



JUDICIAL COUNCIL
OF CALIFORNIA

COMMISSION FOR
IMPARTIAL COURTS

**Task Force on Judicial Campaign Finance
Commission for Impartial Courts**

Administrative Office of the Courts
Judicial Council Conference Center, Redwood Room, 3rd Floor
455 Golden Gate Avenue, San Francisco, CA 94102

Friday, September 12, 2008
10:00 a.m. – 3:00 p.m.

Summary of Meeting

Members present: Hon. William MacLaughlin, Task Force Chair; Hon. Gail Andler; Hon. Alden Danner; Ms. Denise Gordon (via telephone); Mr. Charles Kim, Jr.; Mr. Robert Leidigh (advisory member; via telephone); Hon. Bruce McPherson; Hon. Heather Morse; Mr. Michael Planet; Hon. Mark Simons; Mr. Thomas Warwick, Jr.

Members absent: Ms. Rozenia Cummings; Ms. Angela Padilla; Mr. Gerald Uelmen; Hon. Michael Vicencia.

Consultant present: Ms. Deborah Goldberg.

Staff present: Mr. Chad Finke, Committee Counsel; Ms. Benita Downs, Administrative Coordinator.

Others present: Christine Patton, Regional Administrative Director, Bay Area/Northern Coastal Regional Office.

1. Approval of minutes from April 28, 2008.

The members of the Task Force on Judicial Campaign Finance (TF) voted to approve the minutes from the TF's April 28, 2008, meeting.

2. Discussion of Task Force administrative matters.

Background:

The Chair and staff discussed with the members various administrative matters relating to the TF and the Commission for Impartial Courts (CIC). Items discussed included:

- An update on the progress of the student volunteer who has been assisting with inputting campaign finance disclosure/reporting data into the staff-developed

database. The data should be ready in time for the TF's November 17, 2008, meeting. Early indicators are that most campaign contributions to judicial candidates come from attorneys, and that most are in the \$100 to \$500 range; there appears to be few contributions of \$1000 or more.

Actions:

No specific actions were taken in response to the discussion of the issues above.

3. Video presentation: Excerpt from remarks by Professor Kathleen Sullivan, Stanford Law School, at the July 14, 2008, CIC Public Forum.

Background:

Members of the TF watched an excerpt from Prof. Sullivan's July 14 presentation, in which Prof. Sullivan explains her view that the constitution permits treating judicial candidates differently from candidates for other elective offices for purposes of, among other things, campaign finance laws.

Actions:

Staff will mail a copy of the full July 14, 2008, Public Forum on DVD to any TF member who requests it.

Staff will also provide a written copy of the transcript of the Public Forum, with discussions of campaign finance issues highlighted, to all members of the TF.

4. Review and renewed discussion of all issues considered to date.

Background:

Members of the TF discussed the issues considered and the tentative recommendations made to date by both Working Groups (WGs). Members reviewed the issues and engaged in discussion on an issue-by-issue basis. Following the discussion of each issue, the chair attempted to reach consensus on a tentative recommendation that may ultimately become the TF's final recommendation to the Judicial Council.

Below is a summary of (a) the issues discussed; (b) specific items of discussion for each issue; and (c) where appropriate, the TF's tentative recommendation on the issue.

Issue I(A)(1): Whether to recommend statutory or other limits on contributions to judicial election campaigns by various persons and/or entities.

Discussion points:

- Candidates for judicial office are among a small number of candidates who are not currently subject to contribution limits.
- Unlike candidates for other office, judges are not free to act politically, which may hinder their ability to raise necessary funds. Likewise, judges tend not to have a reliable electoral base the way that candidates for other offices do.
- Data show that imposing contribution limits may lead to increased independent expenditure (IE) spending.
- Judges are under an ethical obligation to recuse themselves where remaining on a case may give the appearance of impropriety.
- A system of mandatory disclosure and disqualification (DQ) may better serve the goal of enhancing the public's trust and confidence in an impartial judiciary while still enabling judicial candidates to raise necessary funds.
- Even one unethical act by a judge—even if in another state—may tend to erode the public's trust and confidence that a system of judicial ethics is sufficient to create an impartial judiciary free from the influence of money.
- As to an electorate, it may be that the attorneys and local bar associations do present a sufficient electoral base for judicial candidates.
- If contribution limits were imposed, having them vary from county to county could lead to too much disparity.
- Given early data as to the average amount of contributions received by judicial candidates, it may be that a contribution limit at the \$1500 level would not have much of an actual impact.
- It is possible that an aggrieved member of the public might think that any contribution to a judicial candidate, no matter how small, might create bias or impartiality.
- Although there has not yet been a major incident in California in which a judge accepted a large monetary contribution from a litigant and then failed to DQ him- or herself, the fact is that without contribution limits or some other protection, it could happen; thus, there may be a need for the TF to recommend putting a system in place now to curb even the potential for a judge or judicial candidate to be “bought.”
- With respect to whether contribution limits would be preferable to a system of mandatory disclosure and disqualification, it may be that the former would be easier to explain to the public.

