



## JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688  
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

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### MEMORANDUM

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**Date**

October 27, 2014

**Action Requested**

For Your Information Only

**To**

Cory Jaspersen, Director  
Laura Speed, Assistant Director  
Governmental Affairs

**Deadline**

N/A

**From**

Deborah C. Brown, Chief Counsel  
Mark Jacobson, Senior Attorney *MJ*  
Legal Services

**Contact**

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

**Subject**

Ethical Principles Applicable to Judges  
Engaged in Legislative Activities

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You have asked Legal Services to provide an information sheet setting forth the ethical principles that pertain to judicial officers who participate in legislative activities that can be distributed to judicial officers who engage in Bench-Bar Coalition legislative outreach activities. To assist judicial officers, this memorandum provides the following information: (1) the applicable canons from the California Code of Judicial Ethics; (2) an analysis of a recent formal opinion from the Supreme Court's Committee on Judicial Ethics Opinions; and (3) relevant excerpts from David M. Rothman's *California Judicial Conduct Handbook*.

**Relevant Canons<sup>1</sup>****Governmental Activities**

The canon most directly on point for judges who wish to participate in legislative activity is canon 4C(1), which prohibits a judge from appearing at a public hearing or consulting with an

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<sup>1</sup> The full text of the canons discussed in this section is set forth in the attached appendix.

executive or legislative body or a public official except on matters concerning the law, the legal system, and the administration of justice. In deciding whether to engage in such activities, a judge must also consider whether that conduct would violate any other provision of the Code of Judicial Ethics. For example, the activity must uphold the integrity, impartiality, and independence of the judiciary (canons 1 and 2A), and it must not cause the judge to be disqualified (canon 4A(4)).

### **Political Activity**

Canon 5 provides that judges may not be involved in political activity that is inconsistent with the independence, integrity, or impartiality of the judiciary or that creates the appearance of political bias or impropriety. Canon 5D states that a judge is not permitted to engage in political activity unless it is related to the law, the legal system, or the administration of justice.

### **Extrajudicial Activities, Appearance of Impropriety, Lending the Prestige of Office**

There are several other canons that should be considered when a judge is involved in legislative activity. Canon 4A states that a judge must conduct any extrajudicial activity so that such activity does not (1) interfere with judicial duties, (2) cast doubt on the judge's impartiality, or (3) lead to frequent disqualification. Canon 2 provides that a judge must not engage in conduct that creates the appearance of impropriety. Canon 2A prohibits a judge from making any statement that commits the judge with respect to cases, controversies, or issues that are likely to come before the courts. Finally, canon 2B(2) states that a judge must not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others.

CJEO Formal Opinion No. 2014-006

The Supreme Court's Committee on Judicial Ethics Opinions issued a formal opinion on October 2, 2014, entitled "Judicial Comment at Public Hearings and Consultation with Public Officials and Other Branches of Government."<sup>2</sup> The opinion addressed the circumstances under which a judge may appear at a public hearing or officially consult with executive or legislative bodies on "matters concerning the law, the legal system, or the administration of justice." (See canon 4C(1), Appendix, p. 1.) The committee concluded that canon 4C(1) allows comment and consultation concerning the court system or matters of judicial administration. The canon permits a judge to appear before or consult with representatives of the other two branches of government "when the subject of the appearance or consultation is one with respect to which the judge's experience and perspective *as a judge* gives him or her unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public." (CJEO Formal Opn. 2014-006, p. 2, emphasis in original.)

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<sup>2</sup> The full opinion can be found on the CJEO website at [http://www.judicialethicsopinions.ca.gov/sites/default/files/CJEO\\_Formal\\_Opinion\\_2014-006.pdf](http://www.judicialethicsopinions.ca.gov/sites/default/files/CJEO_Formal_Opinion_2014-006.pdf).

The committee stated that based on the reference in canon 4C(1) to matters concerning the administration of justice, judges may testify or advocate at public hearings only on behalf of the legal system, i.e., focusing on court users, the courts, or the administration of justice. (CJEO Formal Opn. 2014-006, *supra*, at p. 7.) There are situations in which a judge may comment about substantive legal issues where the purpose is to benefit the law and legal system itself rather than any particular cause or group and when the comment or consultation is made from a judicial perspective. (*Ibid.*) Thus, any comments from a *legal* knowledge/experience perspective should be provided by attorneys, not judges. (*Ibid.*) Where a judge has both judicial and attorney experience to draw from (or only attorney experience) in a particular area of law, the judge's comments or consultation should be presented from a purely judicial perspective. (*Ibid.*)

The committee noted that even if the exception in canon 4C(1) applies, the judge must ensure that the appearance or consultation does not violate any other canons, such as those set forth in the appendix to this memorandum.

