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**Report on ACA 1 (Nation):
Superior Court Elections**

by

**The Judicial Council's
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Chapter 1.

Executive Summary

Assemblymember Joe Nation (D-San Rafael) introduced ACA 1 on December 15, 2000. Under ACA 1, vacancies in superior courts would be filled exclusively by gubernatorial appointment, and judges would run unopposed in retention elections in which voters would be asked whether Judge X should be elected.

The Judicial Council convened a Working Group on ACA 1 to review the proposed constitutional amendment, identify the factors and concerns that gave rise to it, assess the responses to those factors and concerns provided in ACA 1, and identify and evaluate any alternative means of addressing them. The Working Group met four times in May and June 2001 to discuss the issues. Assemblymember Nation addressed the Working Group at its first meeting on May 2. The Working Group also conducted a survey of all California judges to assess their reaction to ACA 1.

The Working Group concludes that ACA 1, as presently drafted, does not appear to solve the problems that inspired its introduction. The Working Group identified the pros and cons of a number of other modifications to either ACA 1 or the existing system, which are described in this report.

The existing superior court election process also has both advantages and disadvantages. Its advantages include maintaining some level of accountability to the public, facilitating access to the bench by diverse candidates, and providing an opportunity for public education about the judicial branch's constitutional role.

Although there are some advantages to judicial elections, there are also some problems. The problems with the existing superior court election process fall roughly into three major categories: (a) Contested elections may undermine the independence and quality of the bench; (b) Contested elections require judges to engage in fundraising activities that are fundamentally inconsistent with a judge's judicial functions; and (c) Contested elections bring pressure on candidates to engage in campaign conduct and speech that can cross ethical boundaries of appropriate judicial behavior.

ACA 1 was introduced in response to what Assemblymember Nation perceived to be excesses in the 2000 race for an open seat on the Sacramento County Superior Court and in other elections for judges both in California and around the country.

To inform its own deliberations, the Working Group took a survey of California's judges to gauge their reaction to the retention election provisions of ACA 1. The survey was sent to

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over 1,600 judges, and we received 375 responses. The judges are polarized in their reaction to ACA 1. The survey asked judges to indicate their “opinion of ACA 1’s proposal to replace the current system of electing superior court judges with the retention system that currently applies to appellate justices.”

The responses were as follows:

Opinion on ACA 1	Number of Responses	Percent
Strongly Disagree	152	40.5%
Disagree	46	12.3%
No Opinion	9	2.4%
Agree	52	13.9%
Strongly Agree	116	30.9%

The Working Group concluded that, as currently drafted, the retention election provisions of ACA 1 would not appear to solve the problems that inspired its introduction. It does not lessen the need for fundraising (and may even increase fundraising activities), and it may not lessen the amount of partisan or inappropriate campaign speech. Judicial independence may well be undermined by ACA 1’s passage, particularly in counties with relatively few judges, and a retention system in Los Angeles and other large counties does not seem practical.

The Working Group considered other changes that could be made to the superior court election system to reduce its increasingly partisan and political nature, while retaining an appropriate balance between independence and accountability. Among these are the following:

- Establishing a trigger (e.g., submission of a petition with a certain number of signatures by voters) to expose particular judges to a retention election.
- Eliminating or curtailing open seat elections (as also provided in ACA 1).
- Adjusting the timing of superior court elections.
- Improving public education about judicial races.
- More effectively regulating campaign conduct and speech.

Each of these proposals has positive and negative consequences, and the Working Group did not reach a consensus about a “best” approach. Instead, we present these options in an effort to contribute to a deliberative, constructive dialogue regarding judicial elections in California.

Chapter 2.

Background Information on Superior Court Elections

A. The Early History of Partisan Judicial Elections

California began its history with a popularly elected judiciary and no restraints upon party support or activity. The California Constitution of 1849 provided that justices of the supreme court and district court were elected by the people for six-year terms (Cal. Const. 1849, Art. VI, §§ 3 & 5), and judges of county courts were elected by the people for four-year terms (*Id.*, § 8).

The choice of an elected judiciary in California was consistent with the history of judicial election methods during the mid-1800's throughout the country. The preference in the states for an elected judiciary was contrary to the federal model of life tenure, and the apparent reasons for the preference are illuminating. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court of the United States declared that it had the power of “judicial review,” that is, the power to declare statutes unconstitutional and to refuse to enforce such statutes. Although the principle of judicial review is today well accepted, *Marbury* was viewed at the time as an exceedingly controversial and political decision. As a result of his disagreement with Chief Justice Marshall’s opinion in *Marbury*, Thomas Jefferson abandoned his prior support for judicial life tenure in favor of six-year terms for judges. Evan Haynes, *The Selection and Tenure of Judges*, pp. 93-94 (1981). He was soon joined by many others who believed that judges needed to be made accountable to the electorate, either indirectly through reappointment by the executive or legislature, or directly by standing for popular election. *Id.*, pp. 94-99. Making judges accountable to the public through election became part of the populist movement known as Jacksonian Democracy that swept the nation in the early 1800's. See Susan Carbon & Larry Berkson, *Judicial Retention Elections in the United States*, p. 1 (1980); Burton Atkins, *Judicial Elections: What the Evidence Shows*, 50 *The Florida Bar Journal* 152, 152 (1976) (“The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process . . . , spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of a government under popular control.”).

The great turning point in this public debate came in 1846 when New York repealed its system of gubernatorial appointment with tenure during good behavior for a system in which all judges were popularly elected for eight- or four-year terms. Haynes, *supra*, pp. 100 & 123. Within ten years of this change, fifteen other states followed suit, and every state to enter the Union since 1846 has provided initially that all or most judges stand for elections for terms of years. *Id.*, p. 100.

The consequences of subjecting judges to frequent elections in which partisanship was permitted were, in hindsight, predictable. Individual judges became beholden to party interests, and the judicial system was perceived by many members of the public to be just another cog in the party machines that dominated the political landscape in the late 1800's. One scholar gives the following explanation:

The post-Civil War increase in industrialization and urbanization nurtured political “machines” in the nation’s larger cities. The Tammany Hall organization in New York epitomized the potential abuses of partisan judicial contests. Seizing control of the political processes that led to nomination, Tammany was able to run and elect its handpicked and politically responsive slate of judicial candidates. The stranglehold of such an organization over elections was strengthened by the metropolitan electorate’s ignorance and complacency about judicial candidates. Elections often became rubber-stamp confirmations of the machine’s slate, not the Jacksonian ideal of individual and equal expression of free will through the ballot.

Sari Escovitz, *Judicial Selection and Tenure*, p. 6 (1975).

In California, the political machine was embodied in the “Big Four,” representing the railroad interests. See, e.g., *California Politics and Policies*, p. 4 (eds. Eugene Dvorin & Arthur Misner 1966). As for the judiciary, as explained in a publication of The League of Women Voters of California, “[b]y the early part of the 20th century, the disadvantages of partisan judicial elections were clear. Many felt that the quality of judicial performance was low, that judges had to spend too much time campaigning, fund raising, and currying favor with party bosses.” Jean Askham, *Courts, Judges & Voters—A Guide to Judicial Elections*, p. 3 (1990).

B. The Nonpartisan Election Of Judges

Public dissatisfaction with the domination of government and judicial offices by political machines resulted in a counter-revolution led by Progressives. The Progressives “associated the civic outrages of the Southern Pacific with partisan political activity and, consequently, sharply circumscribed political parties through legal enactment. Parties *per se* were regarded as the instruments of misrule.” Richard B. Harvey, *California Politics: Historical Profile in California Politics and Policies*, p. 15 (ed. Eugene Dvorin & Arthur Misner 1966).

In this context, Dean Roscoe Pound’s influential 1906 address to the American Bar Association, *The Causes of Popular Dissatisfaction with the Administration of Justice* (reprinted in 46 J. Amer. Judicature Soc. 55 (1962)), focused attention upon the evils associated with partisan, popular judicial elections. Pound pointed out that “[p]utting courts

into politics and compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench.”

Pound and others called for fundamental reforms, of which there ultimately were three major types:

- The rejection of traditional, contested elections, and the adoption in their place of unopposed, retention elections.
- The removal of partisan politics from judicial elections by making judicial offices nonpartisan.
- The creation of merit selection systems to reduce political influence in the initial selection of judges.

Each of these reforms was designed to foster the independence of the judiciary, to enhance public respect for the judiciary and for the rule of law, and to insulate judicial decision-making from the pressures of party influence. *See* Jean Askham, *Courts, Judges & Voters—A Guide to Judicial Elections*, p. 2 (1990).

California joined in the counter-revolution. In 1911, California changed to nonpartisan ballots for judicial elections. Concern about the integrity and independence of a judicial branch subject to the electoral process—whether partisan or not—led to enactment in 1934 of Article VI, Section 26, of the California Constitution, which provided that judges on the California Supreme Court and Courts of Appeal run unopposed on the ballot. So long as the appellate judge received the approval of a majority of the electors voting, the judge remained in office. That protection makes it less likely that judges will fear retaliation by the electorate. The change from election to retention is credited by Joseph Grodin as contributing to the birth of “the great age of the California Supreme Court.” Joseph R. Grodin, *In Pursuit of Justice*, p. 53. Among other things, Grodin notes that prior to 1934, “tenure on the court was quite brief, averaging only a few years.” *Id.* Grodin notes that the California court’s national reputation and influence was often tied directly to those justices who had served substantial periods of time on the court, such as Phil Gibson, Roger Traynor, Raymond Peters, Matthew Tobriner, and Stanley Mosk. *Id.* at p. 54.

