, the State Bar's Commission on Judicial Nominees Evaluation, and local bar association surveys.

Discussion: The commission believes that one of the most significant issues regarding accountability is the public's lack of awareness of current accountability measures for courts. These include elections, appellate review, media coverage, the CJP, the State Bar's Commission on Judicial Nominees Evaluation, and local bar association surveys. Public outreach and voter education efforts should inform the public of the systems that are already in place to deal with judicial performance issues in fair and effective ways.

Recommendation 48
Courts should be encouraged to use CourTools or similar court performance measures.

Discussion: Another existing judicial accountability mechanism is a set of management tools that measure court performance. Court performance measurement tools, such as the NCSC's CourTools pilot project now under way in California, are potentially very useful. Designed by the NCSC to help courts evaluate and improve their performance, the measurements may improve court processes and make court systems more accountable. Eleven superior courts in California have implemented CourTools.

One court that has implemented 10 measures of CourTools plans to post the results of its largely positive assessment on its Web site. That court is also using the findings from CourTools to update its strategic plan. And while CourTools requires more staffing time to implement, the commission agrees that CourTools provides transparency and accountability and can be modified to reduce staffing time.

Judicial Selection and Retention

Merit Selection and Judicial Selection Under the JNE Process

Recommendation 49

The State Bar's Commission on Judicial Nominees Evaluation process, a unique form of a merit-based screening and selection system that has served California well, should be retained.

Discussion: The fundamental goal of all merit selection systems is to produce the best-qualified nominees for appointment to the bench. The JNE system in California serves this goal by providing for a thorough, nonpolitical evaluation of the professional qualifications and fitness to serve of all applicants for judicial appointment submitted by the Governor to JNE. The statutory requirement that all potential appointees must undergo JNE review before appointment discourages unqualified applicants from seeking appointment to the bench and constrains Governors from nominating unqualified people for judicial vacancies.

The selection process that has come to be known as "merit selection" first appeared in 1940 with the adoption of the "Missouri Plan." The American Judicature Society's model merit selection plan calls for a judicial nominating commission to recommend nominees to the appointing authority, executive appointment, and retention elections after brief initial terms of office. Some states have a fourth component—confirmation of executive appointments. California's selection process shares many of the same features as the traditional merit selection process, except that the JNE commission evaluates only those applicants whose names are submitted by the Governor.

The pros and cons of merit selection have been debated extensively. Advocates of merit selection, including the American Judicature Society, argue that such systems strike the appropriate balance between judicial independence and accountability to the public; place the focus on professional qualifications in the initial selection of judges; and reduce or eliminate electoral campaigning, interest group influence, and fundraising from judicial selection. Critics of merit selection plans maintain that the politics of the organized bar replace the politics of contested elections and that merit-selected judges as a whole are not demonstrably more qualified or competent than their elected counterparts.[75]

In 33 states and the District of Columbia, a merit selection system is used to select some or all judges at different points in the initial selection process. No two states use precisely the same merit selection system. Fourteen states use merit selection for all judges at all times, while nine states use it only for appellate judges and in some instances for trial

[75] See Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges* (1987) 70 Judicature 228. Differences in educational and professional backgrounds were attributable to region rather than selection method.

court judges in some jurisdictions. In addition, nine states use such systems only to fill midterm vacancies on some or all levels of court. There are significant variations among states in nominating commission rules and procedures, the number of nominees sent to the appointing authority, and the binding nature of the commission's nominations on the appointing authority, among other features.[76]

The State Bar has submitted the following description of the procedure used by JNE in making its evaluation:[77]

> The volunteer commission thoroughly investigates California judicial candidates while maintaining a code of strict confidentiality. JNE has 90 days to complete its evaluation, but it cannot appoint judges or mandate the appointment of judges.
>
> Two commissioners, at least one of whom is an attorney, are assigned to investigate each candidate for a trial court appointment. At least three commissioners, one of whom is a public member, investigate each candidate under consideration for an appellate or Supreme Court appointment.
>
> JNE commissioners investigate all information in the candidate's judicial application and send out confidential comment forms to hundreds of lawyers, judges, and others who know the candidate.
>
> The commission must receive at least 50 knowing responses from the mailings. The investigating commissioners also interview the candidate. If the commissioners find any criticisms of the candidate to be substantial and credible, they are required to notify the candidate not less than four days before the interview. At the interview, the candidate is given an opportunity to respond to and present information to rebut all reported criticisms.
>
> The Commission on Judicial Nominees Evaluation considers many factors when determining the viability of a candidate for judicial office. The commission considers the candidate's industry, temperament, honesty, objectivity, respect within the community, integrity, work-related health, and legal experience. JNE construes legal experience broadly. For example, it will evaluate litigation and nonlitigation experience. It will examine legal work performed in a business or nonprofit entity, in any of

[76] For detailed information on all facets of these systems, see American Judicature Society, *Judicial Merit Selection: Current Status* (2009).
[77] E-mail dated October 21, 2008, from Joseph Starr Babcock, Special Assistant to the Executive Director, The State Bar of California, and member of the task force.

the three branches of government, and in the arena of dispute resolution. JNE will also consider experience gained as a law professor as well as experience earned in other academic positions.

JNE concludes its work by rating the candidate as exceptionally well qualified, well qualified, qualified, or not qualified. Ratings and information gathered during the investigation are not public. If a candidate is found not qualified by the commission, and the Governor appoints that candidate to a trial court, the State Bar may publicly disclose that fact. When the Governor nominates a person for the Court of Appeal or the Supreme Court, the commission makes a report at the public hearing of the Commission on Judicial Appointments for each candidate regardless of the commission's rating.

A candidate rated not qualified may request rescission of that rating within 60 days of being notified. A three-member review committee, composed of one member of the Board of Governors and two former JNE commissioners, will review the request for rescission. Should the review committee find that the JNE rules have been violated, the candidate may request a new evaluation by the commission. In 2007, approximately 13 percent of candidates were found not qualified.

Other pertinent features of JNE and its processes are discussed in more detail below.

Four levels of JNE ratings

The four levels of JNE ratings provide a helpful tool to the Governor in differentiating between various applicants for a judicial position. While the differences between "qualified" and "well qualified" may be somewhat more subjective, the differences between an "exceptionally well qualified" and a "well qualified" rating at the top and a "qualified" and "not qualified" rating at the bottom are fairly clear.

The following is the interpretation of the four ratings used by JNE in evaluating potential trial court judges and appellate justices:

Trial Judges—Definition of Ratings

- **Exceptionally Well Qualified.** Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without doubt, the person is fit to perform the judicial function with distinction.
- **Well Qualified.** Possessing qualities and attributes considered to be worthy of special note, indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.

- **Qualified.** Possessing qualities and attributes considered to equip a person to perform the judicial function adequately and satisfactorily.
- **Not Qualified.** Possessing less than the minimum qualities and attributes considered necessary to perform the judicial function adequately and satisfactorily.

Appellate Judges—Definition of Ratings

- **Exceptionally Well Qualified.** Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without doubt, the person is suited to perform the judicial function with distinction.
- **Well Qualified.** Possessing qualities and attributes considered to be worthy of special note, indicative of a superior fitness to perform the judicial function with a high degree of skill, effectiveness, and distinction.
- **Qualified.** Possessing qualities and attributes considered indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.
- **Not Qualified.** Possessing less than the qualities and attributes considered indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.

Factors involved in arriving at a JNE rating

Rule II, section 6 of the JNE rules lists the qualities and factors for consideration in evaluating judicial applicants:

> The commission seeks to find the following qualities in judicial candidates. However, the absence of any one factor on the lists below is not intended automatically to disqualify a candidate.
>
> Qualities for all judicial candidates: impartiality, freedom from bias, industry, integrity, honesty, legal experience, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, job-related health.