Tentative recommendation:

The Task Force tentatively recommends that monetary limits not be placed on contributions to judicial election campaigns, but rather—as discussed below—that a system of mandatory disclosure and disqualification be adopted to enhance the public's trust and confidence that judicial decision-making will not be affected by monetary contributions.

Issue I(A)(2): Whether campaign contribution limits, if recommended, should vary by contributor type, e.g., attorneys/law firms, individuals, PACs, etc.

Discussion points:

- There would not necessarily be a free speech problem with imposing different contribution limits on different types of contributors, so long as the overall ability of candidates to raise sufficient funds is protected.

Tentative recommendation:

In light of tentative recommendation I(A)(1), this issue is moot. If, however, the Task Force were to make a tentative recommendation in favor of contribution limits, then the Task Force would also tentatively recommend that such limits be uniform across all types of contributors, whether individual or entity.

Issue I(A)(3): Whether, as an alternative to contribution limits, to recommend a system of mandatory disclosure to litigants and their counsel of—and possibly disqualification because of—contributions at a certain dollar amount.

Discussion points:

- There are no data showing that public trust and confidence would be enhanced more by contribution limits than by a system of mandatory disclosure and DQ.
- Consideration will need to be given as to how long the “taint” of a contribution will last, i.e., for how long will the judges’ obligation to disclose and DQ extent?
- The Code of Civil Procedure provides that judges must DQ themselves if they have a financial interest of \$1500 or more in a party; arguably, this reflects a legislative judgment that \$1500 is a meaningful dollar amount vis-à-vis a judge’s ability to be impartial, or at least to give the appearance of impartiality. There is a concern, however, that that dollar figure has not changed in recent years, and may need to be reexamined periodically.
- While it might be possible to set the DQ level at a percentage of total contributions received rather than an absolute dollar amount, doing so would present serious logistical challenges and could be more likely to challenge in court.
- The mandatory disclosure/DQ model presents unique challenges with respect to appellate justices, as could setting the DQ threshold at \$1500 (given that, in appellate races, incumbents are typically targeted by IE spending groups, which can spend money far in excess of what candidates may be able to raise). For example, appellate justices currently are not subject to any sort of preemptory challenge the way that trial court judges are, which arguably reflects a policy decision that appellate justices are not subject to DQ on the same bases as trial court judges. Disclosure is also potentially more complicated for appellate justices; unlike trial court judges, they cannot, for example, simply post a contributor list in their individual courtrooms.
- At the appellate level, data show that often there is little to no spending at all. When there is spending, however, it can be significantly larger than at the trial

court level, given the presence of IE spending on the other side, i.e., in favor of defeating a justice's retention.

- On a policy level—and notwithstanding the logistical difficulties of crafting a system of disclosure/DQ—it may be difficult to justify treating appellate justices and trial court judges differently, especially given the magnitude and precedential effect of the matters heard by the former.
- If mandatory DQ is recommended, there will also be a need for, e.g., some type of waiver provision, to prevent the system from being “gamed” (by, for example, a party contributing to a judge who that party wants to be removed from a case).
- Given that the general public may not know about or understand the way that DQ works, there may be a need to work with the Task Force on Public Information and Education to provide information on the topic.
- Given the lack of public knowledge about judicial elections generally, it is arguable that imposing contribution limits would not affect the public's trust and confidence the way that requiring disclosure and DQ could.

Tentative recommendations:

a) As to trial court judges:

- i) The Task Force tentatively recommends that a system be adopted under which each trial court judge is required to disclose, to litigants, counsel, and other interested persons appearing in the judge's courtroom, all contributions made to the judge's campaign in the most recent election cycle.
- ii) The Task Force makes no tentative recommendation as to the form and/or logistics of the disclosure recommended above, and instead recommends that those issues be referred to the appropriate group(s) for detailed consideration and further recommendation.
- iii) The Task Force tentatively recommends that each trial court judge be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the judge's campaign in the most recent election cycle, subject to the following:
 - That the contribution level at which disqualification shall be mandatory shall be the same as the level, set forth in Code of Civil Procedure section 170.5(b), at which a judge is considered to have a “financial interest” in a party requiring disqualification;
 - That a recommendation be made that the amount set forth in Code of Civil Procedure section 170.5(b)—which, as of the date of this tentative recommendation, is \$1,500—be periodically reviewed and increased as appropriate; and

- That the mandatory disqualification described above be waivable by those parties to the matter who were not involved in making the contribution in question.

b) As to appellate justices:

- i) The Task Force tentatively recommends that a system be adopted under which each appellate justice is required to disclose, to appellate parties, counsel, and other interested persons appearing before the justice, all contributions made to the justice's campaign in the most recent election cycle.
- ii) The Task Force makes no tentative recommendation as to the form and/or logistics of the disclosure recommended above—including whether that disclosure should exceed that currently required to be made to the California Secretary of State's Office—and instead recommends that those issues be referred to the appropriate group(s) for detailed consideration and further recommendation.
- iii) The Task Force did not reach consensus on whether to make a tentative recommendation that each appellate justice be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the justice's campaign in the most recent election cycle.

