

Supreme Court Advisory Committee on the Code of Judicial Ethics

350 McAllister Street, San Francisco, California 94102-3688

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INVITATION TO COMMENT

SP11-06

Title	Action Requested
Proposed Amendments to the Terminology Section of the Code of Judicial Ethics	Review and submit comments by September 1, 2011
Proposed by	Proposed Effective Date
Supreme Court Advisory Committee on the Code of Judicial Ethics Hon. Richard D. Fybel, Chair	January 1, 2012
	Contact
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes several amendments to the terminology section of the code. After receiving and reviewing comments on the proposals, the committee will make recommendations to the Supreme Court regarding the proposed amendments. The full text of the proposed amended terminology section is attached.

Discussion

Several of the proposed amendments to the terminology section arise from the 2007 revisions to the American Bar Association's Model Code of Judicial Conduct. The ABA last overhauled the model code in 1990. The committee reviewed each revision to the model code and discussed whether to recommend to the Supreme Court that amendments to the California code be adopted based on those revisions.

Two of the proposed amendments are based on recommendations by the Commission for Impartial Courts (CIC), which was formed by then-Chief Justice Ronald M. George in September 2007. The CIC submitted its final report to the Judicial Council in December 2009. The commission's overall charge was to study and recommend ways to ensure judicial quality, impartiality, and accountability. Among other tasks, the CIC was charged more specifically with developing proposals to promote ethical and professional conduct by candidates for judicial office, including through amendments to the Code of Judicial Ethics.

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 These proposals are circulated for comment purposes only.

The remaining amendments have been proposed by the committee based on consideration of issues brought to the committee's attention by other members of the judicial community.

1. Appropriate authority

The terminology section contains a definition of the term “appropriate authority,” a phrase that is used only in canon 3D(1). (Under the proposed amendments to canon 3, the committee proposes adding the term to canon 3D(2) so that its language will be parallel to that of canon 3D(1) (see the Invitation to Comment on Proposed Amendments to Canon 3, item #24, p. 13).) The committee proposes deleting the definition from the terminology section and placing it in the commentary to canon 3D (p. 1, lines 7–9). Someone reading canon 3D and seeking the definition of the term would then be able to find it without the extra step of referring to the terminology section.

2. Candidate for judicial office

The term “candidate” is defined as follows in the terminology section:

A candidate is a person seeking election for or retention of judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term “candidate” has the same meaning when applied to a judge seeking election to nonjudicial office, unless on leave of absence.

As explained in item #1 of the Invitation to Comment on Proposed Amendments to Canon 5, the committee proposes using the term “candidate for judicial office” throughout canon 5 instead of “judicial candidate.” Therefore, the committee proposes amending the term “candidate” in the terminology section (p. 1, line 11) to “candidate for judicial office.” This proposal is based, in part, on CIC recommendation #4, which recommended a review of canon 5 to determine whether the terms “judge,” “judicial candidate,” and “candidate for judicial office” are used consistently. The committee also believes it should be made clear that the defined term refers to incumbents running for judicial office.

In addition, the committee proposes deleting the third sentence of the definition (p. 1, lines 15–17) because it is unnecessary. The sentence reads: “The term ‘candidate’ has the same meaning when applied to a judge seeking election to nonjudicial office, unless on leave of absence.” Article VI, section 17, of the California Constitution provides that a judge may “become eligible for election to other public office” only by taking a leave of absence. Because a judge cannot seek election to nonjudicial office without being on leave of absence, the sentence in the definition about a judge being a candidate for nonjudicial office is superfluous. The current definition with the third sentence predates canon 6H, which addresses the applicability of the canons to judges who are on leave while running for nonjudicial office.

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3. Court personnel

The current definition of “court personnel” states that the term “does not include the lawyers in a proceeding before a judge.” The term appears in canons 3B(4), 3B(7)(b), 3B(9), 3C(2), 6D(1), 6D(2), and 6D(6). Canons 3B(4) and 6D(1) specifically include lawyers in their scope, so the current definition in the terminology section is antithetical and confusing in those contexts. In canon 3B(7)(b) (which would be renumbered as canon 3B(7)(a) under the proposed revisions), the committee proposes that a definition be included in the canon itself because its meaning in that context is unique to that canon. (See the Invitation to Comment on Proposed Amendments to Canon 3, item #7, p. 5.) In the remaining canons, it is unnecessary to define the term to exclude lawyers in the proceeding before the judge because it is clear in those contexts that the term does not include the attorneys. The committee therefore proposes that the definition be deleted because it is unnecessary (p. 1, lines 21–22).