The opinion provides the following illustrative examples:

- A judge may comment or consult about the judicial branch's budget, or a bond measure for court construction, or a bill proposing to replace court reporters with electronic recording.
- Regarding a proposed constitutional amendment to replace the death penalty with life without parole, a judge may comment on the dysfunction of the present system from a judicial perspective, but advocacy for or against the death penalty as a policy matter would violate canon 4C(1).
- A judge who was an environmental attorney may express his or her views in support of a new CEQA settlement process, but only from the viewpoint of a judge who is, for example, seeking to unburden the court's docket by resolving CEQA cases earlier in the judicial process.
- A judge who was a prosecutor but has no judicial experience in criminal law may express support for proposed legislation to reduce the number of peremptory challenges in misdemeanor cases, but those views should be expressed in terms of how the law would affect the legal system or the administration of justice by improving juror satisfaction, enhancing jury diversity, and saving court costs, while still providing the full panoply of due process.
- A judge may not appear at a public hearing of a legislative committee to advocate for longer sentences for certain drug offenders because, even though such comments are

about a matter “concerning the law,” advocacy for longer sentences for only a particular type of offender could undermine public confidence in the impartiality of the judiciary, thus violating canons 1 (upholding the integrity and independence of the judiciary), 2A (promoting public confidence in the integrity and impartiality of the judiciary), 3B(9) (commenting publicly on pending cases), and 4A(1) (casting doubt on the judge’s capacity to act impartially). The judge could, however, discuss the impact of such sentences on the courts or the adjudicatory process.

- Based on the judge’s expertise, a judge may advocate for improvements in the administration of justice that would seek to reduce recidivism by providing information about collaborative court programs the judge had presided over or administered that employ alternative sentencing or probation periods for drug offenders.
- A judge may advocate for statewide use of alternative programs based on the judge’s experience, but must not comment on the outcome of cases involving particular offenders and must not imply that the judge will be ruling in a particular way in a class of cases.
- Judicial advocacy for specific legislation on proposed death penalty or collective bargaining measures could violate the prohibition in canon 2A against making statements that commit a judge with respect to cases, controversies, or issues that are likely to come before the court or that are inconsistent with the impartial performance of duties. But a judge may appear before a public body to explain, from a judicial perspective, the effects of proposed laws on the judicial process or judicial administration.

Rothman, *California Judicial Conduct Handbook*

In the *California Judicial Conduct Handbook* (3d ed. 2007), Judge Rothman addresses judicial involvement in executive and legislative matters:

**[§11.03] Appearances at Public Hearings and Participation in Executive or Legislative Matters**

**Ethics rules on the subject.** A judge . . . must . . . draw the distinction between inappropriate involvement with the legislative and executive branch in what could be called “political” matters as opposed to appropriate involvement in matters that concern the law, legal system, and administration of justice. Thus, for example, a judge may endorse legislation that would provide the court with facilities and services, because such matters deal with the administration of justice.

\* \* \*

**Recognition of the separation of powers—urging moderation in advocacy by judges.** Judges have frequently been active in advocating positions before the legislative and executive branches on a variety of subjects. The Code of Judicial Ethics does not prohibit this activity so long as the activity is limited to issues related to the law, the legal system, and administration of justice. The boundary, however, of this limitation is often stretched.

I am not alone in the belief that judges should greatly limit advocacy of issues before the legislative and executive branches to only the clearest and most urgent of circumstances. Where judges frequently engage in such advocacy, they may be perceived as encroaching on legislative and executive prerogatives. When judges do so they should not be surprised if the legislative and executive branches feel comfortable in doing the same in the judicial arena.

Examples abound of an increasing comfort on the part of the legislature in tinkering with the judicial branch. This may be the result of a basic lack of understanding and appreciation of basic concepts of our form of government. Separation of powers and preservation of the independence of the judiciary require judges to ration their advocacy.

**Special position of juvenile and family court judges.** The special demands of juvenile and family court assignments frequently involve judges in proactive efforts to improve the law. The above caution is less urgent for these judges because they are expected to regularly make recommendations concerning civil procedure and the development of programs to help children.

**Examples of issues concerning appropriate advocacy.** Is it proper for a judge to be involved in writing a statute that increases or reduces child support, or deals with the length of sentences in juvenile or criminal cases? Judges regularly advocate for additional judicial officers, but would it be improper for them to advocate for additional police officers?

Judges do not agree on the answers to these questions. Some believe that such activity is part of the judicial function and is permissible. Others, however, believe that the test is whether such advocacy could “cast reasonable doubt on the judge’s capacity to act impartially.”

It would be proper for a judge to endorse a bond measure that increases county revenues, which would increase funding for judicial-related activities as well as increasing revenues for non-legal system county projects, provided the

endorsement was carefully phrased to focus on judicial needs, while avoiding endorsement of nonjudicial issues. Because of the Trial Court Funding Act, local judicial-related funding advocacy would be very limited, if any, at the local level.

A judge may write a letter to the legislature regarding a bill proposing to replace court reporters with electronic recording as this plainly concerns the administration of justice. A judge, however, who was formerly a member of the legislature, should not be further involved in legislation or consult with legislators or others except on legislation and other matters concerning the law, the legal system or the administration of justice.

(Rothman, *California Judicial Conduct Handbook*, 3d ed. [California Judges Association, 2007] pp. 569–571.)