In addition, for:

> Trial court candidates: decisiveness, oral communication skills, patience.
>
> Appellate court candidates: collegiality, writing ability, scholarship.
>
> Supreme Court candidates: collegiality, writing ability, scholarship, distinction in the profession, breadth and depth of experience.

Other criteria are listed in Government Code section 12011.5(d):

> In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience. The State Bar shall consider legal experience broadly, including, but not limited to, litigation and nonlitigation experience, legal work for a business or nonprofit entity, experience as a law professor or other academic position, legal work in any of the three branches of government, and legal work in dispute resolution.

The criteria used by JNE in evaluating an applicant for judicial office are similar to those used in other states. They are also consistent with the evaluative criteria recommended by the American Judicature Society in its training materials for members of judicial nominating commissions.[78]

Recommendation 50
In order to increase trust and confidence in the judicial selection process, the background and diversity of the commission members should be given more publicity, including by placing photographs of the members on the JNE Web site and making that site more accessible on the State Bar's home page.

Discussion: Public trust and confidence in the findings of JNE will increase if the diverse membership of JNE itself is better known to the public. The State Bar provides background information about the JNE membership on its Web site. Under the enacting statute, "The commission is to be broadly representative of the ethnic, gender, and racial diversity of the population of California."[79]

Recommendation 51
Legislation should be sponsored to require that a JNE rating of "not qualified" (and thus, by the absence of announcement, a rating of at least "qualified" or better) for a trial court judge be made public automatically at the time of appointment of a person with that rating.

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[78] These criteria include impartiality, integrity, judicial temperament, industry, professional skills, community contacts, social awareness, collegiality, writing and speaking ability, decisiveness, suitable age, and good health. (See Marla N. Greenstein and Kathleen M. Sampson, *Handbook for Judicial Nominating Commissioners* (American Judicature Society, 2d ed., 2004).)
[79] See *http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10111&id=1056*.

Recommendation 52
Legislation should be sponsored to make the current practice of releasing the JNE rating for a prospective appellate justice mandatory and permanent.[80]

Discussion of recommendations 51–52: Currently the JNE rating of a prospective appellate justice is released at the time of the Commission on Judicial Appointments hearing. While Government Code section 12011.5(h) permits either the Commission on Judicial Appointments or the State Bar Board of Governors discretionary authority to request or release any rating, the practice is that this information is always released. Nonetheless, there is no requirement that this be done, and the Board of Governors has full discretionary authority, after providing notice to the applicant,[81] to release or not to release "not qualified" ratings for trial court judge appointees.

The commission believes that disclosure of all "not qualified" ratings, particularly if done automatically, would increase the public's confidence in the process. While it is possible that release of all JNE ratings could dissuade some potential applicants, if the change in procedures were to be well publicized, all potential appointees would have fair notice that evaluation results are public.

Because the distinctions between the various forms of qualified ratings are more subtle and the applicant is qualified in all cases, the disclosure of specific ratings of "exceptionally well qualified," "well qualified," or "qualified" is not as important and may be unfair to trial court judges, who are subject to contestable elections. The same issue (i.e., release of the specific level of a qualified rating) does not apply to appellate justices, who are subject to uncontested retention elections.

In the commission's opinion, making the recommended changes by a statute rather than a rule will ensure greater permanency of the requirement.

Recommendation 53
The release of a rating by JNE should not be accompanied by a statement of reasons.

Discussion: The investigation and evaluation process by JNE is confidential, which enhances the accuracy and completeness of the information received. The release of reasons would compromise this confidentiality and ultimately the value and validity of the rating system. The release of reasons might also have a chilling effect on the gathering of information for the rating process if the commenter knows that his or her comment, even in a disguised or anonymous form, will be made public.

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[80] A number of the recommendations in this report propose language amending a current legal authority. All such proposed amendments are in Appendix N to this report.
[81] JNE Rules and Procedures, rule III, § 2(b)(4).

Recommendation 54
The following Web sites should explain the judicial appointment process and link to each other:

- The judicial branch's California Courts Web site; and
- The State Bar's JNE Web site and the Governor's Judicial Application Web site, both of which should be more user-friendly, contain appropriate information about JNE procedures and the rating system, and include videos explaining the judicial appointment process.

Discussion: The judicial branch's California Courts Web site should explain the judicial appointment process and link to both the State Bar's JNE Web site and the Governor's Judicial Application Web site with appropriate information about JNE procedures and the rating system. Both the JNE's and the Governor's Web sites should be more accessible and should contain videos explaining the judicial appointment process.

Recommendation 55
Law schools should be encouraged to provide information about the judicial appointment process to law students by, for example, encouraging qualified JNE members, both past and present, to give presentations at law schools.

Recommendation 56
To increase public knowledge of the judicial selection process, JNE should be encouraged to have its members speak to local and specialty bar associations, service organizations, and other civic groups.

Discussion of recommendations 55–56: Providing the public with knowledge of JNE and the judicial appointment process will help increase public confidence in that process. Further, JNE evaluation is a statutorily mandated function, and there do not appear to be any disadvantages to publicizing the procedures that it uses.

Recommendation 57
The State Bar should amend the JNE rules to require that any member of the State Bar Board of Governors who attends a JNE meeting comply with the JNE conflict of interest rules.[82]

Discussion: JNE rules presently provide that all commissioners complete a statement under oath that they have read and understand rule IV, which addresses conflicts of interest, and that they agree to comply with its provisions. Members of the Board of Governors who attend a JNE meeting should complete the same statement that JNE commissioners sign.

[82] See Appendix N.

The JNE rules currently provide that a member of the Board of Governors is subject to the same confidentiality rules as JNE commissioners. It is appropriate to extend this to the conflict of interest rules as well.

Recommendation 58
A study should be undertaken to develop effective methods of increasing public knowledge of judicial candidates and their qualifications, including development of a model of judicial candidate evaluation that can be used by county bar associations and others. The model should include the method of selecting appropriate members of the entity that conducts the judicial candidate evaluations, the timing of judicial candidate evaluations, and effective dissemination to the public.

Discussion: One of the most serious challenges presented by California's current system of contested judicial elections for trial court judicial positions[83] is that voters often are not well informed about the qualifications of judicial candidates to perform the complex and specialized duties required of trial court judges.[84] Unlike appointments to the bench where the Commission on Judicial Nominees Evaluation conducts a comprehensive evaluation of the qualifications of judicial applicants and reports its evaluation to the Governor, there is no similar process for the evaluation or reporting of the qualifications of those candidates who seek office by election.

An additional challenge arises when one of the candidates in a contested election is an incumbent judge. In retention elections the issue is solely whether the incumbent should remain in office and the election may thus appropriately serve as a judicial accountability mechanism focusing squarely on whether the incumbent's performance in office warrants retention. In a contested election in which one candidate is an incumbent, however, the issue for voters is not simply whether the incumbent's performance warrants retention, but which of the candidates is better suited to serve in the office. Contested elections involving an incumbent are not a hospitable environment for a single-minded focus on the objective of judicial accountability because voters must balance the objective of holding the incumbent accountable for his or her past performance against the other objective of selecting the most qualified of the candidates to serve in the future.

Yet a third challenge in contested elections involving an incumbent is that voters must to some extent compare apples and oranges, i.e., the qualifications and experience of a person with a record of service in judicial office for some period of time against the qualifications and experience of a candidate without such a record. Without further information about the respective qualifications of the candidates, voters are often at a loss and vote for neither candidate.

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[83] A review of data supplied by the California Judges Association indicates that on average there are 28 contested or open superior court elections on the ballot in each general election cycle. This ranges from a high of 47 elections (2002) to a low of 15 (2004), with a median number of 31. Some of the data may be incomplete, however, and the 1992 election year is excluded because of lack of data on open elections.
[84] See findings at pp. 10–11 of this report.