4. Gift

The committee noted that the term “gift” is defined in Code of Civil Procedure section 170.9(l), but there is no definition in the Code of Judicial Ethics, which contains several provisions in canon 4D regarding gifts. The committee agreed that it would be useful to add a definition of “gift” to the terminology section of the Code of Judicial Ethics. The proposed definition (p. 1, lines 27–32), adapted from the section 170.9(l) definition, reads:

“Gift” denotes anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. See Canons 4D(5), 4D(5) (Commentary), 4D(6), 4D(6)(a), 4D(6)(c), 4D(6)(e), 4D(6)(e) (Commentary), 4D(6)(f), and 4H (Commentary).

5. Impartial, impartiality, and impartially

The proposed definition of “impartial,” “impartiality,” and “impartially” (p. 1, lines 34–37; p. 2, lines 1–5) is based on the definition of those terms in the model code and on CIC recommendation #1. The CIC noted that the California code does not contain a definition of “impartiality,” although the term is used frequently in the canons and commentary. In contrast, the ABA model code includes a definition of “impartiality,” which was added in response to *Republican Party of Minnesota v. White* (2002) 536 U.S. 765. In *White*, the U.S. Supreme Court held that a provision in the Minnesota Code of Judicial Conduct prohibiting a judicial candidate from announcing “his or her views on disputed legal or political issues” violated the First Amendment. In that opinion, the court discussed the definition of the term “impartiality” at length. The ABA definition, which is based on the discussion in *White*, reads:

“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

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The committee proposes that the model code’s definition of these terms be incorporated into the California code because (1) the definition tracks the language in the *White* decision; (2) it would be beneficial to have a uniform definition nationwide; and (3) there appears to be no good reason to diverge from the model code definition.

6. Impending proceeding

The proposed definition of “impending proceeding” (p. 2, lines 7–9) is based on the definition in the model code. The California code does not contain a definition and the committee agreed that a definition would be useful. Therefore, the committee proposes adoption of the model code definition, substituting the word “proceeding” for “matter.” The definition would read:

“Impending proceeding” is a proceeding that is imminent or expected to occur in the near future. See Canons 3B(7), 3B(7)(a), 3B(9), 3B(9) (Commentary), 4H(3) (Commentary), and 6D(6). “Pending proceeding” is defined below.

The ABA noted that not all matters that could conceivably come before a judge at some indefinite time in the future are impending. The definition limits the term to situations in which a matter is anticipated to be filed in the near future.

7. Impropriety

The proposed definition of “impropriety” (p. 2, lines 11–15) is based on the definition in the model code. The California code does not contain a definition. The ABA concluded that the code would benefit from a precise definition that links the concept to violations of law, including the code, as well as conduct that undermines judicial independence, integrity, or impartiality. The committee agrees and therefore proposes adoption of the model code definition, which reads: “‘Impropriety’ includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality.”

8. Independence

The proposed definition of “independence” (p. 2, lines 17–19) is based on the definition in the model code. The California code does not contain a definition. The ABA added a definition of this term because judicial independence is a fundamental goal that the code seeks to preserve. The definition recognizes that judicial independence does not connote unfettered freedom. Rather, independence is properly circumscribed by accountability, and the range of a judge’s freedom from control is therefore appropriately constrained by law. The committee agrees and therefore proposes adoption of the model code definition, which reads: “‘Independence’ means a judge’s freedom from influence or controls other than those established by law.”

9. Integrity

The proposed definition of “integrity” (p. 2, lines 21–24) is based on the definition in the model code. The California code does not contain a definition. The ABA explained the term by identifying basic attributes characteristically associated with the term. The committee agrees that a definition would be helpful and therefore proposes adoption of the model code definition,

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which reads: “‘Integrity’ means probity, fairness, honesty, uprightness, and soundness of character.”

