

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP11-10

Title	Action Requested
Proposed Amendments to Canon 5 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 canon 5 of the code. Canon 5 provides: “A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity.” After receiving and reviewing comments on these proposals, the committee will make recommendations to the Supreme Court regarding the proposed amendments. The full text of the proposed amended canon is attached.

Discussion

Several of the proposed amendments to canon 5 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.

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

1. Canon 5

The terms “judge,” “judicial candidate,” and “candidate for judicial office” are used throughout canon 5, which addresses inappropriate political activity and judicial campaign conduct. The CIC noted in its recommendation #4 that those terms appear to be used inconsistently. For example, although canon 5A addresses conduct by “[j]udges and candidates for judicial office,” the advisory committee commentary following the canon discusses only conduct by judges.

Based on the CIC recommendation, the committee proposes use of the term “candidate for judicial office” instead of “judicial candidate” (see attachment, p. 1, line 3; p. 2, lines 15–16; p. 3, line 22) and inserting that term where the canon is meant to apply to both incumbent judges and lawyers running for judicial office (p. 1, lines 8, 14, 33; p. 2, lines 9, 15–16, 20, 21, 27, 38; p. 3, lines 4, 15, 17, 28, 33; p. 4, lines 5–6). In addition, the committee proposes defining the term “candidate for judicial office” in the terminology section of the Code of Judicial Ethics (see the Invitation to Comment on Proposed Amendments to Terminology Section, item #1) to make it clear that the term applies to both incumbents and lawyers running for a judicial seat.

2. Canon 5—title

The proposed amendment of the title of canon 5 (p. 1, lines 3–6) is based on canon 4 of the model code. Currently, canon 5 states: “A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity.” The committee proposes amending the title to read: “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.” This language mirrors that of canon 4 of the model code. The ABA changed the language of its canon for three reasons. First, the phrase “shall refrain from” was replaced with “shall not engage in,” which is more direct and more closely parallels the language of the other canons. Second, the term “political activity” was expanded to “political or campaign activity,” which more accurately reflects the actual content of the canon. Finally, the undefined and vague term “inappropriate activity” was replaced with the phrase “activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”

The committee agrees with the changes to the model code title and proposes that the title of canon 5 be amended to mirror that of canon 4 of the model code.

3. Canon 5—first paragraph

The third sentence of canon 5 states that a judge shall “avoid political activity that may create the appearance of political bias or impropriety.” To make the body of the canon consistent with its title, the committee proposes replacing “avoid” with “not engage in.” Thus, the sentence would read (p. 1, lines 10–11): “They shall, however, not engage in political activity that may create the appearance of political bias or impropriety.”

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In its effort to make the canon consistent with the title, the committee also proposes adding the word “integrity” to the last sentence of the first paragraph of canon 5 (p. 1, lines 11–12). This sentence now states that judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office. As indicated in the proposed title, adding “integrity” to the list would elevate the importance of that concept to make it equal to the notions of judicial independence and impartiality. The sentence would read: “Judicial independence, impartiality, and integrity should dictate the conduct of judges and candidates for judicial office.”

4. Canon 5—proposed second paragraph

The proposed new paragraph of canon 5 (p. 1, lines 14–15) is based on rule 4.2(A) of the model code, which requires judicial candidates to comply with applicable election campaign laws. Canon 2A implicitly addresses this idea by mandating that judges “comply with the law.” Nevertheless, consistent with the CIC goal of promoting ethical and professional conduct by candidates for judicial office, the committee believes making compliance explicit with regard to election laws would enhance ethical campaign conduct. The proposed paragraph would read: “Judges and candidates for judicial office shall comply with all applicable election, election campaign, and election campaign fundraising laws and regulations.”

5. Canon 5A(3)

There are two references in canon 5A(3) to limits on how much a judge or candidate for judicial office can contribute in a calendar year to a political party, a political organization, or a nonjudicial candidate: \$500 per party, organization, or candidate; and \$1,000 for all parties, organizations, or candidates (p. 1, lines 25 and 27). To make the dollar amounts in this canon easier to find when skimming the text, the committee proposes changing the longhand text—“five hundred dollars” and “one thousand dollars”—to numerical figures, i.e., “\$500” and “\$1,000.”