A separate proposal to adopt retention elections for trial courts also appeared on the 1934 ballot. This proposal was not adopted, however, in part because of the trial court proposal’s placement on the ballot. The appellate retention proposal was associated with three other initiatives at the front of the ballot which were part of an anti-crime package of reforms. The trial court retention proposal appeared near the end of the ballot immediately following an unpopular prohibition initiative. *See* California Commission on Campaign Financing, *The Price of Justice*, p. 24 (1995). The appellate retention proposal passed, but the trial court

retention proposal failed. As a result, we have different election systems for our trial and appellate judges.

C. Description of Existing Superior Court Election Process

The vast majority of trial court judges initially reach the bench by gubernatorial appointment to a vacant seat. Under current law, when a vacancy occurs, the Governor is empowered to appoint someone to fill the vacancy “temporarily until the elected judge’s term begins.” Cal. Const., Art. VI, § 16(c). That temporary appointment may last several years because the next election to fill a vacant seat occurs “at the next general election after the second January 1 following the vacancy.” *Id.* The possible delay between a gubernatorial appointment to the superior court and the next election for that seat is intended to give the appointed judge an opportunity to become known by the local bar and community before being required to stand for election. As currently drafted, the length of that delay depends in large part upon the speed with which the Governor appoints someone to fill a vacancy because the time of the next election is set by the date the vacancy occurs rather than the date the Governor makes an appointment.

Governors take their responsibility to appoint judges very seriously. Every Governor in recent memory has utilized a cabinet-level “judicial appointments secretary” to identify, vet and recommend nominees for the Governor’s consideration. The names of all potential appointees are sent to the State Bar’s Judicial Evaluation and Nominations Committee for its review, and its recommendations are forwarded to the Governor.

The system of gubernatorial review, consideration and appointment can be circumvented or defeated in special circumstances. Notwithstanding the language in section 16(c), if a vacancy occurs *after* one or more persons has filed election papers to challenge a judge, the election process for that office continues without interruption. Thus, for example, assume that Smith files election papers to run against Judge Jones and that Judge Jones dies two weeks before the election. Although Judge Jones’s death creates a vacancy, the election process, having already begun, must be allowed to continue, and if Smith receives the most votes, Smith becomes the judge (thereby preventing the Governor from appointing someone to fill that seat).

A strategically timed resignation can achieve the same result. Judge Jones can announce her intention to resign at a time when it will permit one or more persons to file papers to run for what will become an open seat. After those papers are filed and the election process has begun, Judge Jones can resign, leaving the seat to be filled in a contested election, thereby defeating the Governor’s power to appoint someone to fill a vacant seat. These types of contested elections, where there is no incumbent in the race, are known as “open seat” races.

Superior court judges are elected to serve a six-year term and serve until the next judge is elected and qualifies for office.

The Judicial Council's Office of Governmental Affairs recently analyzed data on judicial elections for the last three election cycles. Data was collected from 42 counties, including Los Angeles, San Francisco, and Sacramento. A variety of large, small, and medium-sized counties were included in the sample. The election data came directly from the county agencies responsible for conducting elections and was thoroughly verified.

An initial examination of the results indicates that the number of contested races remained stable for the last three election cycles. Of the approximately 525 seats that come up every two years, there were 50 contested seats in the 1996 election cycle. Thus, only 9.52 percent of all judicial races in the sample were contested during the 1996 election cycle. In 1998 that number decreased slightly to 35 contested seats, or 6.67 percent. The amount of contested seats increased marginally to 48, or 9.14 percent, during the 2000 election cycle.

For the past three election cycles, the number of contested incumbents has been exceedingly low. In the 1996 election cycle, 24 of the 50 contested judicial races involved incumbents. Therefore, only 4.57 percent of potentially contested races involved an incumbent candidate. The number of contested incumbents dropped further in 1998 with only 19 opposed incumbents, or 3.62 percent. This number remained unchanged in 2000 with only 19 opposed incumbents. The evidence clearly illustrates that incumbents are only rarely challenged in judicial races.

Although the total number of contested elections is small, the races are spread widely around the state. Only seven counties in the sample had no judicial elections (Amador, Alpine, Colusa, Madera, Napa, Sutter and Tuolumne). Thus, voters in 51 of California's counties, and all of California's larger counties, experienced one or more judicial election contests since 1996.

D. Advantages to Existing Superior Court Election Process

The existing superior court election process has both advantages and disadvantages. In this section, we review some of the positive aspects of the existing process.

Any system of judicial elections – whether a system involving contested races or a retention system – helps establish some level of judicial accountability to the public. There are some clear benefits to a system that makes judges accountable to the public through some type of electoral process. A judge who knows that he or she may have to stand for election is arguably more likely than a judge with life tenure to be responsive to the needs and culture of the community. Moreover, in a representative democracy such as ours, the public is more likely to place its trust in a governmental institution whose leaders are elected by the public.

One of the most important features of the existing process is that most judges are initially appointed by the Governor to fill a vacancy on the superior court. Thus, most judges reach the bench initially by gubernatorial appointment rather than by a contested election. The process of vetting a potential appointee through the Governor's own appointments office as well as through the State Bar's evaluation committee helps ensure that only properly qualified candidates are put on the bench.

Governors have historically examined a wide range of characteristics in selecting judges, including such things as judicial temperament, respect for the rule of law, a reputation for integrity and sound judgment in the legal community, trial experience, and a professional career that includes a demonstrated commitment to public service. Governors may also consider a person's publicly expressed views on matters of public concern as well as more overtly partisan considerations such as prior service to a political party. Whatever criteria a Governor uses for making the initial appointment, the election process restores to the People the ultimate decision regarding the make-up of the bench. Contested judicial elections thus serve as both a safety valve and a check upon the process of gubernatorial appointments to fill vacancies on the superior court.

Judicial elections also provide a good opportunity for the judicial branch to educate the public about the proper role of the judiciary in our system of government. Surveys repeatedly show that the public generally learns about the courts only by being litigants or jurors, and that judges are virtually anonymous in many larger communities. Elections are a unique time for public civic education, and including judges within the electoral process thus creates an opportunity for the bench to reach out to the public.

E. Problems with Existing Superior Court Election Process

Although there are some advantages to judicial elections, there are also some serious problems. The problems with the existing superior court election process fall roughly into three major categories: (1) Judicial Independence; (2) Campaign Finance; and (3) Campaign Conduct and Speech.

1. Judicial Independence

In a constitutional system of government (i.e., a system where the power of government is limited by a written constitution), the independence and quality of the bench are two of the most important guarantees that government will observe the limitations upon its power. A judiciary that is too dependent upon majoritarian impulses is unlikely to have the independence or the courage to perform its role of impartially interpreting the law and fairly applying the law to the cases that come before it. Impartiality and fairness are the bedrock upon which our judicial system is built, and everyone in society has an interest in promoting, preserving, and protecting the impartiality and fairness of judicial processes. Fair and impartial justice is just

as important in resolving a traffic ticket as it is in deciding felony prosecutions or great questions of civil or constitutional law.

Courts have a special role to play in protecting our constitutional rights against majoritarian overreaching. If judges were too dependent upon the will of the majority, our constitutional rights would inevitably be whittled away as courts bow to the will of the majority. To the extent that elections impair judicial independence, whether contested or retention elections, they are antithetical to the very notion of a non-majoritarian branch of government whose role is to protect minority interests from governmental abuses.

The appearance of an independent judiciary is just as important as actual independence in promoting public trust in the courts. That appearance is substantially undermined when judges run in contested elections that have the look and feel of elections for other local, political offices. The line between judicial elections and other elections is becoming increasingly blurred as we move more and more in the direction of essentially partisan races where high profile political leaders from one party line up behind one candidate, and leaders from another party line up behind another candidate.

Finally, subjecting judges to periodic elections can impair the quality of the bench and undermine its independence by deterring lawyers from seeking or accepting judicial appointments. The fact that judges are elected is one of the top three reasons given by lawyers for their reluctance to accept an appointment to the bench. *See Report on Significance of Various Incentives and Disincentives of Judicial Service*, prepared by Hildebrandt, Inc. for the Select Committee on Judicial Retirement, Judicial Council of California (March 5, 1993), at 1-2. That reluctance stems in part from a perception that standing for election undermines the dignity of what is supposed to be an independent, nonpartisan office, and in part from the reality that judges who stand for election must engage in fundraising (discussed further below).

The threats to independence posed by judicial elections are especially grave in counties with relatively few judges because those judges are very likely to be well known within the community, and every difficult or controversial decision is likely to make front-page headlines. In larger counties, by contrast, most judges are essentially anonymous, and only a handful of court decisions become generally known in the community. This distinction between rural and urban courts should be kept in mind when considering the pros and cons of various judicial election systems.

2. Campaign Finance

Most judges are, by temperament, training and practice, uncomfortable engaging in public campaigns for election. Nevertheless, judicial candidates in contested races have no choice but to raise funds and engage in some semblance of a campaign. The need to raise substantial amounts of money to run a campaign is one of the most serious problems with requiring judges to stand for election in contested races.