10. Knowingly, knowledge, known, and knows

The proposed definition of “knowingly,” “knowledge,” “known,” and “knows” (p. 2, lines 26–29) is based on the definition in the model code. The terms are not defined in the California code, and the committee agrees that a definition would be useful. Therefore, the committee proposes adoption of the model code definition, which reads: “‘Knowingly,’ ‘knowledge,’ ‘known,’ and ‘knows’ mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

11. Law, the legal system, or the administration of justice

This phrase, which appears in numerous places in canons 4 and 5, has never been defined and its scope has often been the subject of discussion and consternation. The committee acknowledged the difficulty of defining the term, but noted that it typically serves as a limitation on certain types of extrajudicial activity addressed in the canons in which it appears. The committee wishes to emphasize that judges cannot disregard other canons when engaged in activity related to the law, the legal system, or the administration of justice. Therefore, the committee proposes that the term be added to the terminology section (p. 2, lines 39–43; p. 3, lines 1–5) with a list of factors and other canons a judge should consider before engaging in the activity. The proposed explanation of the term would read:

“Law, the legal system, or the administration of justice.” 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)). See Canons 4B (Commentary), 4C(1), 4C(2), 4C(2) (Commentary), 4C(3)(a), 4C(3)(b) (Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(a), 4D(6)(b), 5A (Commentary), and 5D.

12. Pending proceeding

The proposed definition of “pending proceeding” (p. 3, lines 31–34) is based on the definition in the model code. The term is not defined in the California code. The ABA defined the term so as to set time limits on the phrase. The definition seeks to create greater certainty in the application of the code’s restriction on judicial speech. The right of litigants to a fair proceeding justifies the imposition of limits on what judges can say about pending matters, but clarifying the time period in which a matter can be considered pending ensures that those limits are reasonably circumscribed. The committee agrees and therefore proposes adoption of the model code definition, which reads: “‘Pending proceeding’ is a proceeding that has commenced. A matter continues to be pending through any appellate process until final disposition.”

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13. Service organization

There are several references in canons 3 and 4 to “fraternal organizations” or “fraternal institutions.” The committee proposes changing all such references in the code to “service organization” because use of the term “fraternal” may be perceived as sexist. To ensure that the proposed change does not lead anyone to conclude that certain fraternal organizations are no longer covered by the canons, the committee also proposes adding that term to the terminology section as follows (p. 4, lines 8–11):

“Service organization” includes any organization commonly referred to as a “fraternal organization.” See Canon 4C(2) (Commentary), Canon 4C(3)(b), Canon 4C(3)(b) (Commentary), Canon 4C(3)(d) (Commentary), and Canon 4D(6)(j).

14. Third degree of relationship

The proposed definition of “third degree of relationship” (p. 4, lines 24–26) is based on the definition in the model code, which is consistent with California case law. The term is not defined in the California code. The committee noted that judges are not always clear on the exact definition of the term and, therefore, a definition would be useful. The committee proposes adoption of the model code definition, which reads: “‘Third degree of relationship’ includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.”

The Terminology section of the California Code of Judicial Ethics would be amended to read:

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the ~~C~~anons where they appear. In addition, the ~~C~~anons in which terms appear are cited after the explanation of each term below.

~~“Appropriate authority” denotes the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported. See Commentary to Canon 3D (Commentary).~~

~~“Candidate for judicial office” A candidate is a person seeking election for to or retention of judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term “candidate” has the same meaning when applied to a judge seeking election to nonjudicial office, unless on leave of absence. See Preamble and Canons 2B(3), the preliminary paragraph of 5, 5A, 5A (Commentary), 5B(1), 5B(2), 5B(3), 5B (Commentary), 5C, 5D, and 6E.~~

~~“Court personnel” does not include the lawyers in a proceeding before a judge. See Canons 3B(4), 3B(7)(b), 3B(9), and 3C(2).~~

~~“Fiduciary” includes such relationships as executor, administrator, trustee, and guardian. See Canons 4E, 6B, and 6F (Commentary).~~