In order to address the public's need for more information about candidates for judicial office, the commission in its draft report proposed extending the JNE rating system to all candidates in contested judicial elections. Currently JNE evaluates only persons being considered for judicial appointment who are referred by the Governor. There is no process for the evaluation of candidates for judicial office who are seeking a judgeship by either opposing a sitting judge in an election or seeking election to an open position.[85]

This recommendation resulted in a large number of negative comments. The most significant objections were based on, among other things, the limited resources available to JNE to evaluate all candidates in a short period of time; the long time required for completion of the thorough JNE process, including appeals, which would greatly increase the time period from filing to election; and the difficulty of implementing such a process in counties of relatively small population.

Many commentators noted as a possible alternative, however, that bar associations in many major California counties, including Los Angeles, regularly perform evaluations of both sitting judges running for reelection and attorney challengers. These evaluations provide valuable information for voters, although dissemination of the results of these evaluations is often limited.

Ultimately, the commission concluded that rather than recommending the utilization of a JNE evaluation—a process that may not be workable—a study should be conducted, building on the experience of local bar evaluations, to determine effective ways of increasing public knowledge of judicial candidates and their qualifications. This would include developing a model of judicial candidate evaluation that can be broadly used by county bar associations and others.[86] The model should include the method of selecting appropriate members of the entity that conducts the judicial evaluations and methods of effective dissemination to the public.

The commission recognizes that processes for public reporting of mandatory evaluations regarding the judicial performance of incumbent judges have emerged in many states as appropriate and successful mechanisms for achieving judicial accountability. However, those are states with retention elections or reappointment processes for trial court office, and such processes have not for the reasons described above ever been extended to judges

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[85] See fn. 83.

[86] The only state in which a state-sponsored entity currently evaluates potential judicial candidates in contested elections is New York, which established independent judicial election qualifications commissions in early 2007. These statewide screening panels, which consist of both lawyers and non-lawyers, are charged with reviewing the qualifications of candidates within their districts and making public a list of candidates found qualified to seek judicial office. Participation in these evaluations is voluntary. It is too early to assess the effectiveness of these commissions. See also Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Contested Judicial Elections* (2007) 29 U. Ark. Little Rock L.Rev. 725.

subject to contested election.[87] The ABA Guidelines for the Evaluation of Judicial Performance also conclude that in the case of contested elections it may be inappropriate for the judicial branch or any entity using public funds to disseminate performance evaluations of incumbent judges running for reelection.[88]

It is critical that the evaluating entity or entities enjoy the confidence of the candidates and the public. The members of such an entity should include lawyers and nonlawyers, and be well qualified, bipartisan, diverse, and balanced. The authority to appoint members of the entity should be shared among several credible and respected members of the community. At least at the outset, candidate participation should be voluntary. Voluntary participation would serve as a useful test of the program and avoid the issue of whether mandatory participation constitutes an unconstitutional additional qualification for judicial office. [89] The judicial candidate evaluation process may also require that the time prescribed by statute between the notice of intent to seek judicial office and the filing date be increased.

Expanding JNE evaluations to all applicants for gubernatorial appointment

One alternative to how JNE determines whom to evaluate would require an evaluation of every person who submits an application to the Governor, as opposed to the current system, under which only those applicants whose names are submitted to JNE by the Governor are evaluated. This raises a question, however, as to who should narrow down the initial group of applicants.

The current system of having the Governor narrow down the list seems more effective and efficient because the Governor has a variety of considerations to account for, some of which are not factors evaluated by JNE. The reduction of the pool of applicants by the Governor before JNE evaluation will still ensure that those who are eventually appointed have been evaluated by JNE without burdening JNE with evaluating applicants that would be unacceptable to the Governor.

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[87] See, Kourlis and Singer, fn. 17, *supra*.

[88] Guideline 4.1.2. The ABA recommends that bar associations provide voters with relevant information about incumbent judges in states where judges are selected in contested elections.

[89] Mandating that a judicial candidate submit to an evaluation as a condition of seeking judicial office could possibly be unconstitutional, absent its placement in the California Constitution, because the Legislature lacks authority to add qualifications or requirements for judges beyond what is set forth in the state Constitution. (*People v. Chessman* (1959) 52 Cal.2d 467, 500.) The current provision concerning appointments does not run afoul of the same provision because the requirement that the candidate's name be submitted to JNE is placed on the Governor. (Gov. Code, § 12011.5.) Arguably there could be a similar requirement for the registrar of voters in each county to submit the names to the evaluating entity. Still, without the candidate's cooperation, it is questionable whether a valid evaluation could be obtained. The requirement that the candidate submit his or her name to evaluation and cooperate with the evaluating entity, enshrined in the Constitution, would both ensure more valuable reports and be an indication of the value California places on qualified candidates.

Diversity of the Judiciary

The commission agrees that an important component of judicial selection in California is examining how to increase diversity among the judiciary. Other states are in accord, and some have placed aspirational language about judicial diversity into their state constitutions. For example, article 6, section 37(C), of the Arizona Constitution reads:

> A vacancy in the office of a justice or a judge of such courts of record shall be filled by appointment by the governor without regard to political affiliation from one of the nominees whose names shall be submitted to him as hereinabove provided. In making the appointment, the governor shall consider the diversity of the state's population for an appellate court appointment and the diversity of the county's population for a trial court appointment, however the primary consideration shall be merit.

The commission concluded that efforts to place such aspirational language in the California Constitution should not be pursued. In the commission's view, there would be little to be gained by pursuing such language in lieu of taking other action that may actually help gain a more diverse bench.

Recommendation 59

The courts should be directed to consider, when making appointments of subordinate judicial officers, both the diverse aspects of the applicants and the applicants' exposure to and experience with diverse populations and their related issues.[90]

Discussion: One of the sources of judicial appointments is from the subordinate judicial officers (SJOs) who serve the courts.[91] Thus, to the extent that the diverse nature of that group—either in terms of its own diversity or its experience with diverse populations—can be increased, the likelihood of more diverse judicial appointments also will increase. This is one area where the judicial branch has control and can help promote a more diverse bench. Any rule of court adopted on this issue should make clear that these qualities are not required but desired. Experience with diverse populations may well be the more important quality.

Recommendation 60

The Commission on Judicial Nominees Evaluation should gather information regarding judicial applicants' exposure to and experience with diverse populations and issues related to those populations and should then communicate this information to the Governor.

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[90] See Appendix N.

[91] Of the 1,482 superior court judges in California as of October 2008, 105 judges (7.1 percent of the total) were former SJOs. Of the 1,263 judges who first obtained office by appointment, 93 (or 7.4 percent of the total) were former SJOs.

Discussion: A judicial candidate's experience in working with diverse populations is an important consideration that will serve to increase the trust and confidence of California's diverse public in its judiciary. This includes the positive aspects of cultural awareness and working with diverse populations, as well as negative attitudes or actions toward people from diverse backgrounds. For example, while some might believe that a person who keeps his or her eyes focused on the ground is being disrespectful, in that person's culture such behavior may actually be one of respect. When evaluating any particular applicant, JNE is not responsible for and cannot appropriately assess how the racial, religious, economic, or practice background of that applicant might affect the overall makeup of the bench.

The commission engaged in intense discussions as to the appropriate role JNE should play with respect to any review of a particular judicial applicant's exposure to and experience with diverse populations. It was determined that because JNE is not the appointing authority, but rather assesses qualifications, an applicant's diverse background is not an appropriate evaluative factor to be considered. Concern was expressed that cultural diversity, as an evaluative factor, would be too difficult to measure using the JNE process.

While the commission does not recommend that an applicant's race, ethnicity, gender, religion, disability, sexual orientation, or other diversity *characteristics* be considered as an evaluative factor, it is important for the Governor to be aware of and to consider an applicant's *exposure to and experience with* diverse populations. The JNE process should include a means by which this information can be collected and communicated in summary form to the Governor's office. This procedure will enhance the selection process and will help to ensure that this important information is made available to the Governor's office.