When the prospect of an incumbent losing a campaign for judicial office is very low (e.g., the typical appellate retention election), there is no need for an expensive campaign. But as the prospect of losing rises—e.g., when an appellate retention election becomes a major public issue or when an incumbent trial court judge faces a contested election—the need for an expensive campaign likewise rises. And, in those instances when there is no incumbent for an open trial court seat, judicial candidates again have no choice but to run an increasingly expensive campaign.

Judicial campaigns around the country occasionally involve millions of dollars. A supreme court justice in Pennsylvania (a state with partisan ballots) spent \$1.2 million in a 1989 campaign. *See The Price of Justice (Id. at p. 75)*. In 1988, spending on six seats on the Texas Supreme Court reached over \$10 million. *Id.* The race for the Chief Justice of Ohio (a contested but nonpartisan election) cost \$2.7 million. *Id.* Expenses for trial court elections are also on the rise around the country, although the numbers here generally range from \$30,000-\$150,000. As a judicial election consultant in Washington said, “You’d better come to a campaign with a fat wallet if you intend to be a serious challenger.” Associated Press, *Want to Be a Judge? Better Have “Fat Wallet,”* S.F. Daily Journal, p. 3 (Aug. 29, 1996).

California has witnessed similar increases in the costs of judicial campaigns. The appellate bench in California runs in retention elections. Retention elections are, in the overwhelming percentage of cases, low risk and do not warrant the expenditure of significant campaign funds. In the over sixty-year history of appellate retention elections in California, only three appellate justices have lost: Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin in the 1986 election. These justices had been targeted by the insurance industry, some prosecutors, victims groups and some highly visible Republican leaders (in part, perhaps, in response to the Supreme Court’s reapportionment decisions in the early 1980’s). Because of the money spent by these and other groups, the justices were themselves forced to raise millions of dollars to mount a campaign. The total cost of the campaign (both for and against) was around \$11 million, setting a national record for judicial campaigns. (*Id. at p. 47.*) (The public campaign focused almost exclusively on the death penalty, but it seems clear that the death penalty was not the only issue motivating contributions to the anti-retention campaign.)

More recently, Chief Justice Ronald M. George and Associate Justice Ming Chin were forced to raise several hundreds of thousands of dollars in response to a campaign against their retention. Moreover, fundraising for appellate retention elections is no longer limited to the high court. For example, the Second District Court of Appeal has engaged in fundraising in recent years to finance limited campaign activities.

Under current law, unless an opponent files for a judicial election, an incumbent's name does not appear on the ballot, and the incumbent is deemed to be the winner as a matter of law. This reduces somewhat the need for sitting trial judges to raise campaign funds (although it does not entirely avoid the need since a judge may have to raise funds in anticipation that someone *may* file election papers). However, once it becomes clear that an office will be contested, campaign spending becomes a virtual necessity. The comprehensive study of judicial elections in Los Angeles trial courts published by the California Commission on Campaign Financing reports that "*spending in Los Angeles County Superior Court races has increased 22-fold, from just over \$3,000 in 1976 to \$70,000 in 1994. Median incumbent spending jumped 95-fold, from just over \$1,000 in 1976 to nearly \$95,000 in 1994.*" (*Id.* at p. 51) (emphasis in original). In one 1994 election for a superior court seat, an incumbent contributed \$176,000 to her own campaign. (*Id.* at p. 46.)

Spending continues to increase in contested races. In the 2000 race for an open seat for the Sacramento County Superior Court, the candidates spent over \$1,000,000, with one of the candidates spending over \$800,000 (\$500,000 of which was her own money).

As a generality, it is probably true that most persons give money to a campaign in the expectation of receiving something in return—a *quid pro quo*. The *quid pro quo* may be an intangible, such as "good government," or it may be more tangible, such as access to the excitement of a campaign, an invitation to a dinner or party, or generally favorable governmental action affecting the contributor. So long as the *quid pro quo* does not involve an "explicit promise" of favorable governmental action (*McCormick v. United States* (1991) 500 U.S. 257, 273) or an offer with the intent to "influence corruptly" (*United States v. Jackson* (9th Cir. 1995) 72 F.3d 1370, 1380, *cert. denied* (1996) 116 S. Ct. 1546), the contribution is lawful (and, indeed, is constitutionally protected as a form of speech).

The persons most interested in judicial elections are: (1) candidates; (2) lawyers who appear regularly in court; and (3) persons or organizations that regularly have legal issues before courts (e.g., large businesses, public interest groups).

Because a single trial court judge is not likely to have a significant impact upon any one lawyer or interest group, it is not surprising that the single largest source of campaign funds for trial court elections are the candidates themselves. As reported in *The Price of Justice*, 46 percent of the total dollars raised for Los Angeles County Superior Court races from 1976 to 1994 came from the candidates and the candidates' families (p. 65), and the figure for municipal court elections was 52 percent (p. 69). In most cases, these payments to the campaign are gifts

(essentially treated as a cost of becoming a judge); in a few isolated cases, however, the campaign has borrowed funds from the candidate, and fundraising efforts continued *after* the candidate became a judge (pp. 66-67).

The next largest block of contributions to trial court judges come from attorneys and law firms. In superior court races over the same period reported above, attorneys contributed 21 percent of the total, and lawyers gave 23 percent of the total to municipal court candidates.

The receipt by incumbent judges or judicial candidates of campaign contributions, most of which come from lawyers, creates two related problems. First, it tends to undermine the appearance and reality of judicial independence. Second, it creates questions about the bias and impartiality of individual judges hearing individual cases.

The former ABA Model Canons of Judicial Ethics addressed the appearance of bias problem by flatly prohibiting receipt of contributions that would raise a question of impropriety. *See Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449, 466 (1988). One consequence of this prohibition was that it virtually compelled judicial candidates to finance their own campaigns. (*Id.* at p. 467.)

The 1972 ABA Code of Judicial Conduct permitted judicial candidates to receive contributions indirectly through a campaign committee. Canon 7B(2) of the 1972 Code provided as follows:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers.

This relieved significantly the pressure on judges to self-finance their campaigns, but came at the cost of permitting at least indirect entanglements with members of the bar and litigation interest groups. Although courts routinely held that a judge was not disqualified from presiding in a case merely because one of the attorneys had contributed to that judge's campaign (*see, e.g., MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990)), scholars worried that the appearance of impartiality suffers serious scarring with each such holding. *See, e.g., Scott D. Wiener, Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. Civ. Rts.-Civ. Lib. L. Rev. 189 (1996); Susan E. Lontas, *Judicial Elections Have No Winners*, 20 Stetson L. Rev. 309 (1990); Leonard A. Bennett, *The Impossibility of Impartiality: Interest in Judicial Reelection as a Denial of Due Process for a Criminal Defendant*, 4 Geo. Mason U. Civ. Rts. L.J. 275 (1994); Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 Georgetown J. Legal Ethics 839, 841 (1994).

In California, Canon 5 of the Code of Judicial Ethics provides that judges “shall . . . avoid political activity that may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office.” It is clear from the commentary that judges may directly solicit campaign contributions. The commentary provides, in relevant part, as follows:

In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge’s campaign may receive attorney contributions.

Although the legal and ethical restraints upon judicial candidates soliciting contributions are dropping away, and the need to engage in fundraising is increasing, judges themselves are not comfortable with the obvious threat to the appearance of impartiality. In 1989, the California Judges Association surveyed 91 judges who had never faced a contested election, and 91 percent of those judges were of the view that races had—by 1989—become so expensive as to create ethical problems. *See* Keith Donoghue, *Judges’ Campaign Hangovers*, *The Recorder*, p. 1 (March 26, 1996).

3. Campaign Conduct and Speech

Judicial elections also create substantial problems because of the conflict between, on the one hand, the non-partisan nature of the office, the need for judges to remain impartial and independent, and ethical restrictions upon campaign speech, and, on the other hand, the need to engage in campaign speech that properly informs the voters and the free speech protections of the United States and California Constitutions.

Judges running in contested races face essentially unresolvable conflicts. In order for voters to be informed and to make a reasoned choice, a candidate needs to communicate why a voter should vote for that candidate instead of any other candidates. This pushes a candidate in the direction of campaign speech that indicates what the candidate stands for and how the candidate would behave as a judge. And in light of the substantial sums of money spent on campaigns, it also pushes a candidate in the direction of campaign speech that criticizes his or her opponent. Moreover, there is pressure to talk about issues that will appeal to voters, which often means candidates are pressured to talk about politically “hot” topics (e.g., capital punishment, abortion, religion) or to raise incendiary charges against opponents.

For example, the Commission on Judicial Performance has filed formal charges against a judge for alleged willful misconduct in connection with the 2000 election. According to the

complaint, the judge's campaign circulated a four-page mailer that described in colorful language legal positions that the judge's opponent had taken in the course of representing several criminal defendants, including one defendant who had murdered a deputy sheriff and another defendant who had raped an 11-year-old girl. With respect to the murder case, language on the cover of the mailer stated that the judge's opponent "demanded that all charges against the cop killer be dropped. Later, [he] tried to stop the DA from seeking the death penalty." In two of the cases described in the mailer, the judge who circulated the mailer had presided over the trial, and the mailer described how the judge had imposed maximum sentences notwithstanding the judge's opponent's pleas for leniency. The mailer did not indicate that the judge's opponent was serving as a deputy public defender during these cases; he was described only as a "criminal defender."

