

# Supreme Court Advisory Committee on the Code of Judicial Ethics

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## INVITATION TO COMMENT

**SP18-08**

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**Title**

Proposed Amendments to Canon 5 of the Code of Judicial Ethics

**Action Requested**

Review and submit comments by May 31, 2018

**Proposed by**

Supreme Court Advisory Committee on the Code of Judicial Ethics  
Hon. Richard D. Fybel, Chair

**Proposed Effective Date**

August 1, 2018

**Date**

March 20, 2018

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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 concerns political and campaign activities by judges and candidates for judicial office. The proposed amendments would move existing language from the commentary following canon 5A into new canon 5B(4). That new canon would permit judges to solicit contributions and endorsements from anyone, including attorneys and other judges, but would prohibit judges from using the prestige of judicial office in a manner that would reasonably be perceived as coercive when soliciting contributions or endorsements. The code currently permits judges and other judicial candidates to (1) endorse judicial candidates and donate money to judicial campaigns, and (2) solicit endorsements and campaign contributions for their own judicial campaigns.

The proposed amendments would also clarify that a judge may solicit campaign contributions and endorsements for another judicial candidate, regardless of whether the candidate is an incumbent or an attorney running for judicial office. 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 amendments is attached.

### Discussion

The proposed amendments are intended to clarify and improve the code.

*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 These proposals are circulated for comment purposes only.*

## 1. Soliciting Campaign Contributions and Endorsements—New Canon 5B(4) and Commentary

Canon 5A, entitled “Political Organizations,” addresses holding office in and making speeches for political organizations, publicly endorsing or opposing candidates for nonjudicial office, and personally soliciting funds for or making contributions to political organizations or nonjudicial candidates. Canon 5B, entitled “Conduct During Judicial Campaigns and Appointment Process,” covers topics such as making inappropriate statements during the appointment or election process, making false or misleading statements, overseeing campaign committees, and ethics training for judicial candidates.

Currently, the third paragraph of the commentary following canon 5A addresses campaign contributions to judges. It states that judges are permitted to solicit contributions from anyone, including attorneys, but it prohibits judges from using the prestige of judicial office in a manner that would reasonably be perceived as coercive when soliciting contributions or endorsements. This commentary to canon 5A is the only place in the code that deals with solicitation of campaign contributions. (Canon 3E(2)(b) addresses *disclosure* of campaign contributions.)

The committee considered (1) whether the language regarding solicitation of campaign contributions in the commentary should be moved into the canon and, if so, which canon; and (2) whether a provision should be added that prohibits a judge from soliciting campaign contributions and endorsements from certain people, including court personnel.

Regarding the location of the language, the committee agreed that it should be removed from the commentary and placed in a canon. The preamble to the code states that the commentary “provides guidance as to the purpose and meaning of the canons. *The commentary does not constitute additional rules and should not be so construed.*” (Italics added.) The commentary regarding solicitation of contributions states that a judge may receive campaign contributions from attorneys and announces a prohibition against use of the prestige of judicial office in this context. This language constitutes an “additional rule” that should be contained in a canon rather than commentary. In addition, the topic of solicitation of campaign contributions and endorsements is important and arises often enough that it should be placed in a canon instead of commentary.

As to which canon should contain these provisions, the committee concluded that canon 5B—Conduct During Judicial Campaigns and Appointment Process—would be more appropriate than canon 5A—Political Organizations. Except for the sentences at issue, all the provisions in canon 5A relate to a judge’s involvement with or contributions to a political organization or candidate. Canon 5B, on the other hand, specifically addresses campaign conduct, which encompasses solicitation of campaign contributions and endorsements. Therefore, the committee proposes the adoption of a new canon 5B(4).

The committee also proposes adding a provision to new canon 5B(4) prohibiting judges from soliciting contributions and endorsements from subordinate judicial officers and court personnel. Canon 4C(3)(d)(i), which relates to a judge soliciting funds for certain limited types of organizations, provides that a judge may privately solicit funds for these organizations only from “members of the judge’s family or from other judges (excluding court commissioners, referees, retired judges, court-appointed arbitrators, hearing officers, and temporary judges).” Judges are not permitted to solicit funds from these judicial officers because, as judicial officers who report to the judges in the court, they may feel compelled to contribute. The committee concluded that the same considerations are involved when a judge asks court staff or a subordinate judicial officer for campaign contributions or endorsements. It is likely that a court employee or subordinate judicial officer would feel pressured to contribute to or endorse a judge’s campaign if asked because of the judge’s position.

Finally, the committee proposes adoption of new commentary to new canon 5B(4) consisting of cross-references to canon 3E(2)(b), which governs disclosure of campaign contributions, and Code of Civil Procedure section 170.1, subdivision (a)(9), which addresses disqualification based on receipt of campaign contributions from parties or attorneys. (As described in the next section, the committee proposes adding other language to the new commentary regarding solicitation of campaign contributions and endorsements for others.) The cross-reference to canon 3E(2)(b) would obviate the need for the reference to that canon in the current commentary to canon 5B, so the committee proposes deleting the existing sentence in the commentary to canon 5B.