Recommendation 61
The Governor should consider an applicant's exposure to and experience with diverse populations and issues related to those populations and request this information on the judicial application form.

Discussion: The commission recognizes that the Constitution gives the Governor the unqualified duty to fill vacancies in judicial offices.[92] Because most trial court judges and all appellate court justices originally take office by virtue of gubernatorial appointment, the exposure to and experience with diversity among the appointees of a Governor can dramatically affect the presence of those qualities on the bench.

[92] "[T]he Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins." (Cal. Const., art. VI, § 16(c) for superior court judges); "The Governor shall fill vacancies in those courts by appointment." (Cal. Const., art. VI, § 16(d)(2) for appellate court justices).

Although the Governor has unfettered discretion under the Constitution in making judicial appointments (except for the constitutional qualifications for office), the commission believes that issues of diversity should be considered by the Governor in the course of exercising that discretion. Of course, the weight given to this factor in any particular case would be solely within the Governor's discretion.

Recommendation 62
The judicial branch's public outreach programs should encourage qualified members of the bar to consider applying for judicial office.

Discussion: Part of any effort to increase diversity on the bench is increasing the diversity of those who apply for judicial positions. As discussed above, increasing the diversity of SJOs is one partial solution. Increasing the diversity of the applicant pool generally is another solution, and the judicial branch's public outreach efforts, which are discussed in great detail above, should encourage all qualified members of the Bar to consider applying for judicial office.

Citizenship as a qualification to become a judge
The commission considered whether to recommend sponsoring a constitutional amendment to require that a person be a U.S. citizen in order to become a judge in California. There is currently no such explicit requirement in this state,[93] and there is likely no implicit requirement. Currently only 20 states have an explicit constitutional or statutory requirement that judges be U.S. citizens. However, it is an implicit requirement in states where judges must be licensed attorneys or state bar members and licensure or bar membership is limited to U.S. citizens.

The commission feels that it is unlikely that a noncitizen would be appointed or elected a judge. Thus, the commission has not recommended sponsoring a constitutional amendment; doing so would, in the commission's opinion, be appropriate only in the context of recommending other constitutional amendments.

[93] The requirements in the Constitution do not state that a judge must be a citizen. (See Cal. Const., art. VI, § 15 [imposing only experience requisites including bar membership].) Case law holds that the Legislature lacks authority to add qualifications or requirements for judges beyond what is set forth in the state Constitution. (*People v. Chessman* (1959) 52 Cal.2d 467, 500.) The requirements for bar admission are similarly silent on the issue of citizenship. Of the eight specified requirements for admission, none speaks to residency or citizenship of the candidate. (Compare Cal. Const., art. IV, § 2(c) [requiring citizenship for members of the Legislature] and art. V, § 2 [requiring citizenship of the Governor].)

California's Electoral Process at Both Trial and Appellate Court Levels

In addressing judicial selection and retention, the commission evaluated California's current trial and appellate electoral processes, with an eye toward considering whether any aspects of those processes warrant recommended changes. The issues that were examined are discussed below.

Increasing the length of trial court judges' terms of office

The commission believes that the present term of six years for a trial court judge should be retained. Judicial officers currently have the longest term of office of any elected officials in California. The current term length for trial court judges appears to strike an appropriate balance between public accountability and judicial impartiality. Indeed, most judges up for reelection do not face contests. Although a term of eight years might provide a marginally greater protection of judicial impartiality,[94] a judge would still stand for election three times during a typical two-decade judicial career.

Reelection by contestable election versus retention election at the trial court level

The present system of contestable trial court elections following an initial appointment or election is preferable to the other systems considered by the commission: retention elections, triggered retention elections, or hybrid systems. Under the current system, a judge appears on the ballot only if an opponent files to run against the judge. If there is no opponent, the judge's name does not appear on the ballot and the judge is automatically reelected. Most trial court judges retain their offices unopposed. A discussion of each of the alternatives considered by the commission follows.

Regular retention elections

The California Constitution provides, "The Legislature may provide that an unopposed incumbent's name not appear on the ballot."[95] The Legislature has so provided.[96] A retention election system would require that every judge's name appear on the ballot, contrary to this policy. The phenomenon of ballot roll-off, in which voters cast votes for major offices but do not vote for other offices, such as judicial offices, could result in the removal of a judge from office for no reason other than the length of the ballot. This problem would be exacerbated in large counties with many judicial positions.

Triggered retention elections

The alternative of a triggered retention election has several disadvantages, depending on the type of trigger. Initially, any triggered system may imply that a judge's name appears on the retention ballot only if the judge's performance has resulted in some opposition to his or her retention. Thus, such judges may attract a base of negative votes simply by

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[94] Some studies indicate that judges tend to be less concerned about adverse public or political response to a decision when an election is less imminent.
[95] Cal. Const., art. VI, § 16(b).
[96] Elec. Code, § 8203.

being on the ballot, and a number of individuals may vote against any judge in a triggered retention election. A judge facing retention under a triggered system, therefore, may start with a significant negative base without regard to his or her actual performance or qualifications. No state currently has a triggered retention election system.

If the trigger is a petition of the voters, then interest groups, disgruntled litigants, political parties, or others with an axe to grind against a particular judge or in opposition to a single decision by a judge might be encouraged to launch campaigns to force judges to appear on the retention ballot. This could inject interest group politics into judicial elections in direct contravention to what the commission is trying to accomplish. In addition, some might see a system with a petition as the only triggering system as equivalent to a lifetime appointment subject only to recall.

The only other theoretically possible trigger would be a judge's unacceptable performance evaluation score. California does not have any formal, mandatory, judicial performance evaluation process designed for this purpose, nor does any other state. A similar proposal was made in Illinois in the late 1990s but was not adopted. The commission believes that its recommendations regarding evaluation of judicial candidates in contested elections are far more sound.

Hybrid elections

The commission also chose not to recommend a hybrid system in which there is an appointment followed by an initial contestable election followed by retention elections. This system is used in part in Illinois and Pennsylvania, neither of which is generally viewed as a positive model for judicial selection (although that reputation is primarily due to the partisan influence on judicial elections). New Mexico uses a similar system, with a nominating commission appointment followed by a contestable partisan election followed by retention elections. The opposition to this system is based on the same reasons as opposition to standard and triggered retention elections.

Open elections versus all initial selections by appointment at the trial court level

The present system, which permits open elections—that is, an election in which there is no incumbent judge on the ballot—should be retained. This is important to provide greater opportunities for judicial service.

While some concerns have been expressed that open elections can lead to partisan battles, contestable elections appear equally subject to that risk. In addition, open elections provide a useful alternative for good candidates who might not otherwise be appointed. A prohibition on open elections could also potentially lead to a less diverse bench in the event that governors consistently fail to nominate and appoint a heterogeneous pool of judges. The commission notes, however, that most studies of judicial selection methods and diversity have found little consistent correlation between the two. In some states, women and people of color appear at a disadvantage in statewide contested election

systems, while contested elections in other states have resulted in significant gains in judicial diversity. The diversity of the eligible pool of potential judges; the political dynamics, history, and culture of the state or jurisdiction; and other factors unrelated to the formal selection method appear to have a greater influence on the overall diversity of the bench.

Recommendation 63
An amendment should be sponsored to change the constitutional provision for the recall of a judge—which currently requires a petition with signatures of 20 percent of those voting for a judge in the most recent election—to require a petition with signatures of 20 percent of those voting for district attorney, the only county official elected in every county.[97]

Discussion: Because races for judicial office are likely to draw a low number of voters, using the number of voters who voted for that office in the most recent election as a base provides an inappropriately low threshold for mounting a recall petition against a judge. The commission instead recommends using the number of voters for the office of district attorney as a base, as district attorney is the only county official that is elected in every county.