6. Canon 5A commentary—third paragraph

Noting the provision in the third paragraph of the commentary following canon 5A that specifically permits judges to solicit campaign contributions from anyone, including attorneys, the committee considered the possibility of judges soliciting contributions in a coercive manner. To discourage judges from unreasonably pressuring potential contributors or endorsers, the committee proposes adding the following to the third paragraph of the commentary (p. 1, lines 39–41): “In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that might reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B.” This language is modeled on canon 4C(3)(d)(iii), which prohibits judges from personally participating in membership solicitation for organizations “if the solicitation might reasonably be perceived as coercive”

7. Canon 5A commentary—fourth paragraph

The fourth paragraph of the commentary following canon 5A cautions judges that if they attend a political gathering, their attendance should be restricted so that it would not constitute an express public endorsement of “a measure not directly affecting the administration of justice” It is not

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clear why the terms “law” and “legal system” do not precede “administration of justice” in this commentary as they do in other parts of the code. To make the code consistent, the committee proposes adding these terms to the commentary (p. 2, line 6). The proposed language would read: “Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate or a measure not directly affecting the law, the legal system, or the administration of justice otherwise prohibited by this canon.”

8. Canon 5A commentary—sixth paragraph

The sixth paragraph of the commentary states that a judge is permitted to endorse judicial candidates because judges “have a special obligation to uphold the integrity and impartiality of the judiciary and are in a unique position to know the qualifications necessary to serve as a competent judicial officer.” To be consistent with other parts of the code in which the terms “integrity,” “impartiality,” and “independence” are used together, e.g., the title and first paragraph of canon 5, the committee proposes adding the term “independence” to this sentence (p. 2, line 17). The sentence would read: “Such endorsements are permitted because judicial officers have a special obligation to uphold the integrity, impartiality, and independence of the judiciary and are in a unique position to know the qualifications necessary to serve as a competent judicial officer.”

9. Canon 5B—title

The current title of canon 5B is “Conduct During Judicial Campaigns.” Because the canon also addresses the conduct of judges who are appointed to the bench, the committee proposes adding “and Appointment Process” to the title (p. 2, line 25). The amended title would read: “Conduct During Judicial Campaigns and Appointment Process.”

10. Canon 5B(1)

Canon 5B prohibits “a candidate for election or appointment to judicial office” from making statements “to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts” The committee considered whether a candidate for appointment to judicial office becomes a candidate when he or she submits an application to the Governor. Some applications are pending for years before an applicant is appointed. If so, the canon may be overbroad in that it prohibits a person seeking appointment from making any such statements indefinitely.

To address this issue, the committee proposes adding the phrase “an applicant seeking” as follows (p. 2, lines 27–32):

A candidate for judicial office or an applicant seeking appointment to judicial office shall not:

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(a) make statements to the electorate or the appointing authority that commit the candidate or the applicant with respect to cases, controversies, or issues that are likely to come before the courts,

The committee also proposes changing the phrase “that could come before the courts” to “that are likely to come before the courts” because anything “could” come before the courts. Finally, the committee proposes renumbering the canon (p. 2, lines 27–36) to facilitate the addition of canons 5B(2) and (3) (discussed below).

11. New canon 5B(2)

The proposed adoption of new canon 5B(2) (p. 2, lines 38–42; p. 3, lines 1–2) is based on CIC recommendation #24 and rule 4.2(A)(3) of the model code. The first sentence of the proposed canon tracks the language of rule 4.2(A)(3), which states that a judicial candidate (including an incumbent) must “review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee . . . before their dissemination.” The ABA added this provision to the model code because it gives greater effect to the prohibition against making false or misleading statements in a campaign, which is codified in the California code as proposed renumbered canon 5B(1)(b).