Issue I(B)(1): Whether to recommend limiting corporate and union financing of judicial candidates and/or IEs, directly or indirectly.

Discussion points:

- This recommendation would not limit the ability of corporations and unions to participate in judicial elections; it would simply mean that they would have to contribute through PACs (which, in turn, requires individual members' support) rather than expending directly from their treasury funds. In essence, this would mean that corporate/union spending would reflect the support of the individual members of those entities, rather than, e.g., simply the support of the board of directors or other governing body.
- Given tax laws, it is already the case that tax-exempt organizations such as unions cannot spend treasury funds on candidate campaigns; they are required to contribute through PACs. Thus, this recommendation, if made, could be seen as leveling the playing field as between corporations and unions.
- Sometimes, corporate interests are aligned against interest groups that are not unions, such as trial lawyers' groups. In such situations, limiting corporate treasury spending could potentially be seen as creating a differential "playing field." On the other hand, the limit being considered could also be viewed as leveling the field, as it is, in essence, requiring that any entity that is expending

funds on a judicial election is doing so through the will of the individual persons in that group.

- While this proposed recommendation would treat judicial candidates differently than candidates for other offices vis-à-vis corporate and union spending, it is important to recall that, unlike candidates for other offices, judicial candidates are not subject to contribution limits. Thus, corporations and unions are already limited—albeit in a different way—in terms of their ability to contribute funds to candidates for non-judicial office.

Tentative recommendation:

The Task Force tentatively recommends that legislation be pursued prohibiting corporations and unions from expending treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with campaigns for judicial office. This tentative recommendation would not, however, prohibit corporations and unions from forming separate, segregated funds or PACs for these purposes.

Issue II(A)(1): What recommendations, if any, to make with respect to the content and timing of judicial candidates’ disclosures regarding contributions received and expenditures made.

Discussion points:

- As the TF has previously discussed and noted, California’s current disclosure laws have received praise and high marks.

Tentative recommendation:

The Task Force tentatively recommends that no changes be pursued as to the content and/or timing of judicial candidates’ disclosures regarding contributions received and expenditures made.

Issue II(A)(2): Whether to recommend that judicial candidates be required to e-file their mandatory disclosures, and, if so, with what agency and at what aggregate contribution/expenditure level.

Discussion points:

- E-filing would enhance the public’s ability to access information about judicial candidates’ contributions received and expenditures made, particularly at the trial court level.
- While it may prove to be the case that use of the Secretary of State’s Cal-Access Web site and software is not cost-effective for judicial candidates, there is likely some way of providing data in electronic form to the Secretary of State (e.g., in

the form of a scanned PDF document) that would still enhance the public's ability to search and obtain that data remotely.

Tentative recommendations:

- a) The Task Force tentatively recommends that appropriate authority be pursued to require that all candidates for judicial office—regardless of their total dollar amount of contributions received and/or expenditures made—be required to file, in some electronic format with the California Secretary of State's Office, all campaign disclosure documents that they would also be required to file in paper form.
- b) The Task Force makes no tentative recommendation as to the exact electronic format—e.g., scanned PDF file, entry into the fields of the Secretary of State's Cal-Access database—that judicial candidates should be required to use when filing their disclosure documents, and instead recommends that that issue be referred to the appropriate group(s) for detailed consideration and further recommendation.

Issue II(B)(1): Whether to recommend legislative changes designed to expand the scope of which groups are subject to campaign disclosure/reporting laws applicable to IEs.

Discussion points:

The members decided to defer discussion of this issue until the TF's follow-up October telephonic meeting.

Issue II(B)(2): Whether to recommend expanding the scope of what information must be reported by IE groups under the campaign finance reporting laws.

Discussion points:

- As the TF has previously discussed and noted, and as referenced above, California's current disclosure laws have received praise and high marks.

Tentative recommendation:

The Task Force tentatively recommends that no changes be pursued as to the content of the information that must be reported by groups making independent expenditures in connection with campaigns for judicial office.

Actions:

Staff will schedule a conference call for the full TF in late September or early October. At the conference call, members of the TF will review and discuss the remaining issues

considered to date. At that time, the issue of mandatory disclosure/DQ for appellate justices will also be revisited.

The TF chair will also raise the issue of appellate disclosure/DQ with the Appellate Institute in October.

Ms. Goldberg will circulate sample recusal standards for consideration by the TF.

5. Adjournment.

The Task Force meeting adjourned at 3:00 p.m.