~~“Gift” denotes anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. See Canons 4D(5), 4D(5) (Commentary), 4D(6), 4D(6)(a), 4D(6)(c), 4D(6)(e), 4D(6)(e) (Commentary), 4D(6)(f), and 4H (Commentary)~~

~~“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1 (Commentary), 2A, 2A (Commentary), 2C (Commentary), 3, 3A(9)~~

1 (Commentary), 3B(10) (Commentary), 3B(12), 3B(12) (Commentary), 3C(1),
2 3C(5), 3E(3) (Commentary), 3E(4)(b), 3E(4)(c), 4A(1), 4A (Commentary),
3 4C(3)(b) (Commentary), 4C(3)(c) (Commentary), 4D(1)(b) (Commentary),
4 4D(6)(d) (Commentary), 4D(6)(e) (Commentary), 4H(3) (Commentary), 5A
5 (Commentary), and 6D(3)(vii).

6
7 “Impending proceeding” is a proceeding that is imminent or expected to occur in
8 the near future. See Canons 3B(7), 3B(7)(a), 3B(9), 3B(9) (Commentary), 4H(3)
9 (Commentary), and 6D(6). “Pending proceeding” is defined below.

10
11 “Impropriety” includes conduct that violates the law, court rules, or provisions of
12 this Code, and conduct that undermines a judge’s independence, integrity, or
13 impartiality. See Canon 2, 2A (Commentary), 2C (Commentary), Canon 3B(9)
14 (Commentary), 4D(1)(b) (Commentary), 4D(6)(d) (Commentary), 4H, and 5A
15 (Commentary).

16
17 “Independence” means a judge’s freedom from influence or controls other than
18 those established by law. See Preamble, Canon 1, 1 (Commentary), 4C(2)
19 (Commentary), 4D(6)(f) (Commentary), 4H(3) (Commentary), 5, and 6D(1).

20
21 “Integrity” means probity, fairness, honesty, uprightness, and soundness of
22 character. See Preamble, Canons 1, 1 (Commentary), 2A, 2A (Commentary), 2C
23 (Commentary), 3B(9) (Commentary), 3C(1), 3C(5), 4D(6)(d) (Commentary),
24 4D(6)(e) (Commentary), 4H (Commentary), 5A (Commentary), and 6D(1).

25
26 “Knowingly,” “knowledge,” “known,” and “knows” mean actual knowledge of the
27 fact in question. A person’s knowledge may be inferred from circumstances. See
28 Canons 2B(2)(b), 2B(2)(e), 2C (Commentary), 3D(2), 3D(4)(b), 3E(5)(f), 5B(2),
29 6D(3)(a)(i), 6D(3)(a) (Commentary), 6D(4) (Commentary), and 6D(5)(a).

30
31 “Law” denotes court rules as well as statutes, constitutional provisions, and
32 decisional law. See Canons 1 (Commentary), 2A, 2C (Commentary), 3A, 3B(2),
33 3B(7), 3B(7)(c), 3B(8), 3B(8) (Commentary), 3B(12) (Commentary), 3E, 3E
34 (Commentary), 3E(5)(a), 3E(5)(b), 3E(5) (Commentary), 4B (Commentary),
35 4C(1), 4C(2), (Commentary), 4C(3)(a), 4C(3)(b)(Commentary),
36 4D(3)(c)(Commentary), 4C(3)(d)(ii), 4C(3)(Commentary), 4D(6)(a)-(b), 4F, 4G,
37 (Commentary) , 4H, and 5D.

38
39 “Law, the legal system, or the administration of justice.” When a judge engages in
40 an activity that relates to the law, the legal system, or the administration of justice,
41 the judge should also consider factors such as whether the activity upholds the
42 integrity, impartiality, and independence of the judiciary (Canons 1 and 2A),
43 whether it impairs public confidence in the judiciary (Canon 2), whether the judge

1 is allowing the activity to take precedence over judicial duties (Canon 3A), and
2 whether engaging in the activity would cause the judge to be disqualified (Canon
3 4A(4)). See Canons 4B (Commentary), 4C(1), 4C(2), 4C(2) (Commentary),
4 4C(3)(a), 4C(3)(b) (Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(a),
5 4D(6)(b), 5A (Commentary), and 5D.