The second and third sentences of the proposed new canon address actions by third parties on behalf of the candidate. The CIC and the committee noted that a candidate cannot be expected to control the actions of third parties. Therefore, the new canon would require candidates only to “take reasonable measures to protect against any misrepresentations being made in his or her support by third parties.” It would also require candidates to “take reasonable measures to ensure that appropriate corrective action is taken if the candidate learns of any misrepresentations being made in his or her support by third parties.”

The committee believes this is a reasonable approach to addressing actions by third parties and proposes a new canon 5B(2).

12. New canon 5B(3) and commentary—proposed fifth paragraph

The adoption of proposed new canon 5B(3) (p. 3, lines 4–10) is based on CIC recommendation #10, which would require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct. This would apply only to candidates who appear on the ballot. Thus, superior court judges who are unopposed when their terms expire and therefore do not appear on the ballot would not be required to complete the training. As to appellate justices, although they appear on the ballot in retention elections, they do not campaign unless there is a perceived threat to their retention. On the rare occasions when that has occurred in the past, those justices have formed campaign committees. Therefore, the committee proposes that appellate justices be subject to this requirement only if they have formed a campaign committee.

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It is important to note that the Judicial Council, in reviewing the CIC recommendations, voted disapproval of this recommendation at its June 2010 meeting and referred the recommendation and the council's disapproval to the committee for further consideration.

Based on the CIC recommendation and after careful consideration, the committee agreed to propose the mandatory training requirement. The CIC noted that other states, including New York and Ohio, have mandatory judicial candidate ethics training. In California, article VI, section 18(m), of the California Constitution appears to authorize the Supreme Court to require this type of training. It provides that the Supreme Court "shall make rules for the conduct of judges . . . and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics." Based on this provision, the CIC believes the training requirement should be placed in the Code of Judicial Ethics, as opposed to a rule of court, because attorney candidates are governed by the code but not by court rules.

The committee will recommend that the Education Division/Center for Judicial Education and Research of the Administrative Office of the Courts collaborate with the State Bar to develop a training program that would be made available online so that candidates in remote counties need not travel to attend a course. The committee will also recommend that judges and attorneys who complete the training program receive continuing legal education credit.

With regard to timing, the committee proposes that the training be completed no earlier than one year and no later than 60 days from the earliest of the following dates: (1) the filing of the candidate's declaration of intention; (2) the formation of a campaign committee; or (3) receipt of any campaign contribution. The proposed commentary (which would be the fifth paragraph of the commentary following canon 5B(3) on page 3, lines 32–34) would make it clear that receipt of a campaign contribution includes a financial contribution made by the candidate to his or her own campaign.

13. Canon 5B(3) commentary—proposed first paragraph

In considering various issues pertaining to judicial elections, the committee agreed that it would be useful to add to the commentary a statement of the purpose of canon 5B as it relates to the overarching goal of the Code of Judicial Ethics, which is, in part, to preserve the integrity of the judiciary and to ensure public confidence (p. 3, lines 13–17). Therefore, the committee proposes adding the following as the first paragraph of the commentary following canon 5B(3):

The purpose of Canon 5B is to preserve the integrity of the appointive and elective process for judges and to ensure that the public has accurate information about candidates for judicial office. Compliance with these provisions will enhance the integrity, impartiality, and independence of the judiciary and better inform the public about qualifications of candidates for judicial office.

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14. Canon 5B(3) commentary—proposed fourth paragraph

In connection with proposed canons 3E(2)(b) and (c), which would require superior court judges to disclose campaign contributions, the committee agreed that because canon 5 contains provisions related to judicial election campaigns, many judges will look to canon 5 for rules governing judicial elections. Therefore, the committee proposes adding to the commentary following canon 5B(3) a cross-reference to the disclosure requirement in canons 3E(2)(b) and (c) (p. 3, lines 28–29).

15. Canon 5D and proposed new commentary

Canon 5D, which was based on the 1990 model code, 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.” The ABA deleted this provision from the 2007 revised model code because rule 4.1(A) lists all the political and campaign activities that are prohibited. The California code does not contain such a list; the committee therefore concluded that this language should be retained.