The Commission's complaint alleged that the judge (who ultimately lost the election) engaged in willful misconduct by attempting to mislead the public into thinking that the judge's opponent's statements represented his personal views rather than fulfillment of his obligation as a court-appointed attorney. It further alleged that the mailer implied that the judge might not be impartial toward those defendants and their attorneys. The Commission noted that the cases referenced in the mailer were pending in appellate courts at the time.

The judge has responded in part by suing the Commission and its individual members in federal court, claiming that the mailer is core political speech protected by the First Amendment. In seeking to enjoin the Commission from enforcing judicial ethics rules related to political speech, the judge contends that the canons she is alleged to have violated abrogate the voters' rights to have sufficient information about the candidates and issues.

Although this complaint appears to be the first time the Commission has filed formal charges against a judge based on campaign speech, the Commission has investigated numerous complaints and has disciplined several judges for conduct arising out of election campaigns. For example, the Commission issued an advisory letter in 1991 to a judge for failure to exercise control over the judge's campaign committee. With apparent disregard of the truth, the committee published what seemed to be defamatory falsehoods about a law firm with which the judge's opponent had been associated and which still practiced in the county. In 1988, a judge received an advisory letter for deliberately giving an incorrect and misleading home address on a declaration of candidacy. And in 1992, the Commission publicly reprimanded a judge for, among other misconduct, misinforming the public of his actual marital status in campaign literature and appearances. The judge referred to his living companion as "my wife," although they were divorced but continued to live together.

In another type of campaign misconduct, the Commission in 1988 privately admonished a judge for funding campaign advertisements that appeared to promise certain rulings. The judge was also admonished for making speeches to jurors that could reasonably have been understood as electioneering.

These examples support the common sense conclusion that requiring judges to stand for election creates pressures on judicial candidates to campaign in the same manner as candidates for other more political and partisan offices. The harm to the independence, integrity, and dignity of the judicial branch is palpable.

Chapter 3. ACA 1 (Nation)

A. Description

Assemblymember Joe Nation (D-San Rafael) introduced ACA 1 on December 15, 2000. In general terms, ACA 1 would replace the current system of electing superior court judges, in which judges may face contested elections, with a system where all superior court vacancies would be filled by gubernatorial appointments, there would be no contested races and voters would simply be asked whether Judge X should be elected. ACA 1 was introduced in response to what Assemblymember Nation perceived to be excesses in the 2000 race for an open seat on the Sacramento County Superior Court and in other elections for judges both in California and around the country.

ACA 1 proposes to amend Section 16 of Article VI of the California Constitution as follows (strikeouts indicate deletions and italics indicate new language):

SEC 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.

(b) ~~(1) In counties in which there is no municipal court, judges~~ *Judges* of superior *and municipal* courts shall be elected in their counties *or municipal court districts* at general elections except as otherwise necessary to meet the requirements of federal law. ~~In the latter case the Legislature, by two thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed in subdivision (d), or by any other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.~~

~~(2) In counties in which there is one or more municipal court districts, judges of superior and municipal courts shall be elected in their counties or district at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.~~

~~(e) Terms of judges of superior courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the second January 1 following the~~

~~vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.~~

~~(d)~~

~~(c) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.~~

~~The Governor shall fill *judicial* vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor to the Supreme Court or a court of appeal is effective when confirmed by the Commission on Judicial Appointments.~~

~~Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of superior courts.~~

In effect, ACA 1 replaces the existing system of electing superior court judges with a retention system of electing judges substantially similar to the one that is now used only for justices of the Supreme Court of California and the Courts of Appeal. Under this system, superior court judges would initially be appointed to the bench by the Governor (i.e., there would be no open seat elections). An appointed judge would first appear on the ballot at the first general election at which the appointed judge could qualify (which could be as short as several months and as long as approximately two years). Superior court judges would serve six-year terms and would subsequently appear on the ballot at the end of the term in a retention-style election.

Even with the enactment of ACA 1, however, there would remain certain differences between the appointment and election system for superior court judges and appellate court justices. First, the term of office for appellate court justices would remain at twelve years (§ 16(a)), while the term of office for superior court judges would remain at six years (§ 16(b)). Second, retention elections for appellate court justices would continue to be held only at the same general elections at which governors are elected (§ 16(c)), while retention elections for superior court judges could occur at any general election (§ 16(b)). Third, newly appointed appellate justices who win a retention election would serve out only the remainder of the unexpired term of their predecessors (§ 16(a)), while newly appointed superior court judges would be elected for a full six-year term (§ 16(b)). Fourth, only nominations or appointments to the appellate bench would require confirmation by the Commission on Judicial

Appointments (§ 16(c)); nominations or appointments to the superior court bench would be effective immediately without further confirmation.

Because ACA 1 proposes to extend the retention system to *all* superior courts, it strikes out the final paragraph of Section 16(d) which gives electors of each county the ability, on a county-by-county basis, to adopt a retention system for the superior court of that county “by majority of those voting and in a manner the Legislature shall provide.” The deleted provision has never been used by any county.

In addition to provisions designed to eliminate open seat elections and to extend the retention system to superior courts, ACA 1 makes several other technical changes to reflect the unification of trial courts in California. In 1998, subdivision (b) was divided into two subdivisions by Proposition 220 (trial court unification) to make clear that judges in unified counties would be elected in countywide races except as required by federal law (i.e., the Voting Rights Act). The trial courts in all counties have now unified, and it is therefore appropriate to repeal subdivision (b)(2) and to remove language in subdivision (b)(1) that was designed to deal with the special problem of compliance with the Voting Rights Act in light of unification. Since trial courts in all counties have unified, the references to “municipal courts” and “municipal court districts” that ACA 1 proposes to add to subdivision (b) should be removed.

B. Analysis of ACA 1

ACA 1 addresses only a few of the problems inherent in a system of judicial elections, and it introduces a few new problems.

Independence. As for the quality of the bench, whether ACA 1 would result in more lawyers being willing to take a superior court appointment is speculative. Some lawyers might be more willing to take an appointment because of the protection from the possibility of contested races.

If the retention election provisions of ACA 1 remain in place, lawyers might be *less* willing to take an appointment precisely because ACA 1 would guarantee an appearance on the ballot every six years. Moreover, under the current system, problem judges can be identified by the bar and targeted for removal in a contested race. This type of selective targeting is likely to be more difficult if all judges appear on the ballot in retention elections because the electorate would have to be educated to distinguish among the judges on the ballot (an enormously difficult task given the low salience of judicial elections).

It is unclear whether moving to a retention system for superior court judges would strengthen the independence and quality of the superior court bench. As noted above, *any* system of judicial elections can undermine judicial independence. And in fact, under current law, the

vast majority of superior court judges never appear at all on the ballot and, as a practical matter, can serve their entire career without ever facing the voters in a contested race. By contrast, the current version of ACA 1 would require *every* judge to appear on the ballot periodically. Thus, ACA 1 would actually *increase* the exposure of superior court judges to the electoral process, arguably undermining their independence and increasing the risk of politicizing the judiciary.

Campaign Finance. As currently drafted, ACA 1 eliminates open seat elections and provides for retention elections. In its current form, ACA 1 may actually exacerbate the problem of campaign finance because it will periodically expose *all* superior court judges to the ballot. If ACA 1 only does away with open seat elections, it could eliminate the current campaign finance problems inherent in those elections.

As explained above, fundraising for appellate retention elections has become more commonplace, and even the announcement of an effort to unseat an appellate justice in a retention election forces the justice to raise substantial funds in anticipation of a battle. Moreover, judges may need to engage in some essentially preemptive fundraising in the event that a “vote no” campaign is begun right before the election. Under current law, fundraising efforts at the superior court level are largely (although not exclusively) limited to judges who have been challenged. The current version of ACA 1 might well increase the number of judges who have to engage in some fundraising activity.

Campaign Conduct and Speech. It is unclear whether ACA 1 would reduce the level of borderline campaign conduct and speech. Arguably, a judge in a retention election would have less need to engage in any type of campaign speech because retention elections are almost always low salience races. With no direct competitor, there is arguably less of a need for campaigning.

On the other hand, if opponents wish to run a campaign against the retention of a judge, the opponents will have the advantage of not being bound at all by the Code of Judicial Ethics, and their speech will be almost completely unrestrained. There will be great pressure on a judge facing this type of opposition to respond in kind. Yet that judge, unlike his or her opponents, will be bound by the Code.

Retention Elections in Smaller Counties. In counties with only a handful of judges (e.g., 15 or less), ACA 1 will probably have the effect of *increasing* the salience of judicial races, thereby exposing judges in these counties to *more* opportunities for political and partisan influence. This is because the judges in these smaller counties are much more likely to be known individually by the citizens of the county. Thus, when a judge’s name appears on the ballot, it is more likely to trigger some individual reaction. The result may be that judges in smaller counties will be required to engage in much more substantial campaign activities under ACA 1 than under current law.