6
7 “Member of the judge’s family” denotes a spouse, registered domestic partner,
8 child, grandchild, parent, grandparent, or other relative or person with whom the
9 judge maintains a close familial relationship. See Canons 2B(2), 4D(1)(b)
10 (Commentary), 4D(2), 4D(5), (Commentary), 4D(6), 4D(6)(e)(Commentary),
11 4E(1), 4G (Commentary), and 5A.

12
13 “Member of the judge’s family residing in the judge’s household” denotes a
14 spouse or registered domestic partner and those persons who reside in the judge’s
15 household and who are relatives of the judge including relatives by marriage, or
16 persons with whom the judge maintains a close familial relationship. See Canons
17 4C(6)(e), 4D(5), (Commentary) , 4D(6), 4D(6)(d), and 4D(6)(e) (Commentary).

18
19 “Nonprofit youth organization” is any nonprofit corporation or association, not
20 organized for the private gain of any person, whose purposes are irrevocably
21 dedicated to benefiting and serving the interests of minors and which maintains its
22 nonprofit status in accordance with applicable state and federal tax laws. See
23 Canon 2C.

24
25 “Nonpublic information” denotes information that, by law, is not available to the
26 public. Nonpublic information may include but is not limited to information that is
27 sealed by statute or court order, impounded, or communicated in camera; and
28 information offered in grand jury proceedings, presentencing reports, dependency
29 cases, or psychiatric reports. See Canon 3B(11).

30
31 “Pending proceeding” is a proceeding that has commenced. A proceeding
32 continues to be pending through any appellate process until final disposition. See
33 Canons 3B(3), 3B(6), 3B(7)(a), 3B(9), 3B(9) (Commentary), 3E(5)(a), and 4H(3)
34 (Commentary). “Impending proceeding” is defined above.

35
36 “Political organization” denotes a political party, political action committee, or
37 other group, the principal purpose of which is to further the election or
38 appointment of candidates to nonjudicial office. See Canon 5A.

39
40 “Registered domestic partner” denotes a person who has registered for domestic
41 partnership pursuant to state law or who is recognized as a domestic partner
42 pursuant to Family Code section 299.2. See Canons 3E(5)(d), 3E(5)(e), 3E(5)(i),
43 4D(6)(a), 4D(6)(a), 4D(6)(c), 4D(6)(j), 4H(2), 5A(Commentary), 6D(3)(a)(v), and

1 6D(3)(a)(vi).

2
3 “Require.” Any Canon prescribing that a judge “require” certain conduct of
4 others means that a judge is to exercise reasonable direction and control over the
5 conduct of those persons subject to the judge's direction and control. See Canons
6 3B(3), 3B(4), 3B(6), 3B(8) (Commentary), 3B(9), and ~~3C(2)~~ 3C(3).

7
8 “Service organization” includes any organization commonly referred to as a
9 “fraternal organization.” See Canon 3E(5)(d), Canon 4C(2) (Commentary), Canon
10 4C(3)(b), Canon 4C(3)(b) (Commentary), Canon 4C(3)(d) (Commentary), and
11 Canon 4D(6)(j).

12
13 “Subordinate judicial officer.” A subordinate judicial officer is, for the purposes
14 of this Code, a person appointed pursuant to article VI, section 22 of the California
15 Constitution, including, but not limited to, a commissioner, referee, and hearing
16 officer. See Canons 3D(3), 4G (Commentary), and 6A.

17
18 “Temporary Judge.” A temporary judge is an active or inactive member of the bar
19 who, pursuant to article VI, section 21 of the California Constitution, serves or
20 expects to serve as a judge once, sporadically, or regularly on a part-time basis
21 under a separate court appointment for each period of service or for each case
22 heard. See Canons 3E(5)(h), 4C(3)(d)(i), 4C(3)(d) (Commentary), 6A, and 6D.

23
24 “Third degree of relationship” includes the following persons: great-grandparent,
25 grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-
26 grandchild, nephew, and niece. See Canons 3E(5)(e), 3E(5)(i), and 6D(3)(a)(v).

Item SP11-06 Response Form

Title: Proposed Amendments to the Terminology Section of the Code of Judicial Ethics

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Thursday, September 1, 2011

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