In discussing the propriety of judges commenting publicly about ballot and legislative measures that concern the improvement of the law, the legal system, or the administration of justice, the committee agreed that it would be helpful to include in canon 5D a reminder that judges must comply with all provisions of the code while engaging in permitted political activity. The proposed revision (p. 4, lines 5–8) would read:

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

The committee also proposes adding commentary (p. 4, lines 10–15) that specifically addresses the issue of judges commenting publicly about ballot measures and reiterates the cautionary provision in the canon about compliance with the rest of the code. The commentary would reference the explanation of the phrase “law, the legal system, or the administration of justice” that the committee proposes be added to the terminology section. (See the Invitation to Comment on Proposed Amendments to Terminology Section, item #11, p. 5.)

Canon 5 of the California Code of Judicial Ethics would be amended to read:

CANON 5

A JUDGE OR JUDICIAL CANDIDATE FOR JUDICIAL OFFICE* SHALL REFRAIN FROM INAPPROPRIATE 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, ~~avoid~~ not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence,* ~~and~~ impartiality,* and integrity* should dictate the conduct of judges and candidates for judicial office.*

Judges and candidates for judicial office* shall comply with all applicable election, election campaign, and election campaign fundraising laws and regulations.

A. Political Organizations*

Judges and candidates for judicial office* shall not

- (1) act as leaders or hold any office in a political organization;*
- (2) make speeches for a political organization* or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office; or
- (3) personally solicit funds for a political organization* or nonjudicial candidate; or make contributions to a political party or political organization* or to a nonjudicial candidate in excess of ~~five hundred dollars~~ \$500 in any calendar year per political party or political organization* or candidate, or in excess of an aggregate of ~~one thousand dollars~~ \$1,000 in any calendar year for all political parties or political organizations* or nonjudicial candidates.

ADVISORY COMMITTEE COMMENTARY

The term "political activity" should not be construed so narrowly as to prevent private comment.

This provision does not prohibit a judge or a candidate for judicial office from signing a petition to qualify a measure for the ballot ~~without the~~ provided the judge does not use of the judge's his or her official title.*

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. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that might reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B.*

1 Although it is improper for a judge to receive a gift from an attorney subject to
2 exceptions noted in Canon 4D(6), a judge's campaign may receive attorney
3 contributions.

4 Although attendance at political gatherings is not prohibited, any such attendance
5 should be restricted so that it would not constitute an express public endorsement of a
6 nonjudicial candidate or a measure not directly affecting the law, the legal system, or the
7 administration of justice otherwise prohibited by this Canon.

8 Subject to the monetary limitation herein to political contributions, a judge or a
9 candidate for judicial office* may purchase tickets for political dinners or other similar
10 dinner functions. Any admission price to such a political dinner or function in excess of
11 the actual cost of the meal shall be considered a political contribution. The prohibition
12 in Canon 5A(3) does not preclude judges from contributing to a campaign fund for
13 distribution among judges who are candidates for reelection or retention, nor does it
14 apply to contributions to any judge or candidate for judicial office.*

15 Under this Canon, a judge may publicly endorse ~~another~~ a judicial candidate for
16 judicial office.* Such endorsements are permitted because judicial officers have a
17 special obligation to uphold the integrity,* ~~and~~ impartiality,* and independence of the
18 judiciary and are in a unique position to know the qualifications necessary to serve as a
19 competent judicial officer.

20 Although family members of the judge's or candidate for judicial office* family
21 are not subject to the provisions of this Code, a judge or candidate for judicial office*
22 shall not avoid compliance with this Code by making contributions through a spouse or
23 registered domestic partner* or other family member.

