



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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MEMORANDUM

Date

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Action Requested

For Your Information Only

To

Donna Hershkowitz, Assistant Division
Director
Office of Governmental Affairs

Deadline

N/A

From

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Subject

Ethical Principles Applicable to Judges
Engaged in Legislative Activities

You have asked the Office of the General Counsel to provide a succinct information sheet setting forth the ethical principles that pertain to judicial officers who participate in legislative activities. You stated that this information sheet will be distributed to judicial officers who engage in Bench-Bar Coalition legislative outreach activities. As we discussed, a document that contains the applicable canons from the California Code of Judicial Ethics and relevant excerpts from David M. Rothman's *California Judicial Conduct Handbook* would best serve the needs of those judicial officers who engage in these activities.

Relevant Canons

Governmental Activities

The canon most directly on point for judges who wish to participate in legislative activity is canon 4C(1), which limits a judge's involvement to matters concerning the law, the legal system, and the administration of justice.

- **Canon 4C(1) states:**

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.

In the *California Judicial Conduct Handbook*, Judge Rothman addresses this topic:

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.

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

Political Activity

Canon 5 provides that judges may not be involved in inappropriate political activity.

- **Canon 5 states:**

A judge or judicial candidate shall refrain from inappropriate political activity.

Judges 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, 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.

Under canon 5A, prohibited political activity includes holding office in a political organization, publicly endorsing or opposing a candidate for nonjudicial office, and personally soliciting funds for a political organization. Canon 5D reiterates 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.

- **Canon 5D states:**

Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.

In the *California Judicial Conduct Handbook*, Judge Rothman cites canon 5D and states:

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....

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. (ibid., pp. 578–579)

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. A judge should be mindful that any such activity does not interfere with judicial duties or cast doubt on the judge's impartiality.

- **Canon 4A states:**

- 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; or**
 - (3) interfere with the proper performance of judicial duties.**

In addition, a judge must not engage in conduct that creates the appearance of impropriety.

- **Canons 2 and 2A state:**

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

- 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.**

Finally, a judge must not lend the prestige of judicial office to advance the interests of the judge or others. Although canon 4C(1), stated above, permits a judge to "officially consult with an executive or legislative body or public official . . . [on] matters involving the judge's private economic or personal interests," canon 2B(2), stated below, prohibits the use of the judicial title in those situations.

- **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.**

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. (ibid., pp. 368–369)

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 should contact the California Judges Association’s Judicial Ethics Hotline at 415-263-4600 or 866-432-1252. For more general information about ethical constraints discussed in this memorandum, they can contact Senior Attorney Mark Jacobson at 415-865-7898 or mark.jacobson@jud.ca.gov.

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