

Supreme Court Advisory Committee on the Code of Judicial Ethics

350 McAllister Street, San Francisco, California 94102-3688
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INVITATION TO COMMENT

SP19-07

Title

Proposed Amendment to Canon 4E(1) of the Code of Judicial Ethics

Action Requested

Review and submit comments by December 2, 2019

Proposed by

Supreme Court Advisory Committee on the Code of Judicial Ethics
Hon. Richard D. Fybel, Chair

Proposed Effective Date

April 1, 2020

Date

October 1, 2019

Contact

Mark Jacobson
415-865-7898 phone
415-865-7664 fax
mark.jacobson@jud.ca.gov

Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes amending canon 4E(1) to allow a judge to act as a health care representative for a person whose preexisting relationship with the judge would prevent the judge from hearing a case involving that person. Currently, the canon prohibits a judge from acting as a fiduciary except for family members. After receiving and reviewing comments on this proposal, the committee will make recommendations to the Supreme Court regarding the proposed amendment. The full text of the proposed amendments is attached.

Discussion

The California Judges Association (CJA) sent a letter to the committee proposing an amendment to canon 4E(1), which prohibits judges from serving as a fiduciary except for family members. The CJA suggested adding another exception allowing a judge to act as an agent pursuant to an advance health care directive for a person whose preexisting relationship with the judge would disqualify the judge from hearing a case involving that person. The letter noted that the current prohibition precludes a judge who has no family from asking a colleague to be the judge's health care representative.

There are three reasons for the prohibition against judges serving as a fiduciary except for family members: (1) appearance of favoritism; (2) conflict of interest leading to possible disqualification, and (3) interference with judicial duties.

The proposals have not been approved by the Supreme Court and are not intended to represent the views of the court. These proposals are circulated for comment purposes only.

The committee concluded that these concerns are not implicated by the proposed exception. It would be rare that a judge serving as a health care representative pursuant to an advance health care directive would be placed in a position in which favoritism is an issue. Likewise, such a judge would seldom be disqualified because of this limited exception. Finally, a judge who agrees to serve as a health care representative would need to ensure that those obligations do not interfere with the proper performance of judicial duties.

To the extent these concerns exist, the commentary to canon 4E provides that a judge who serves as fiduciary must be mindful of his or her obligations as a result of the fiduciary relationship. It states:

The restrictions imposed by this canon may conflict with the judge’s obligation as a fiduciary. For example, a judge shall resign as trustee if detriment to the trust would result from divestiture of trust holdings the retention of which would place the judge in violation of [the canon that requires a judge to manage financial interests to minimize disqualification].

In addition, canon 4E(2) addresses the conflict issue by prohibiting a judge from serving as a fiduciary “if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or minor or conservatee will be engaged in contested proceedings in the court on which the judge serves or one under its appellate jurisdiction.”

Canon 4E(1) would be amended to read:

CANON 4

**A JUDGE SHALL SO CONDUCT THE JUDGE’S QUASI-JUDICIAL AND
EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF
CONFLICT WITH JUDICIAL OBLIGATIONS**

A. – D. * * *

E. Fiduciary Activities

(1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge’s family, and then only if such service will not interfere with the proper performance of judicial duties. A judge may, however, act as a health care representative pursuant to an advance health care directive for a person whose preexisting relationship with the judge would prevent the judge from hearing a case involving that person under Canon 3E(1).

(2) – (3) * * *

F. – H. * * *