24

25 **B. Conduct During Judicial Campaigns and Appointment Process**

26

27 (1) A candidate for ~~election~~ judicial office* or an applicant seeking appointment to
28 judicial office shall not:

29

30 ~~(1)~~ (a) make statements to the electorate or the appointing authority that commit the
31 candidate or the applicant with respect to cases, controversies, or issues that ~~could~~ are
32 likely to come before the courts, or

33

34 ~~(2)~~ (b) knowingly, or with reckless disregard for the truth, misrepresent the identity,
35 qualifications, present position, or any other fact concerning ~~the candidate~~ himself or
36 herself or his or her opponent.

37

38 (2) A candidate for judicial office* shall review and approve the content of all campaign
39 statements and materials produced by the candidate or his or her campaign committee
40 before their dissemination. A candidate shall take reasonable measures to protect against
41 any misrepresentations being made in his or her support by third parties. A candidate
42 shall take reasonable measures to ensure that appropriate corrective action is taken if the

1 candidate learns of any misrepresentations being made in his or her support by third
2 parties.

3
4 (3) Every candidate for judicial office* shall complete a judicial campaign ethics course
5 approved by the Supreme Court no earlier than one year before or no later than 60 days
6 after either the filing of a declaration of intention by the candidate, the formation of a
7 campaign committee, or the receipt of any campaign contribution, whichever is earliest.
8 This requirement does not apply to judges who are unopposed for election and will not
9 appear on the ballot. This requirement also does not apply to appellate justices who have
10 not formed a campaign committee.

11
12 **ADVISORY COMMITTEE COMMENTARY**

13 *The purpose of Canon 5B is to preserve the integrity* of the appointive and*
14 *elective process for judicial office and to ensure that the public has accurate information*
15 *about candidates for judicial office.* Compliance with these provisions will enhance the*
16 *integrity*, impartiality*, and independence* of the judiciary and better inform the public*
17 *about qualifications of candidates for judicial office.**

18 *This code does not contain the “announce clause” that was the subject of the*
19 *United States Supreme Court’s decision in Republican Party of Minnesota v. White*
20 *(2002) 536 U.S. 765. That opinion did not address the “commit clause,” which is*
21 *contained in Canon 5B(1)(a). The phrase “appear to commit” has been deleted because,*
22 *although ~~judicial~~ candidates for judicial office* cannot promise to take a particular*
23 *position on cases, controversies, or issues prior to taking the bench and presiding over*
24 *individual cases, the phrase may have been overinclusive.*

25 *Canon 5B(2)(1)(b) prohibits making knowing misrepresentations, including false*
26 *or misleading statements, during an election campaign because doing so would violate*
27 *Canons 1 and 2A, and may violate other canons.*

28 *Candidates for judicial office* must disclose campaign contributions in*
29 *accordance with Canon 3E(2)(b) and (c).*

30 *The time limit for completing a judicial campaign ethics course in Canon 5B(3) is*
31 *triggered by the earliest of either the filing of a declaration of intention, formation of a*
32 *campaign committee, or receipt of any campaign contribution. A financial contribution*
33 *by a candidate for judicial office* to his or her own campaign constitutes receipt of a*
34 *campaign contribution.*

35
36 **C. Speaking at Political Gatherings**

37
38 *Candidates for judicial office* may speak to political gatherings only on their own*
39 *behalf or on behalf of another candidate for judicial office*.*

1 **D. Measures to Improve the Law**
2

3 ~~Except as otherwise permitted in this Code, judges shall not engage in any~~
4 ~~political activity, other than in relation to measures concerning the improvement of the~~
5 ~~law, the legal system, or the administration of justice. A judge or candidate for judicial~~
6 office* may engage in political activity relating to measures concerning improvement of
7 the law, the legal system, or the administration of justice as long as the conduct is
8 consistent with this code.
9

10 ADVISORY COMMITTEE COMMENTARY

11 When deciding whether to engage in political activity relating to measures
12 concerning the law, the legal system, or the administration of justice,* such as
13 commenting publicly on ballot measures, a judge should consider whether the conduct
14 would violate any other provisions of this code. See explanation of “law, the legal
15 system, or the administration of justice” in the Terminology section.

Item SP11-10 Response Form

Title: Proposed Amendments to Canon 5 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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