Recommendation 64
A constitutional amendment should be sponsored to provide that a trial court judge shall serve at least two years before his or her first election.[98]

Discussion: Judges should have an opportunity to build a record on which they can run. The current system, which measures the time to the first election based on the occurrence of the vacancy rather than the appointment of the judge, may unfairly penalize a judge based on how promptly the vacant office is filled.[99] A strong argument can be made that two years is a minimum acceptable period of time for a judge to establish a record of service. Some highly qualified attorneys may be discouraged from abandoning a rewarding or lucrative practice to seek judicial appointment if they face the very real possibility of encountering a strong electoral challenge shortly after assuming the bench.

Recommendation 65
Legislation should be sponsored to change the number of signatures needed for placing an unopposed judicial election on the ballot for a potential write-in contest from the current level of 100 signatures to 1 percent of the voters for district attorney in the last county election but not fewer than 100 signatures.

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[97] See Appendix N.
[98] *Id.*
[99] A chart showing initial term lengths for interim appointments nationwide is attached to this report as Appendix O.

Recommendation 66
Legislation should be sponsored to amend current law—which provides that an unopposed judge may be challenged by write-ins at either or both the primary election and the general election—to permit only one challenge, which should be at the first (i.e., primary) election.

Discussion of recommendations 65–66: Current law provides that a petition with only 100 signatures (no matter the size of the county) can force an unopposed judge's name onto the ballot because of a potential write-in campaign.[100] This extremely low threshold can result in a judge being "targeted" for improper reasons. Increasing the number of threshold signatures needed to 1 percent of the voters for district attorney in the last county election (or 5 percent of the level for recall of a judge), but not fewer than 100, seems an appropriate number of signatures to demonstrate an interest where a person truly is seeking to run a write-in campaign. The application of such an amendment would, for example, raise the number of signatures in Los Angeles County, based on the most recent election, to just over 7,000 out of a population of 9,878,554 in 2007, based on a U.S. Census Bureau estimate.

In addition, there does not appear to be any reason why an unopposed judge should be subject to a write-in challenge at both the primary and general elections when, if the judge were opposed at the primary election, he or she would not be subject to a write-in challenge at the general election.[101]

Recommendation 67
An amendment should be sponsored to article VI, section 16 of the California Constitution to reorder the subdivisions therein and make minor wording changes for the sake of clarity.

Discussion: The subdivisions in section 16 of article VI of the California Constitution are currently in a somewhat confusing order. Subdivisions (a) and (d) deal with appellate offices, while subdivisions (b) and (c) deal with superior court offices. The commission recommends a complete reordering of the language of the section to make it clearer. Subdivision (a) would cover terms, elections, and filling of vacancies for Supreme Court and Court of Appeal justices, and subdivision (b) would cover superior court judges.

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[100]The number of signatures required to submit nomination papers for the purpose of challenging an incumbent is 20, and this recommendation is not intended to alter that number. (See Elec. Code, § 8062(a)(3).) Rather, this recommendation applies only to write-in situations, i.e., elections where only the incumbent has filed nomination papers, meaning that he or she would be unopposed but for a write-in campaign. The commission's goal is to reduce the ease of conducting last-minute, frivolous write-in campaigns.
[101] See Appendix N.

The recommended reordering of the provisions is not intended to fundamentally alter the pattern of superior court contested elections and appellate court retention elections. The proposed amendments to section 16 are presented in two forms. Each change is shown as it would be made to the current organization of section 16,[102] and then the entire reorganized section is shown as a repeal and reenactment of the existing language.[103]

The current constitutional provisions are confusing concerning which officers are voted on at which elections. The term "general election" as used in the Constitution has two meanings, referring both to the direct primary election (currently held in June of even-numbered years) and the runoff or general election (held in November of even-numbered years). For superior court positions, it is possible (and it occurs with some regularity) that no candidate will receive a majority of votes at the first election and a runoff will be necessary. The normal process is to hold the initial election at the direct primary, with a runoff, if needed, in November. The proposed language makes explicit these two election dates.[104]

The proposed language also makes clear that when the office that a judge held was subject to the electoral process in that year, and at least one candidate has qualified for the election for that office before the incumbent leaves office, the election goes forward for a full term beginning the following year.[105]

Term of office of appellate justices

Judicial officers currently have the longest terms of office of any elected official in California. While this is appropriate, the commission concluded that there has been no demonstrated need for increasing the length of a judge's term. The current term length for appellate court justices appears to strike an appropriate balance between public accountability and judicial impartiality. Indeed, nearly all justices up for retention are confirmed.

While an argument could be made for lifetime appointments, especially of appellate court justices, who grapple with more politically sensitive cases,[106] a counterargument could be made for contestable elections. Outside of the federal system, most states do not have lifetime appointments for their judiciary. The current system of 12-year terms with retention elections seems an appropriate compromise between lifetime appointments and 6-year terms subject to contestable elections.

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[102] *Id.*
[103] *Id.*
[104] This language appears in various provisions of the revision on section 16.
[105] This is the holding in *Stanton v. Panish* (1980) 28 Cal.3d 107. See Appendix N.
[106] "The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. . . . [I]t is a[n] . . . excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." (*The Federalist No. 78* (Alexander Hamilton).)

Recommendation 68
A constitutional amendment should be sponsored to provide that retention elections for appellate justices be held every two years (during both the gubernatorial and the presidential elections) rather than the present system of every four years (during the gubernatorial elections).[107]

Discussion: With elections every two years, there would be 50 percent fewer retention elections on a ballot and a concomitant reduction in ballot fatigue. Based on historical trends, elections in presidential years also would have somewhat greater turnout than elections in gubernatorial years. With elections every two years instead of every four, the length of time a person would serve before facing the initial retention election could be reduced by up to two years.

Recommendation 69
A constitutional amendment should be sponsored to provide that following an appellate justice's initial retention election, that justice serves a full 12-year term, rather than the current system of a 4-, 8-, or 12-year term, depending on the length of term remaining for the previous justice holding that seat.[108]

Discussion: Under the current system, at the first retention election, a justice is elected to the remaining term (or a full term if there is no remaining term) of his or her predecessor. This means that the term is 4, 8, or 12 years. Under the commission's recommendation, a justice would be retained for a full 12-year term at each retention election.

An exception would be made, however, when a 12-year term for a new justice would result in more than three justices from the Supreme Court or more than two justices from the same division of a Court of Appeal being up for retention at the same time. This exception would spread out the retention elections in a manner similar to the "one-third every four years" originally envisioned by the Constitution.

Recommendation 70
A constitutional amendment should be sponsored to provide that an appellate justice serve at least two years before the first retention election, paralleling recommendation 64 above concerning trial court judges.[109]

Discussion: Under the current system, a justice may face an initial retention election within a short time, i.e., less than a year following his or her appointment. The discussion

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[107] See Appendix N.
[108] *Id.*
[109] See Appendix N.

presented with recommendation 64 above for allowing more time before an election for trial court judges is equally relevant here.

Recommendation 71
Further study should be made of ways to help ensure that judicial vacancies are filled promptly.

Discussion: Vacant judicial positions contribute to a backlog in the courts, delay justice, and potentially reduce the quality of justice. The commission recommends that further consideration be given to methods to ensure more prompt action on judicial vacancies.[110]

[110] See, e.g., Pub. Resources Code, § 25206. Under that provision, which the commission does not necessarily recommend for judicial vacancies, the Governor is required to fill vacancies in the State Energy Resources Conservation and Development Commission within 30 days of the date a vacancy occurs or the right to make the appointment falls to the Senate Rules Committee.

Consolidated List of Recommendations

Judicial Candidate Campaign Conduct

1. The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."

2. The commentary to canon 4B of the Code of Judicial Ethics should be amended to encourage judges to educate the public on the importance of an impartial judiciary.