Retention Elections in Larger Counties. A retention system in larger counties presents a very different problem. For example, under ACA 1, approximately one-third of the almost 500 Los Angeles superior court judges would have to appear on the ballot at each general election. A ballot that includes the names of approximately 150 judges where voters would have to cast a vote for each judge is simply not practical. It would dramatically increase the cost of printing the ballot and ballot pamphlet, and there would be a huge drop-off in voting as a result of “voter fatigue.”

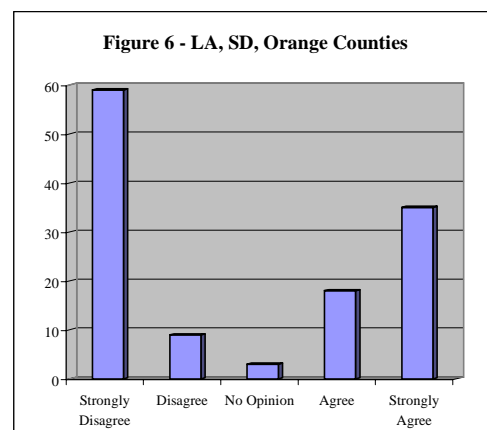
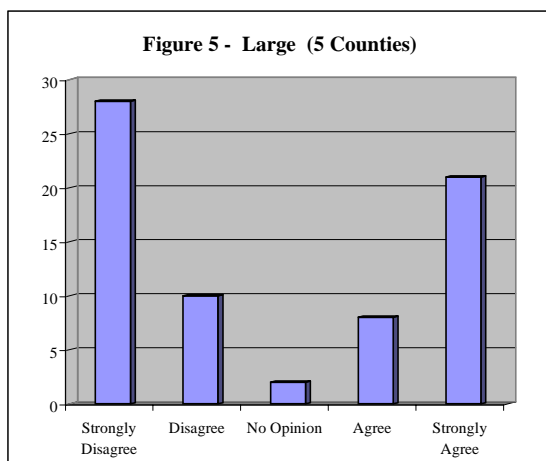
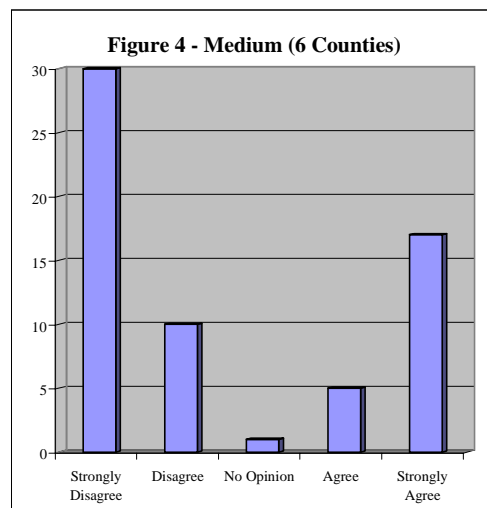
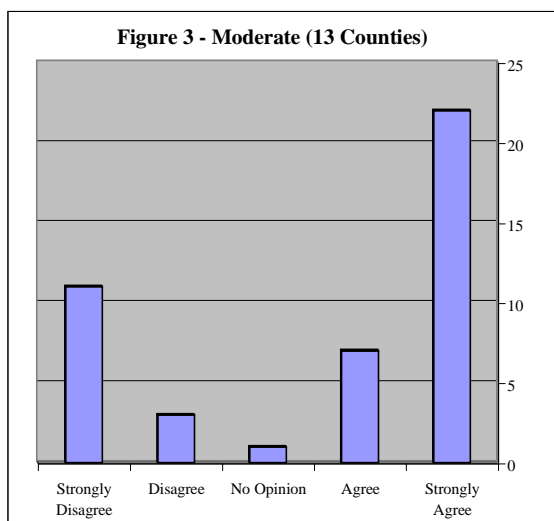
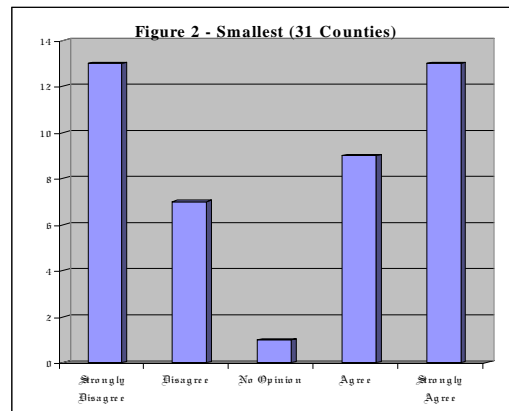
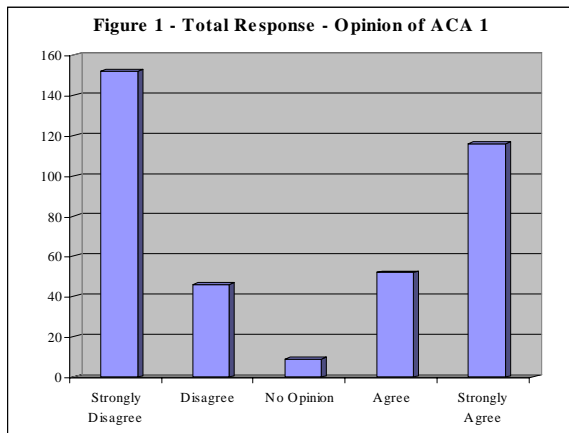
ACA 1 Survey Responses. The Working Group took a survey of California’s judges to gauge their reaction to the retention election provisions of ACA 1. The survey was sent to over 1,600 judges, and we received 375 responses. The judges are polarized in their reaction to those provisions. The survey asked judges to indicate their “opinion of ACA 1’s proposal to replace the current system of electing superior court judges with the retention system that currently applies to appellate justices.”

The responses were as follows:

Opinion on ACA 1	Number of Responses	Percent
Strongly Disagree	152	40.5%
Disagree	46	12.3%
No Opinion	9	2.4%
Agree	52	13.9%
Strongly Agree	116	30.9%

Figure 1 below displays the responses graphically, where the divergence of opinion can clearly be seen. In order to determine whether there were differences between large and small counties, the responses were divided into five categories depending upon the population of the county. The categories are Smallest (31 counties with population up to 167,000 and an average of 5 judicial position equivalents (JPE’s); Moderate (13 counties with population up to 566,600 and an average of 19 JPE’s); Medium (6 counties with population up to 930,000 and an average of 46 JPE’s); Large (5 counties with population up to 1,736,700 and an average of 82 JPE’s); and a final grouping of Los Angeles, San Diego and Orange Counties (average of 320 JPE’s). Figures 2 through 6 show that judges in counties of all sizes are split on the merits of ACA 1’s proposed changes to the superior court election system.

ACA 1 Working Group Report



Summary. As currently drafted, the retention election provisions of ACA 1 do not appear to solve the problems that inspired its introduction. These provisions do not lessen the need for fundraising (and may even increase fundraising activities), and may not lessen the amount of partisan or inappropriate campaign speech. Judicial independence may well be undermined by ACA 1's passage, particularly in counties with relatively few judges, and a retention system in larger counties does not seem practical.

Chapter 4.

Superior Court Election System Alternatives

The Working Group considered other changes that could be made to the superior court election system to reduce its increasingly partisan and political nature, while retaining an appropriate balance between independence and accountability. The remainder of this report reviews the pros and cons of the following options:

- Establishing a trigger to expose particular judges to a retention election.
- Eliminating or curtailing open seat elections.
- Adjusting the timing of superior court elections.
- Improving public education about judicial races.
- More effectively regulating campaign conduct and speech.

These alternatives are *not* mutually exclusive, and most of these alternatives could be enacted as part of ACA 1's retention system. Because the Working Group did not achieve a consensus regarding the "best" system for electing superior court judges, these alternatives are discussed separately, and no attempt has been made to suggest a single, integrated proposal.

A. Establish a Trigger for Retention Elections

As noted in Chapter 3, ACA 1's requirement that all superior court judges stand for retention elections is problematic for a number of reasons, including the fact that it would result in many more judges appearing on the ballot than is the case under current law (where a superior court judge's name appears on the ballot only if challenged). The Working Group concluded that one alternative would be to require a judge to appear on the ballot for a retention election only if a "no retention petition" is signed by registered voters in the county equal in number to 12 percent of the total number of votes cast in the jurisdiction for the countywide office that had the greatest number of votes in the most recent general election in a contested race.

Under the current election system for superior court judges, if a judge is unopposed, the judge's name does not appear on the ballot and he or she is reelected automatically. Thus, judges are vulnerable to defeat only if they are challenged. Under ACA 1, a judge's name would be placed on the ballot for retention purposes after initial appointment (conceivably within a few months after appointment and certainly no more than two years after appointment) and, subsequently, every time the judge's term ends. Another concern with ACA 1 is that in large counties, the ballot would become unwieldy whenever a substantial number of judges are up for retention election, dramatically increasing the cost to the county of printing and distributing ballot materials and resulting in substantial voter drop-off because of voter fatigue.

In response to these concerns, it has been suggested that ACA 1 could be modified to set up a mechanism by which a particular event would “trigger” placement of a judge’s name on the ballot for retention purposes. The most obvious such trigger would be the collection of a certain number of voter signatures on a petition. In addition, it has been suggested that a grace period be established after initial appointment to the court so that a judge would have several years on the bench to become known and established within the community before having to stand for election.