Judge Rothman also discusses judicial support of or opposition to ballot measures in the context of inappropriate political activity:

#### **[§11.24] Supporting or Opposing Ballot Measures**

**Measures not related to improvement of the law, legal system or administration of justice.** Although one might argue that anything on the ballot relates to the improvement of the law, such is not the case. For example, it would be improper for a judge to draft, promote, or be listed publicly as supporting a school bond ballot proposal as such a proposal would not fit the limited purpose related to improvement of the legal system. A judge may not sign a ballot statement, essentially a public endorsement, for an ordinance advocating criminal penalties for violation of a law/ordinance.

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**Appropriate ballot measures for comment by judges.** Appropriate judicial activity related to ballot measures would include public support of a tax override measure or other ballot proposition that would provide revenue for court operations or jail construction, since the objects of the funding pertain to the administration of justice. A court and its judges may also take a public position on a ballot proposition that affects judicial funding and the administration of justice. A judge may support or oppose a ballot measure dealing with the unification of the court.

A judge may speak and take a public stance against a ballot measure that would take away the power to appoint and retain the chief probation officer from the courts and place it in the hands of the board of supervisors.

A judge may act in support of political goals that directly relate to improvement of the judicial system such as jail construction or renovation of a juvenile detention facility.

A judge may participate in a newspaper ad concerning a ballot measure that concerns the law, legal system or administration of justice.

(Rothman, *supra*, at pp. 578–579.)

#### Disqualification and Disclosure

Judges who are involved in legislative activity should be aware of the disqualification and disclosure implications if it appears that the judge cannot be impartial in ruling on a matter concerning the issue with which the judge was involved. Code of Civil Procedure section 170.1(a)(6)(A)(iii) provides that a judge is disqualified if “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” A judge is *not* disqualified, however, if the judge “[h]as as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.” (Code Civ. Proc., § 170.2(c).)

Judge Rothman addresses this issue:

[A] judge’s expression of opinions outside of the context of judicial decision may raise disclosure and disqualification issues.

\* \* \*

**Drafting or advocating concerning laws.** Although there can be an argument that the use of the term “public official” is not intended to encompass a judge, subdivision (c) of section 170.2 above appears to allow a judge (i.e., a “public official”) to participate in the drafting of or advocacy concerning laws that the judge may later have to interpret. Judges have been involved on many occasions in such activities although, as noted in the concluding language of subdivision (c), such involvement has the potential of requiring disqualification.

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(Rothman, *California Judicial Conduct Handbook*, 3d ed. [California Judges Association, 2007] pp. 368–369.)

Judges should also be aware of canon 4A(4), which states that a judge must conduct all of the judge's extrajudicial activities so that they do not lead to frequent disqualification of the judge.

#### Contact Information for Questions

If judicial officers have questions about whether their own conduct would violate any provision of the Code of Judicial Ethics, they may contact the Supreme Court's Committee on Judicial Ethics Opinions at [judicial.ethics@jud.ca.gov](mailto:judicial.ethics@jud.ca.gov) or 855-854-5366, or the California Judges Association's Judicial Ethics Hotline at 866-432-1252. For more general information about ethical constraints discussed in this memorandum, they may contact Senior Attorney Mark Jacobson at 415-865-7898 or [mark.jacobson@jud.ca.gov](mailto:mark.jacobson@jud.ca.gov).

DCB/MJ/ms  
Attachment  
cc: Jody Patel, Chief of Staff

# Appendix

## **Canon 2**

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

### **Canon 2A**

#### A. Promoting Public Confidence

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

### **Canon 2B(2) states:**

A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.

### **Canon 4A**

#### A. Extrajudicial Activities in General

A judge shall conduct all of the judge's extrajudicial activities so that they do not

- (1) cast reasonable doubt on the judge's capacity to act impartially;
- (2) demean the judicial office;
- (3) interfere with the proper performance of judicial duties; or
- (4) lead to frequent disqualification of the judge.

### **Canon 4C(1)**

A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests.

### **Advisory Committee Commentary to Canon 4C(1) (added January 1, 2013)**

When deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the

administration of justice, a judge should consider whether that conduct would violate any other provisions of this code. For a list of factors to consider, see the explanation of “law, the legal system, or the administration of justice” in the Terminology section. See also Canon 2B regarding the obligation to avoid improper influence.

### **Canon 5**

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office.

### **Canon 5D**

A judge or candidate for judicial office may engage in activity in relation to measures concerning the improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.

### **Advisory Committee Commentary to Canon 5D (added January 1, 2013)**

When deciding whether to engage in activity relating to measures concerning the law, the legal system, or the administration of justice, such as commenting publicly on ballot measures, a judge must consider whether the conduct would violate any other provisions of this code. See explanation of “law, the legal system, or the administration of justice” in the terminology section.

### **Explanation of “law, the legal system, or the administration of justice” from the Terminology section (added January 1, 2013)**

When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether it impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified (Canon 4A(4)).