3. The commentary to canon 5B of the Code of Judicial Ethics should be amended to encourage judicial candidates to discuss their qualifications for office and the importance of judicial impartiality.

4. Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

5. The Code of Judicial Ethics should be amended by adding a new canon 3E(2), providing 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.

6. A definition of "commitment" that includes "pledges" and "promises" should be added to the Code of Judicial Ethics.

7. An unofficial statewide fair judicial elections committee should be established to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in statewide and regional elections and in local elections where there is no local committee.

8. The formation of unofficial local fair judicial elections committees to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in local elections should be encouraged.

9. A model campaign conduct code for use by the state and local oversight committees should be developed.

10. The Code of Judicial Ethics should be amended to require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct.

11. Judicial candidate training on ethical campaign conduct should include:

    (a) Identifying issues raised by judicial candidate questionnaires;
    (b) Distributing a model letter and a model questionnaire that candidates can use in lieu of responding to an interest group questionnaire;
    (c) Using the advisory memorandum on responding to questionnaires prepared by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight;
    (d) Encouraging candidates to give reasoned explanations for not responding to improper questionnaires rather than simply citing advisory opinions;
    (e) Using candidate Web sites; and
    (f) Explaining why partisan activity by candidates is disfavored.

12. Both the California Judges Association's Judicial Ethics Hotline and the new Supreme Court Committee on Judicial Ethics Opinions should be publicized as resources that judicial candidates can use to obtain advice on ethical campaign conduct.

13. Collaboration among the Administrative Office of the Courts, State Bar, California Judges Association, and National Center for State Courts should be recommended to develop brochures to educate judicial candidates.

14. The sentence "This 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" should be added to the commentary following canon 3B(9) of the Code of Judicial Ethics, but the prohibition against public comment on pending cases should not be extended to attorney candidates for judicial office.

15. The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

16. Local county bar associations should consider creating independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

17. The California Judges Association's Response to Criticism Team and its network of contacts should be publicized.

18. The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.

19. An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose judicial candidates.

20. Judicial campaign instructional materials providing best practices regarding the use of slate mailers should be developed.

21. Judicial candidates should be advised to obtain written permission before using an endorsement and to clarify which election the endorsement is for, to honor any request by an endorser to withdraw an endorsement, and to request written confirmation of any oral request to withdraw an endorsement.

22. Judicial candidates should be prohibited from seeking or using endorsements from political organizations," as defined in the terminology section of the Code of Judicial Ethics.

23. Instructional materials about the importance of truth in advertising should be developed.

24. Canon 5 of the Code of Judicial Ethics or its commentary should be amended to place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements, to encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations.

25. The Code of Judicial Ethics should be amended to add a list of prohibited campaign conduct.

26. A letter—to be sent by the courts to county registrars before each election cycle—should be developed addressing permitted use of the title "temporary judge" or "judge pro tem" by candidates.

27. Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" or "judge pro tem" may be properly used.

28. The State Bar should be encouraged to discipline attorney candidates who engage in campaign misconduct.

Judicial Campaign Finance

29. A system should be adopted under which each trial court judge is required to disclose to litigants, counsel, and other interested persons appearing in the judge's courtroom all contributions of $100 or more made to the judge's campaign, directly or indirectly. Specifically:

    (a) The commentary to the disclosure provision in canon 3E(2) of the Code of Judicial Ethics should be amended to require a trial judge to maintain an updated list of campaign contributions of $100 or more and to disclose to litigants appearing in court that the list is available for viewing in the courthouse and online;
    (b) The commentary to canon 3E(2) should be amended to state that the obligation to disclose campaign contributions continues for a minimum of two years after the judge assumes office; and
    (c) The commentary to canon 5B should be amended to cross-reference the proposed new commentary to canon 3E(2).

30. Each trial court judge should 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 judge's campaign, directly or indirectly, subject to the following:

    (a) The contribution level at which disqualification shall be mandatory shall be the same as the level, specified in Code of Civil Procedure section 170.5(b), at which a judge is considered to have a "financial interest" in a party, requiring disqualification;
    (b) Notwithstanding the above mandatory disqualification amount, trial court judges shall continue to disqualify themselves based on contributions of lesser amounts when doing so would be required by Code of Civil Procedure section 170.1(a)(6)(A);
    (c) The Judicial Council should recommend that the amount specified in Code of Civil Procedure section 170.5(b)—which, as of the date of this recommendation, is $1,500—be periodically reviewed and adjusted as appropriate;
    (d) The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
    (e) The obligation to disqualify shall begin immediately on receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

31. Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

32. Appellate justices' campaign finance disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State Web site.

33. Each appellate justice should 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, subject to the following:

    (a) For justices of the Courts of Appeal, the contribution level at which disqualification shall be mandatory shall be the same as the level, stated in canon 3E(5)(d) of the Code of Judicial Ethics, at which a justice is considered to have a "financial interest" in a party requiring disqualification;
    (b) For justices of the Supreme Court, the contribution level at which disqualification shall be mandatory shall be the same as the contribution limit, stated in Government Code section 85301(c) and California Code of Regulations title 2, section 18545, in effect for candidates for Governor;
    (c) Notwithstanding the above mandatory disqualification amounts, appellate justices shall continue to disqualify themselves based on contributions of lesser amounts when doing so would be required by canon 3E(4) of the Code of Judicial Ethics;
    (d) The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
    (e) The obligation to disqualify shall begin immediately on receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

34. Legislation should be sponsored prohibiting corporations and unions from expending treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with campaigns for judicial office.

35. Legislation should be sponsored to require that all candidates for judicial office—regardless of their total dollar amount of contributions received and/or expenditures made—be required to file in some electronic format with the California Secretary of

State's office all campaign disclosure documents that they would also be required to file in paper form.

36. Spending in connection with judicial elections should be closely observed for developing trends that would indicate a need to reconsider whether to sponsor legislation to create a system of public financing at the trial court or appellate court level, but such legislation should not be sponsored at this time.

Public Information and Education

37. To improve transparency and better inform the public of the role and operations of the state court system and to enhance public outreach, the judicial branch should identify and disseminate essential information that would increase both the public's access to justice and its opportunities for input. To that end, the following are recommended:

    (a) A leadership advisory group should be appointed to oversee, identify, and coordinate public outreach programs and opportunities for public input; to establish benchmarks of good practice; and to promote the assembly of local teams to assist courts with local outreach programs;
    (b) The AOC should collect, summarize, and evaluate public outreach resources and methods for public input that are currently available for judges and court administrators and should also collect, summarize, and evaluate educational materials for K–12 teachers and for judges and court administrators making classroom visits;
    (c) The AOC should maintain a list of resources for local courts that will reflect the diversity of the state and explore ethnic media outlets;
    (d) Web sites should be enhanced to include the role of the judicial branch and explain how judges are elected or appointed; information concerning how judges are selected or elected should be placed prominently on the California Courts Web site;
    (e) A compelling video on the role of the judicial branch should be created for use in various venues and should be posted on local court Web sites;
    (f) The judicial branch should view any public gathering place—such as jury rooms or nonjudicial settings—as an opportunity to inform the public about the role and importance of the judiciary in a democracy;
    (g) Courts should be identified to pilot programs dealing with community outreach and education; and
    (h) Information about how judges are elected or appointed should be incorporated into outreach efforts and communications with the media.

38. To improve the quality of justice and the public's trust and confidence in the judiciary, solicitation of public feedback on issues such as judicial performance and satisfaction with the courts should be encouraged, facilitated, and enhanced at all times.

39. Training should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily understood by litigants, their attorneys, and the public.

40. Local and statewide elected officials should be educated on the importance of the judicial branch.

41. Judges and court administrators should be better trained on how to interact with the media, and training for the media in reporting on legal issues should be supported and facilitated.