Under a trigger plan, whenever a judicial officer is up for election, his or her name would not be placed on the ballot unless a petition requesting such placement had been filed and signed by a certain number of registered voters. The most significant issue to resolve in designing this system is the number of signatures that would be necessary to qualify the judge’s name to be placed on the ballot. In order to devise a trigger system based on a certain number of signatures being gathered, both the base figure (e.g., the number of votes cast for Governor in the last gubernatorial election) and the percentage must be determined. A review of state laws governing recall elections and voter initiatives is useful in this regard.

State law on recall elections (*see* Cal. Const., Art. II, §§ 13-19; Elec. Code §§ 11000 et seq.) is divided into two categories: recall of state officers, which includes appellate justices from the courts of appeal and the Supreme Court, and recall of local officers, which includes superior court judges. With minor variations, however, the preliminary requirements are the same to recall any judge.

Recall proponents must serve, file, and publish or post a notice of intention to circulate a recall petition. The notice must contain the name and title of the judge sought to be recalled; a statement of no more than 200 words of the reasons for the recall; the name, address, and signature of each of the proponents of the recall (there must be at least ten); and the provisions of Election Code section 11023, which permit incumbents to file an answer to the notice. Within seven days after the filing of the notice, the judge may file with the Secretary of State an answer of no more than 200 words. The petition can be circulated and signed only by registered voters in the jurisdiction who are qualified to vote for the judge sought to be recalled.

The number of signatures needed to qualify a particular recall varies depending on the court on which the judge serves. For Supreme Court justices, a petition must be signed by registered voters equal in number to 12 percent of the last vote for the office. (In addition, signatures must be obtained from at least five different counties and must be equal in number to at least one percent of the last vote for office in each of five counties.) For justices of the courts of appeal and superior court judges, the number of signatures needed on the petition must total at least 20 percent of the last vote for the office. If, however, the office has not appeared on the ballot since its creation or did not appear at its last regularly scheduled date, the number of signatures must equal at least 20 percent of the votes cast within the jurisdiction for the

countywide office that had the *least* number of votes in the most recent general election in the county in which the judge holds office.

If the requisite number of signatures is obtained, the petition must be filed. At that point, certain verification and counting procedures are triggered, depending on whether the subject of the recall is an appellate or a superior court judge.

Signature requirements for ballot initiatives provide another analogy. *See* Cal. Const., Art. II, §§ 8-11; Elec. Code §§ 9000 et seq. After a statewide ballot initiative is written and submitted to the Attorney General's office for review, proponents have 150 days to collect signatures. In order to qualify for the ballot, the initiative measure must be signed by a specified number of registered voters, depending on the type of initiative submitted. Petitions proposing initiative statutes must be signed by registered voters whose numbers equal five percent of the votes cast for all candidates for Governor at the last gubernatorial election preceding the issuance of the title and summary for the measure by the Attorney General. Petitions proposing initiative constitutional amendments must be signed by a number of registered voters totaling eight percent of the votes cast for all candidates for Governor at the last gubernatorial election.

For county elections, Elections Code section 9118 provides that an initiative petition, to qualify for the ballot at the next general election, must be signed by ten percent of the entire vote cast in the county for all candidates for Governor at the last gubernatorial election.

As may be expected, local initiatives vary from county to county and from city to city. In San Francisco, for example, in order to qualify a charter amendment for the ballot, it takes ten percent of the total number of registered voters of the city and county. To qualify a proposed ordinance or proposed declaration of policy for the ballot, signatures must be gathered in an amount equal to five percent of the entire vote cast for mayor at the last preceding regular municipal election.

In devising a trigger system for judicial retention elections, it must first be determined what base figure to use. State law regarding recall elections refers to the number of votes cast in the last election for the particular office involved. The statutes addressing initiatives use as a base the number of votes cast for the Governor in the last gubernatorial election. A triggered retention election is more analogous to a recall election than an initiative election, and it therefore makes more sense to use a base figure that is derived from votes for a countywide office.

In the recall context, the statutes first look to the number of votes cast for the particular office involved. Only if the office did not appear at its last regularly scheduled election do the statutes examine the votes for some other countywide offices. In the context of a recall for an appellate seat, this approach makes sense because all seats are required to appear on the ballot periodically in a retention election. However, in the context of a triggered retention system, it is very unlikely that a particular office will have appeared on the ballot at the last regularly

scheduled election for that office. Indeed, a particular office will have appeared at the last regularly scheduled election *only if* there are *successive* petitions against the officeholder, which is unlikely. Accordingly, in designing a triggered retention system for superior court judges, it makes more sense to select some other base measure. After considering a variety of options, the Working Group decided that the base figure should equal the total number of votes cast in the jurisdiction for the countywide office that had the *greatest* number of votes in the most recent general election in a contested race.

As for the percentage of votes required, a superior court judge recall drive requires 20 percent of the votes cast at the last election, while a recall petition against a Supreme Court justice requires 12 percent of the votes cast at the last general election (which is much harder to achieve because of the statewide nature of the office). The Working Group believes that the trigger for a superior court retention election should be set at 12 percent of the total number of votes cast in the jurisdiction for the countywide office that had the greatest number of votes in the most recent general election in a contested race.

B. Eliminate Open Seat Elections

Under existing law, while most superior court judges reach the bench initially by gubernatorial appointment, a handful of judges each year reach the bench by winning an open seat election where there is no incumbent. About half of the contested judicial elections for the superior court involve open seat races. Because ACA 1 was inspired by special problems with open seat elections, its proposed remedy—eliminating all contested elections and establishing superior court retention elections—may go far beyond what is necessary.

Open seat races may present special problems for the independence, integrity, and quality of the bench. Among other things, since neither candidate is presently a judge, neither candidate will have functioned under the strictures of the Canons of Judicial Conduct. This lack of experience may result in a greater likelihood that the canons will be stretched or broken during the campaign.

In addition, judges who are initially selected for the bench by a Governor have had their backgrounds and applications thoroughly reviewed, both by the Governor's office and by the State Bar's judicial evaluation commission. There is, accordingly, good reason to believe that such judges will be well qualified for the bench. By contrast, in an open seat election, there is no formal, systematic, or objective evaluation process to screen the candidates. Some county bar associations evaluate judicial candidates, but it stretches credulity to claim that a true evaluation of the merits of the two candidates actually takes place in the context of the election process itself. Simply put, the electorate may not have sufficient information to make a fully informed decision.

Accordingly, eliminating open seat elections (by requiring that all vacancies be filled by gubernatorial appointment and not by election) or reducing the likelihood of open seat elections (by giving the Governor some defined period of time following a vacancy to make an appointment, such as nine months or one year, during which time the seat could not be filled by election) might reduce the number of judicial election contests (cutting them by as much as 50 percent), reduce the likelihood of inappropriate campaign speech, and ensure that nearly all judges go through a rigorous, formal evaluation process before being appointed to the bench.

On the other hand, open seat elections offer one way of expanding diversity on the bench, particularly if appointments by a particular Governor tend to fall into a homogenous pattern. *See, e.g.,* Commission on the Future of the California Courts, *Justice in the Balance—2020*, p. 87 (1993). In addition, the elimination of open seat elections may *increase* the likelihood of challenges to sitting judges (because, under the current system, a lawyer might wait for an open seat election instead of trying to challenge an incumbent, whereas that same lawyer might challenge an incumbent if given no other choice). Thus, if the current system of contested elections were retained but open seat elections were eliminated, there might be an increase in the number of challenges to incumbents.

In summary, there are both pros and cons to modifying the current system by eliminating open seat elections. Eliminating open seat races may reduce the overall number of judicial races, reduce the likelihood of inappropriate campaign conduct, and ensure gubernatorial screening for nearly all persons who become judges. On the other hand, eliminating open seat races may close off one important avenue for diverse candidates to become judges and may increase the number of challenges to incumbents.

C. Adjust the Timing of Superior Court Elections

The frequency of judicial elections may be another factor in their increasing political and partisan flavor. As judicial elections become more common, the tendency will be for both candidates and the public to treat such elections as essentially indistinguishable from elections for other offices. In many counties, the legal culture has treated judicial elections as extremely unusual events that deserve special treatment. Greater familiarity with judicial elections is likely to breed more aggressive and robust campaigning.

The frequency of judicial elections is determined by three factors. The first factor, the frequency with which lawyers decide to enter races, is not subject to direct legislative control. The other two factors – when an appointee must first stand for election and the term of office for a superior court judge – are structural features that may be changed by appropriate constitutional amendments. It should be clear at the outset that any change to these two factors adjusts the balance between judicial accountability and judicial independence.

Timing of First Election After Appointment. Under current law, judges who are appointed by the Governor temporarily to fill a vacancy on the superior court do not have to face the possibility of a contested election until after two to four years on the bench (depending upon the timing of the vacancy and the timing of the appointment). *See* Cal. Const., Art. VI, § 16(c) (“A vacancy shall be filled by election to a full term at the next general election after the second January 1 following the vacancy.”). This gives an appointed judge a reasonable period of time to establish a track record as a judge and to become better known in the community. Under ACA 1, a judge’s name would be placed on the ballot for retention purposes conceivably within a few months after appointment and certainly no more than two years after appointment.