42. In order to improve transparency and be responsive to public comments and constructive criticism of the judicial branch, the judicial branch should do the following:

    (a) Adopt both a model method for responding to unwarranted criticism of the judicial branch and a tip sheet for judges to use when responding to press inquiries;
    (b) Create an advisory group to provide ongoing direction and oversight of the recommended response plan and ensure that the services it proposes are provided; and
    (c) Ensure that valid criticisms are referred to the appropriate bodies for response.

43. Every child in the state should receive a quality civics education, and judges, courts, teachers, and school administrators should be supported in their efforts to educate students about the judiciary and its function in a democratic society. To that end, the following are specifically recommended:

    (a) Strategies for meaningful changes to civics education in California should be supported, and a strategic plan for judicial branch support for civics education should be developed;
    (b) Political support should be sought from leaders in the Legislature, the State Bar, the law enforcement community, and other interested entities to improve civics education;
    (c) Teacher training programs, curriculum development, and education programs on civics should all be expanded to include the courts;
    (d) Presiding justices and presiding judges should be encouraged to grant continuing education (CE) credits to judicial officers and court executive officers who conduct K–12 civics and law-related education;

(e) The State Bar Board of Governors should be asked to grant Minimum Continuing Legal Education (MCLE) credits to attorneys who conduct K–12 civics and law-related education programs;
(f) The AOC should be directed to help pilot extensive civics-related outreach in three jurisdictions; and
(g) Recognition programs that bring attention to teachers, judges, and court administrators who advance civics education should be promoted.

44. To ensure that voters can make informed choices about candidates for judicial office, the following are recommended:

(a) Voter focus groups should be conducted within California to determine what information to provide in education materials;
(b) Voter education materials should be developed to inform voters about the constitutional duties and responsibilities of judges and justices and the role of the state court system;
(c) Judicial candidates should participate in candidate forums and respond to appropriate questionnaires;
(d) Efforts should be undertaken to determine the most effective uses of multimedia tools to promote voter education;
(e) Collaboration should be established among the Judicial Council, the League of Women Voters, the California Channel, and other groups to inform and educate voters; and
(f) Politically neutral toolkits regarding voter information and best practices on public outreach should be developed for use by judicial candidates.

45. The State Bar should be asked to offer an educational course to potential judgeship applicants.

46. A model self-improvement program should be developed for voluntary use by courts and individual judges.

47. The public should be informed that systems are in place to deal with judicial performance issues in fair and effective ways, including elections, appellate review, media coverage, the Commission on Judicial Performance, the State Bar's Commission on Judicial Nominees Evaluation, and local bar association surveys.

48. Courts should be encouraged to use CourTools or similar court performance measures.

Judicial Selection and Retention

49. The State Bar's Commission on Judicial Nominees Evaluation process, a unique form of a merit-based screening and selection system that has served California well, should be retained.

50. In order to increase trust and confidence in the judicial selection process, the background and diversity of the commission members should be given more publicity, including by placing photographs of the members on the JNE Web site and making that site more accessible on the State Bar's home page.

51. Legislation should be sponsored to require that a JNE rating of "not qualified" (and thus, by the absence of announcement, a rating of at least "qualified" or better) for a trial court judge be made public automatically at the time of appointment of a person with that rating.

52. Legislation should be sponsored to make the current practice of releasing the JNE rating for a prospective appellate justice mandatory and permanent.

53. The release of a rating by JNE should not be accompanied by a statement of reasons.

54. The following Web sites should explain the judicial appointment process and link to each other:

    (a) The judicial branch's California Courts Web site; and
    (b) The State Bar's JNE Web site and the Governor's Judicial Application Web site, both of which should be more user-friendly, contain appropriate information about JNE procedures and the rating system, and include videos explaining the judicial appointment process.

55. Law schools should be encouraged to provide information about the judicial appointment process to law students by, for example, encouraging qualified JNE members, both past and present, to give presentations at law schools.

56. To increase public knowledge of the judicial selection process, JNE should be encouraged to have its members speak to local and specialty bar associations, service organizations, and other civic groups.

57. The State Bar should amend the JNE rules to require that any member of the State Bar Board of Governors who attends a JNE meeting comply with the JNE conflict of interest rules.

58. A study should be undertaken to develop effective methods of increasing public knowledge of judicial candidates and their qualifications, including development of a model of judicial candidate evaluation that can be used by county bar associations and others. The model should include the method of selecting appropriate members of the entity that conducts the judicial candidate evaluations, the timing of judicial candidate evaluations, and effective dissemination to the public.

59. The courts should be directed to consider, when making appointments of subordinate judicial officers, both the diverse aspects of the applicants and the applicants' exposure to and experience with diverse populations and their related issues.

60. The Commission on Judicial Nominees Evaluation should gather information regarding judicial applicants' exposure to and experience with diverse populations and issues related to those populations and should then communicate this information to the Governor.

61. The Governor should consider an applicant's exposure to and experience with diverse populations and issues related to those populations and request this information on the judicial application form.

62. The judicial branch's public outreach programs should encourage qualified members of the bar to consider applying for judicial office.

63. An amendment should be sponsored to change the constitutional provision for the recall of a judge—which currently requires a petition with signatures of 20 percent of those voting for a judge in the most recent election—to require a petition with signatures of 20 percent of those voting for district attorney, the only county official elected in every county.

64. A constitutional amendment should be sponsored to provide that a trial court judge shall serve at least two years before his or her first election.

65. Legislation should be sponsored to change the number of signatures needed for placing an unopposed judicial election on the ballot for a potential write-in contest from the current level of 100 signatures to 1 percent of the voters for district attorney in the last county election but not fewer than 100 signatures.

66. Legislation should be sponsored to amend current law—which provides that an unopposed judge may be challenged by write-ins at either or both the primary election and the general election—to permit only one challenge, which should be at the first (i.e., primary) election.

67. An amendment should be sponsored to article VI, section 16 of the California Constitution to reorder the subdivisions therein and make minor wording changes for the sake of clarity.

68. A constitutional amendment should be sponsored to provide that retention elections for appellate justices be held every two years (during both the gubernatorial and the presidential elections) rather than the present system of every four years (during the gubernatorial elections).

69. A constitutional amendment should be sponsored to provide that following an appellate justice's initial retention election, that justice serves a full 12-year term, rather than the current system of a 4-, 8-, or 12-year term, depending on the length of term remaining for the previous justice holding that seat.

70. A constitutional amendment should be sponsored to provide that an appellate justice serve at least two years before the first retention election, paralleling recommendation 64 above concerning trial court judges.

71. Further study should be made of ways to help ensure that judicial vacancies are filled promptly.

Commission for Impartial Courts Implementation Committee

Revised January 5, 2010

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Revised January 5, 2010

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Public Comments
RECOMMENDED PRACTICES FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY AND ACCOUNTABILITY IN CALIFORNIA

1. The Code of Judicial Ethics should be amended to include the American Bar Association (ABA) Model Code of Judicial Conduct definition of "impartiality."

No.	Commentator	Full Comments	Commission Response
14.	Hon. Paul M. Marigonda Judge of the Superior Court of California, County of Santa Cruz	Agree.	No response required.
15.	California Judges Association Hon. Mary E. Wiss, President	A number of the recommendations in the "Judicial Candidate Campaign Conduct" section of the Report call for amendments either to the Code of Judicial Ethics or to the Code's Commentary. For the most part, CJA believes these amendments are unnecessary and perhaps unwise. CJA is particularly concerned with the proposed addition of hortatory language to the Code. CJA believes that the Supreme Court's purposeful adoption of the mandatory form ("shall") in the Code provides clearer guidance to judges than the hortatory form ("should"), which can easily be misinterpreted and misapplied. Also, although a number of the recommendations contain sound content, CJA believes that they more appropriately belong in jurisprudential publications such as the David Rothman's *California Judicial Conduct Handbook* and/or election guides such as the CJA *Ethics in Judicial Elections* handbook. Finally, some of the suggested additions would not clarify or explain the canons to which they relate, creating a risk of confusion. CJA's comments on specific recommendations that call for amendments to the Code or Commentary are below (recommendations 1, 2, 3, 5, 6, 16, 17, 21, 29, 32) Disagree with recommendation 1, proposing that the Code define "impartiality." As this word has the same definition in every day parlance as it does in the world of judicial ethics, adding the definition to the Code would be superfluous and would invite speculation concerning its purpose.	The term "impartiality" appears throughout the Code of Judicial Ethics, and the terminology section of the code should contain a definition. The proposed definition reflects language used by the Supreme Court in *Republican Party of Minnesota v. White* and tracks the definition in the ABA's Model Code of Judicial Conduct.

Attachment E

Public Comments
RECOMMENDED PRACTICES FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY AND ACCOUNTABILITY IN CALIFORNIA

1. The Code of Judicial Ethics should be amended to include the American Bar Association (ABA) Model Code of Judicial Conduct definition of "impartiality."

No.	Commentator	Full Comments	Commission Response
16.	Barbara Kauffman Attorney at Law San Rafael, California	Agree. I agree with the proposed definition, so long as any review of alleged bias or conflict of interest by the CJP, the courts, or pursuant to CCP 170.1 et seq., remains subject to the current objective standards set forth in CCP 170.1 et. seq. Whether or not a judge is impartial should never be determined by the judge in question. It must be determined by an out-of-county judge without ties to the challenged judge, pursuant to an objective standard (Would a person aware of the facts reasonably doubt the judge's ability to be impartial?).	No response required.
17.	Hon. Runston G. Maino Judge of the Superior Court of California, County of San Diego	Disagree	No response required.

4. Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

No.	Commentator	Full Comments	Commission Response
27.	Hon. Paul M. Marigonda Judge of the Superior Court of California, County of Santa Cruz	Agree.	No response required.
28.	Barbara Kauffman Attorney at Law San Rafael, California	I disagree with Canon 5 of the Code of Judicial Ethics in general to the extent it allows campaign contributions by those appearing before judges, although this is inconsistent with Code of Civil Procedure section 170.1. The Judicial Council knows this. Justice at Stake (who has advised our Judicial	The issue of campaign contributions by those appearing before judges is addressed in recommendations # 36-40.

4. Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

No.	Commentator	Full Comments	Commission Response
		Council) has performed polls illustrating that 75% of the public, and at least 25% of judges, believe campaign contributions affect the outcome of judicial decisions. As former judge LaDoris Cordell has stated in Stanford Law School's videotaped discussion on judicial campaign contributions noted, it does not matter what the amount is—judges are aware of who gives them money and supports them, and who does not, and this can and does affect a judge's perspective.	

RECOMMENDATION 15 (was numbered recommendation 17 during public comment period)

17. The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

No.	Commentator	Full Comments	Commission Response
75.	California Judges Association Hon. Mary E. Wiss, President	Undecided on recommendations 16 and 17. See comments under 16.	See response to comment #73.
76.	Barbara Kauffman Attorney at Law San Rafael, California	Disagree. I strongly disagree. In Marin County, we already have judges who shut litigants and lawyers up when they are trying to delve into or comment upon inappropriate judicial behavior, or matters that are prejudicial to the party the judge is favoring. Recently, one judge allowed a party to go and on, attacking the other party, notwithstanding multiple objections—and then refused to allow the other party to refute what had been said. This creates a very interesting and one-sided record. Allowing the use of transcripts so judges can "defend themselves" will encourage this practice, and also encourage judges to actively work to create a favorable transcript, for	The proposed language clarifies actions that judges are already permitted to take. However, to avoid encouraging judges to make inappropriate comments in response to an attack, the commission decided to delete the words "quoting from" from the proposed amendment to the commentary.

RECOMMENDATION 15 (was numbered recommendation 17 during public comment period)

17. The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

No.	Commentator	Full Comments	Commission Response
		example, by asking questions, or inserting objections where counsel for one party fails to adequately do so. Yes, this happens in Marin County.	

RECOMMENDATION 16 (was numbered recommendation 18 during public comment period)

18. Courts should work with local county bar associations to create independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

No.	Commentator	Full Comments	Commission Response
77.	Hon. Barbara A. Kronlund Presiding Judge of the Juvenile Court Superior Court of California, County of San Joaquin	Agree, if modified. This recommendation has some problems. It states that Courts should work with county Bar Associations to create independent standing committees to respond to judicial attacks, and says the "steering committee agreed that it would not violate the canon for a judge to file a confidential complaint with such a voluntary standing committee or otherwise to alert such a committee to the fact that someone is attacking a ruling in a pending matter". This last language bothers me because I could see this as an improper ex parte communication on a pending matter, and I could see it later be used by the CJP to illustrate the judge's embroilment over the case, attorney, or a number of things. How is this complaint filed by the judge "confidential"? Who guarantees confidentiality and how?	Upon reconsideration, the commission thinks the recommendation should be: “Local county bar associations should consider creating independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.” This would avoid any court involvement in the process.
78.	Barbara Kauffman Attorney at Law San Rafael, California	Disagree. See comment under 10.	See response to comment #53

RECOMMENDATION 24 (was numbered recommendation 31 during public comment period)

31. Canon 5 of the Code of Judicial Ethics or its commentary should be amended to require candidates to take reasonable measures to control the actions of campaign operatives and the content of campaign statement.

No.	Commentator	Full Comments	Commission Response
101.	California Judges Association Hon. Mary E. Wiss, President	Disagree. The Recommendation is unclear as to who counts as "operatives" and what rises to the level of "reasonable efforts." Such ambiguities expose candidates to potential liability and discipline where they might have difficulty in controlling campaign consultants or volunteers.	The Code of Judicial Ethics contains a definition of "require" that is relevant here. It says, "Any Canon prescribing that a judge 'require' certain conduct of others means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control." The commission agrees to delete the word "operatives" from the recommendation. The commission now recommends that the canon or commentary be amended to "place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements." In addition, it would "encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties and to take appropriate corrective action if they learn of such misrepresentations."
102.	Barbara Kauffman Attorney at Law San Rafael, California	Agree.	No response required.

RECOMMENDATION 27 (was numbered recommendation 34 during public comment period)

34. Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" may be properly used.

No.	Commentator	Full Comments	Commission Response
109.	Hon. Steven C. Bailey Judge of the Superior Court of California, County of El Dorado	Agree, if modified. Again, this recommendation makes a great deal of sense. I recommend clarification of the "pro tem" term.	The commission agrees and has modified the report accordingly.

RECOMMENDATION 31 (was numbered recommendation 38 during public comment period)

38. Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

No.	Commentator	Full Comments	Commission Response
123.	Hon. Paul M. Marigonda Judge of the Superior Court of California, County of Santa Cruz	Agree. This recommendation needs to be implemented to make sure that: (1) judicial candidates are not overly influenced by political organizations or political candidates, and (2) large donors cannot influence a judicial campaign.	No response required.
124.	Barbara Kauffman Attorney at Law San Rafael, California	See comment under 36.	See response to comment #117 above.

RECOMMENDATION 32 (was numbered recommendation 39 during public comment period)

39. Appellate justices' disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State's Web site.

No.	Commentator	Full Comments	Commission Response
125.	Hon. Paul M. Marigonda Judge of the Superior Court of California, County of Santa Cruz	Agree. This recommendation needs to be implemented to make sure that: (1) judicial candidates are not overly influenced by political organizations or political candidates, and (2) large donors cannot influence a judicial campaign.	No response required.
126.	Barbara Kauffman Attorney at Law San Rafael, California	See comment under 36.	See response to comment #117 above.