We can retain the current practice in superior court elections of delaying the first election following initial appointment by amending ACA 1 so that an appointee would hold office until the Monday after January 1 following the *second* general election at which the appointee had the right to become a candidate. This would give an appointed judge two to four years on the bench before a retention election. In the context of the current contested election system, this could be accomplished by amending section 16(c) to provide that a vacancy shall be filled by election after a period of time *following the Governor’s appointment* to fill the vacancy temporarily (instead of starting the clock running at the time the vacancy occurs).

Term of Office. Under current law, the term of office for a superior court judge is six years, while the term of office for appellate justices is twelve years. This means that a superior court judge might have to stand for election as many as four times over the course of a twenty-year career on the bench and creates a large number of opportunities for contested races. This level of exposure to the electoral process may undermine the independence of the bench, and because the last election cycle may occur in a judge’s eighteenth or nineteenth year, the system exposes our most experienced judges (who are often the judges who are best qualified to handle the most difficult, high profile cases) to the pressures of politics near the end of their careers.

Extending the term of a superior court judge to ten years would cut in half the number of opportunities for contested judicial elections over a twenty-year judicial career, but lengthening the term from six to ten years may be too great a change. On the other hand, lengthening the term to only eight years would still, all other things being equal, expose a superior court judge to three election cycles over the course of a twenty-year career, and the last election would come sometime between the seventeenth and nineteenth year on the bench.

In order to reduce the number of elections a superior court judge may have to face over a twenty-year career and to avoid an election near the end of that career, California could adopt eight-year terms for superior court judges and provide that an appointed judge first stands for election at the *third* general election following the judge’s appointment. Under this system, judges would face elections at the fifth and thirteenth years of a twenty-year career (or at the sixth and fourteenth years of a twenty-year career). In addition to reducing the overall

frequency of judicial elections, this change would help the Governor's office in recruiting lawyers to serve because the possibility of an early election challenge is a deterrent to accepting a judicial appointment.

D. Public Information about Judicial Races

Judicial races have been typically low salience contests with little controversy and few interested spectators. Greater voter awareness of judicial races would arguably improve the quality of the campaigning and the voters' choices. Voters have consistently expressed frustration at receiving so little information on judicial candidates. Furthermore, the bulk of the information they receive is either misleading or inadequate. Many frustrated voters do not bother to vote for judges at all. In California, about 35 percent of those voting simply ignore judicial candidates altogether. Low levels of voter participation in judicial elections appears to be largely a function of inadequate information. The problem is particularly poignant in open races with no incumbent, where voters and members of the legal profession may cast their ballots with even less knowledge of the candidates.

The most promising avenues for increasing voter information involve greater utilization of the voter pamphlets and outreach to the public directly, through the media and through electronic means.

1. Voter Pamphlets

The voter's pamphlet is probably the most important source of voter information in lesser-publicized election contests such as judicial elections. However, the value of the voter's pamphlet was undermined when most California counties began charging candidates fees for inclusion of their statements in the pamphlet. While this may pose no great burden on candidates in small counties, the cost can be enormous in large counties. About 82 percent of superior court candidates are unable or unwilling to publish a statement in the voter's pamphlet because of its exorbitant cost, leaving voters with little or no information about their candidacies. For instance, Los Angeles County charged countywide candidates \$30,000 in the 2000 primary election and about \$27,000 in the general election to print their statements in English in the voter's pamphlet. If the countywide candidates wished to include their statement in both English and Spanish, the prices nearly doubled to nearly \$60,000 for the primary election and \$53,000 for the general election. Although some judicial candidates have been able to increase fundraising efforts to cover these costs, this approach effectively denies most superior court judges access to the voter pamphlet.

Eliminating the cost for voter pamphlet statements is particularly important in light of ACA 1 because, as currently drafted, all superior court judges will stand for periodic retention elections. Unless the voter pamphlet statements are provided without cost, every superior

court judge in the state will be required to engage in fundraising to pay for the pamphlet statement.

2. Direct Public Outreach

Declining public trust and confidence in the courts is one of the most significant issues facing the justice system today. For more than 25 years, public opinion surveys in California and throughout the United States have documented that (1) fewer than half the members of the public have a generally positive opinion of their local court system; (2) many people believe that the courts are not consistently fair; (3) while many people have more confidence in the courts than in other government institutions, the public is not overwhelmingly confident of the courts; (4) fewer than half the members of the public understand basic legal principles and are familiar with the role and operation of their courts; and (5) most receive information about the court system from the news media.

A long-term strategy must be pursued to properly address the current problem of public perception. Outreach efforts are most effective when they are pursued as a year-round effort. Given the decline in public trust and confidence in the courts, it is important that the courts sincerely seek to provide improved services to the users of the justice system and that courts renew their traditional position of leadership within their communities. Historically, the courts have been recognized as relevant to the lives of the people they serve. To reclaim that respected role, the courts need to take action in two broad areas: (1) courts should open avenues of communication with the public through which the courts truly “listen,” and (2) courts should actively engage in public education about the role and operation of the courts.

The Judicial Council’s Community Collaboration project has been working for the last three years to implement a year-round statewide approach to improve the courts’ ability to maximize resources, meet increasing demands, and improve public confidence. A key objective of the Community Collaboration project is to promote greater understanding of the judiciary’s role in government through public involvement in the future of our courts.

The Community-Focused Court Planning Implementation Committee is currently working on plans for two regional trial court workshops to be held in October 2001. These workshops will afford opportunities for courts to exchange information about community outreach and education initiatives already in place statewide. Other topics to be addressed at the workshops include strategic plan implementation and evaluation, and change management.

The judiciary, the bar, and other interested groups should use ongoing programs to educate the public about the judicial process. Special attention should be given to informing educators, students, and media representatives about the judicial process. Judges should increase their efforts to explain the judicial role to the public.

3. Media

With few exceptions, most studies have shown that voters have very little awareness of the court system, judicial contests and the identities of sitting judges and judicial candidates. Low voter awareness of judicial contests is particularly evident in trial court elections, which are largely ignored by the media. But even in highly publicized and controversial races, voter information can be low. One such race occurred in Sacramento County's 2000 judicial election. Working with the media may pose some of the most difficult obstacles when reaching the electorate.

Canons of judicial conduct have seriously restricted the type of speech, political activities, and campaign fundraising in which judicial candidates can engage. These restrictions are imposed in an attempt to balance the need for judicial independence and the appearance of impartiality with the very real and practical need for judges who are elected to communicate information to the voters. Imposing no limits on judicial campaign speech would transform nonpartisan judicial officers into ideological politicians. However, a total ban on judicial campaign speech and political activity would cripple candidates for judicial office and render the election of judges essentially worthless.

This ongoing tension between both extremes will continue to create contentious debate. However, there are steps that can be taken to increase the positive publicity that judicial races receive. Efforts to engage editorial boards by judges, judicial candidates, and members of the bar would provide one mechanism to reach the general public. Increased op-ed pieces on judicial elections, judicial procedures, and the limits of judicial conduct could also play an important role. Television media could also take part in helping educate the public about judicial elections. Local stations could host and sponsor forums featuring the major judicial officers. These forums could serve as tools to help differentiate candidates while still abiding by the judicial canons.

4. Internet

The Internet has provided all forms of government with the increased capability to deliver services directly to customers' homes and workplaces. The increased prominence of the Internet will demand a greater presence for the courts. As the influence of the Internet keeps growing, an electronic presence will become pivotal for the court's continued public education efforts. The courts should continue to develop their websites for the purpose of explaining the judicial role to the public as well as delivering customer service and support. Courts can gain a great deal of benefit from a variety of e-Government initiatives. The courts can provide customer access and service through the Internet, making transactions easier for the public. Court dockets, court calendars, and jury information will provide a better experience for the public.

The Internet is an ideal place to put up information about judicial elections. An enormous amount of election-related data is now on the Internet, and many voters are getting used to

turning to the Internet for information on upcoming and past elections. A systematic effort should be made to put information about judicial races and candidates on the Internet at locations that are relatively easy for the public to find.

E. Regulation of Campaign Conduct and Speech

In California, one of the traditional characteristics of judicial elections has been their nonpartisan nature and the relatively uncontroversial, low-key, and low profile style of judicial campaigns. As a result, voters often lack adequate information on which to make election decisions about the judges who appear on the ballot. There is an inherent tension between the voters' interest in relevant information and judges' and candidates' First Amendment rights on one side and the concept of a nonpartisan, independent judiciary on the other side. With a view toward preserving the integrity, independence, and impartiality of the judiciary, the Code of Judicial Ethics contains language that prohibits judges and candidates from imparting the type of information in which voters are often most interested. These rules apply not only to judges who are bound to follow the Code of Judicial Ethics, but also to lawyers who are candidates for judicial office. *See* Rules of Professional Conduct; Rule 1-700(A) ("A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.").

There are several canons that address generally conduct that often arises during election campaigns. For example, Canon 1 provides that judges are expected to act in such a manner that "the integrity and independence of the judiciary will be preserved." Canon 2A states that judges "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." And canon 3B(9) states that judges must not "make any public comment about a pending or impending proceeding in any court."

Canon 5B is the only portion of the code that specifically addresses election campaign conduct. It reads:

A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent.

Because judicial candidates must be permitted as a practical matter to engage in *some* campaign speech, restrictions upon such speech are necessarily content-based. Content-based restrictions on core political speech can be justified only by showing a compelling interest and that the restriction is narrowly tailored to further that interest. The long-term trend in First Amendment jurisprudence is toward an expansion of the rights of speech and association and a

rejection of the states' ability to draw narrowly tailored lines between acceptable and unacceptable speech. This trend has been apparent in cases raising the constitutionality of restrictions upon judicial campaign speech. Successful challenges to proscriptions on judicial campaign speech are now fairly commonplace.

Based on the ABA's 1990 Code of Judicial Ethics, the Supreme Court of Illinois promulgated a rule providing that:

[A] candidate, including an incumbent judge, for a judicial office filled by election or retention . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity . . . or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.

A federal appellate court struck down this rule as unconstitutionally overbroad when applied to a judge's campaign statement that he had never written an opinion reversing a rape conviction. (*Buckley v. Illinois Judicial Inquiry Board* (7th Cir. 1993) 997 F.2d 224.)

Other courts have struck down as unconstitutional similar restrictions. See *ACLU v. Florida Bar* (N.D. Fla. 1990) 744 F.Supp. 1094 (striking down ban on discussion of "disputed legal or political issues"); *Ackerson v. Kentucky Judicial Retirement & Removal Comm.* (W.D.Ky.1991) 776 F.Supp. 309 (striking down ban on pledges and promises as applied to judicial administration functions); *Pittman v. Cole* (S.D.Ala. 2000) 117 F.Supp.2d 1285 (TRO issued to enjoin Judicial Inquiry members from enforcing advisory opinions restricting candidate's speech answering Christian Coalition questionnaire); *J.C.J.D. v. R.J.C.R.* (Ky. 1991) 803 S.W.2d 953 (striking down requirement that judicial candidates "maintain the dignity appropriate to judicial office" as overbroad).

One other notable case found a federal court striking down an attempt to ban political party endorsements of judges. (*Geary v. Renne* (9th Cir. 1990) 911 F.2d 280 (en banc).) In that case, the court found that the ban violated the free speech rights of political parties. In a concurring opinion, Judge Reinhardt noted that "[i]f [California] wants to elect its judges, it cannot deprive its citizens of a full and robust election debate."

California's Canon 5B does not include the ABA model code's proscription against making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." On the one hand, dropping this part of the ABA's model code is probably a good thing in view of the fact that it raises serious constitutional issues. On the other hand, dropping the proscription means that judicial candidates in California are apparently free to make any campaign pledge or promise so long as it does not "commit or

appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts.” For example, although these issues have not been addressed by the Commission on Judicial Performance, candidates arguably can pledge to be “tough on crime,” to be “a protector of Proposition 13,” to enforce “three strikes,” and so on, all apparently without committing themselves to cases or legal issues.

As it stands now, Canon 5B appears to be adequate to prohibit the two categories of misconduct of greatest concern: misrepresentations about the candidate and his or her opponent, and appearing to commit oneself to a position on an issue or case likely to come before the court. The question then becomes whether the Code of Judicial Ethics could be amended so that judges who are involved in election campaigns would have a more precise idea of what conduct is prohibited.

Without running afoul of the First Amendment, one approach may be to add an advisory committee commentary to the canon explaining the type of conduct to which the canon pertains. As noted above, the law is unclear on exactly what types of statements would fall within the prohibition against committing oneself to a certain position. Nevertheless, some guidance could be provided. For example, the commentary could state that the prohibition against committing oneself to a position includes statements that convey the impression of prejudgment. Although not in an election context, one judge was publicly censured in 1997 for, among other misconduct, making it known publicly that he would impose certain sentences for first-, second-, and third-time DUI offenders. The Commission on Judicial Performance cited the judge for creating the appearance of prejudgment in DUI cases.

As to misrepresentations of qualifications, the commentary could refer to Elections Code sections that regulate the content of candidates’ statements for nonpartisan offices that are printed in the voter’s pamphlet sent to voters shortly before an election. Section 13307(a)(1) of the Elections Code provides that “[t]he statement may include the name, age, and occupation of the candidate and a brief description, of no more than 200 words, of the candidate’s education and qualifications expressed by the candidate himself or herself.” Section 13308 contains additional restrictions upon the candidate’s statement for judicial office. It provides that judicial candidates’ statements “shall be limited to a recitation of the candidates’ own personal background and qualifications and shall not in any way make reference to other candidates for judicial office or to another candidate’s qualifications, character or activities.”

The need for more robust deterrents against inappropriate campaign conduct has motivated the Bar Association of Santa Clara County to author and enforce its own campaign code of ethics for judicial races. Candidates agree voluntarily to abide by the bar association’s Judicial Election Campaign Code of Ethics. The Code of Ethics sets forth parameters of speech and conduct. It addresses both oral and written communications between the candidates and the public. The Code also demands that candidates share campaign material with each other prior to distribution to the voters.

Some of the guidelines delineated in the Judicial Election Campaign Code of Ethics are essentially consistent with and reinforce Canon 5 of the Code of Judicial Ethics. For example, the bar association's code proscribes misrepresentations, distortions, and falsifications in campaign material about any judicial candidate, and it forbids statements that could reasonably be construed as an indication of how the candidate would decide specific cases as a judge.

However, some of the guidelines go far beyond the requirements of Canon 5 and provide very specific limitations on judicial campaign speech. For example, the bar association's code requires candidates and their supporters to meet the following standards:

- a. Ensure that statements concerning the change or modification of court structure, calendar or programs, that require the concurrence of fellow judges or legislative enactments be qualified as such and not imply that the candidate alone can accomplish those goals.
- b. Not make any statements about individual cases or matters involving conduct by the opposing candidate, whether a judge or a lawyer, that have no bearing upon one's ability to perform in the judicial position being sought.
- c. Not make any statements concerning personal character or traits of opposing candidates that have no bearing upon one's ability to perform the judicial position being sought.
- d. Repudiate immediately and publicly repudiate support or independent expenditures deriving from any individual or group that resorts, on behalf of the candidate or in opposition to opponents of the candidate, to methods and tactics prohibited by this Code.
- e. Not use or permit any appeal to negative prejudice based upon race, sex, religion, ethnicity, sexual orientation, physical health status, or age.
- f. Ensure that all campaign materials that include excerpts from newspaper articles or editorials not be used in such a context as to imply the newspaper's endorsement unless such excerpt is from an actual newspaper editorial making such an endorsement.
- g. Not include the judicial evaluation poll or any excerpts therefrom in any campaign material, advertisement, or presentation.

The Santa Clara County Fair Judicial Election Practices Commission uses the Judicial Election Campaign Code of Ethics to evaluate the campaign practices and conduct of candidates for judicial office and their supporters so that each campaign will be conducted in a dignified

manner. While recognizing a candidate's right to free expression, the commission is expected to speak out when the use of that right violates the Judicial Election Campaign Code of Ethics. The commission seeks to meet this goal by receiving complaints, evaluating them, and taking appropriate action. The commission is impartial, and it has no power to impose financial or legal sanctions. However, it may publicly report or comment on any violation of the Judicial Election Campaign Code of Ethics.

The commission acts as a forum to resolve disputes between candidates over the interpretation of the standards of conduct in this code. It is prepared to examine the truthfulness and fairness of a candidate's statements that are alleged to be false or misleading.

The commission consists of the president of the Santa Clara County Bar Association, the judge who will be the presiding judge of the superior court at the time of the election and ten members, appointed by the President with approval of the Board of Trustees, including judges, lawyers, and community representatives. The Executive Director of the Bar Association serves as Clerk of the Commission.

A unique feature of the commission is its agility and speed. Immediately upon receipt of the complaint from a candidate or a commissioner, the executive director must contact the co-chairs of the commission and schedule a meeting of the full commission.

Where the commission finds a violation of the Judicial Election Campaign Code of Ethics, the commission shall determine an appropriate remedy, including:

- a. a public statement by the commission;
- b. a public retraction of the statement by the offending candidate;
- c. an agreed-upon resolution by the candidates involved.

The public and vocal statements made by the commission have been known to carry with them serious repercussions. Because of the commission's enforcement of the Code of Ethics, candidates have lost endorsements and support. Other county bar associations should consider adopting similar programs, which can go a long way toward self-regulating judicial elections.

Chapter 5. Conclusion

The general topic of judicial elections has been problematic for our country from its founding. We are torn as a society between our desire for accountability in a *representative* democracy and our recognition of the need for judicial independence in a *constitutional* democracy. For the last 70 years, that balance in California has been struck by having retention elections for appellate justices and contested elections for trial court judges. In considering changes to the existing system, it is worth recalling that any change we make today will probably guide us for the next half century or so and may result in fundamental changes in the independence, accountability, and quality of the bench.

The Working Group appreciates the opportunity it has been given to deliberate on the pros and cons of ACA 1. Although the Working Group has unanimously concluded that the retention election provisions of ACA 1 are likely to create more problems than they solve, we recognize that reasonable people can and do have different views. It is in a spirit of cooperation and collaboration that we present our views in this report, hopeful that our deliberations will advance the conversation regarding the topic judicial elections.