## **2. Soliciting Campaign Contributions and Endorsements for Others—New Commentary Following New Canon 5B(4)**

The California Supreme Court Committee on Judicial Ethics Opinions seeks clarification as to whether canon 5A permits a judge to solicit campaign contributions on behalf of another judge.

For the reasons described below, the committee proposes adoption of new language in the commentary following proposed new canon 5B(4) clarifying that, under certain express conditions, judges may solicit campaign contributions and endorsements on behalf of other judicial candidates.<sup>1</sup> Preliminarily, the committee would not treat incumbents differently than attorney candidates because allowing solicitation only on behalf of sitting judges would appear to be unduly protective of incumbent judges.

The first reason supporting the committee’s recommendations involves the reality of judicial elections themselves and the rising expenses associated with judicial elections. California judges and justices must stand for election. An attorney can run against an incumbent trial court judge or attorneys can vie for an open trial court seat, and appellate justices appear on the ballot in

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<sup>1</sup> The Committee on Judicial Ethics Opinions requests clarification only on the issue of soliciting campaign contributions for other judicial candidates. But the Advisory Committee on the Code of Judicial Ethics believes the same rationale for its views on this issue also applies to solicitation of endorsements for other candidates.

retention elections. Contested elections are very expensive and will become even more expensive in the future. Indeed, there is a national trend for well-funded interest groups to politicize state judicial elections and to back certain judicial candidates, thus challenging the independence of the judiciary. In view of these realities and to preserve the independence of the judiciary, the committee concluded that judges should not be hamstrung in their efforts to raise money and solicit endorsements for judicial campaigns, including raising campaign funds and seeking endorsements for other judicial candidates.

Second, the proposal is consistent with advice in the California Judicial Conduct Handbook and by the Judicial Ethics Committee of the CJA. According to the Handbook, “The judicial candidate is free to campaign and publicly raise money, and other judges supporting a judicial candidate are not subject to the rules in canon 5 that limit support, fundraising and contribution regarding nonjudicial candidates.”<sup>2</sup> The CJA Judicial Ethics Committee has also consistently advised judges that they may raise campaign funds for other judicial candidates.<sup>3</sup>

Third, the rationale for allowing judges to endorse candidates for judicial office is applicable to soliciting campaign funds for other judicial candidates. Canon 5A(2) prohibits a judge from publicly endorsing (or opposing) a nonjudicial candidate, but the commentary makes it clear that a judge may publicly endorse a judicial candidate, including an attorney running for judicial office. It states: “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.” In other words, judges may endorse judicial candidates because of their knowledge about the qualities of a good judge.

The committee reasoned that if a judge has special knowledge about whether a candidate is qualified, allowing that judge to ask for endorsements or raise money for the other candidate accomplishes the same goal, i.e., increasing the likelihood the candidate will prevail in the election based on the judge’s opinion of the candidate. If a judge is permitted to endorse a candidate for judicial office, a judge should also be allowed to raise funds and solicit endorsements on behalf of a judicial candidate. In addition, a judge is permitted to seek endorsements and contributions for the judge’s own campaign, so a judge should be able to do so for another judicial candidate.

Fourth, in the context of both endorsements of and fundraising for judicial candidates, there are significant protections in the code against abuse. As to the former, judges who endorse candidates have disclosure and disqualification considerations. Thus, if a judge publicly endorses an attorney candidate who then appears before the judge, the judge must disclose that endorsement.<sup>4</sup> The judge may also need to consider recusal. According to the Handbook,

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<sup>2</sup> Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 11:41, p. 755.

<sup>3</sup> See, e.g., Cal. Judges Assn., Judicial Ethics Update (Dec. 2014), p. 5; Cal. Judges Assn., Judicial Ethics Update (Dec. 1995), p. 8; Cal. Judges Assn., Judicial Ethics Update (1990).

<sup>4</sup> Cal. Judges Assn., Judicial Ethics Update (Dec. 2014), p. 4.

“Under such circumstances, a judge should also consider declining such an endorsement if the potential result would be regular recusal affecting a judge’s primary responsibility to avoid conduct that would lead to frequent disqualification.”<sup>5</sup> Disclosure and disqualification obligations would be the same if a judge solicited campaign contributions for an attorney candidate who appears before the judge. In addition, the commentary following canon 5A warns that a judge who is soliciting an endorsement or campaign contributions must not use the prestige of judicial office in a manner that would reasonably be perceived as coercive, citing canons 1 (integrity and independence of the judiciary), 2 (avoid impropriety and appearance of impropriety), 2A (public confidence in the judiciary), and 2B (use of prestige of judicial office).

The committee proposes moving the existing cautionary language noted above from the commentary into the canon. In the new commentary, the committee proposes specifically warning judges that even though it is permissible to engage in this conduct, a judge “must be cautious” about who is being solicited and the manner in which the solicitation is being made.

In addition to the cross-references to other canons in the canon itself, the committee suggests including in the commentary a statement that solicitation for attorney candidates may raise disqualification and disclosure issues, with a specific reference to canon 3E regarding disclosure and to Code of Civil Procedure section 170.1, subdivision (a), regarding disqualification. It would note that even if a judge is not disqualified, disclosure may be required under canon 3E(2). It would state that, for example, if a judge solicited funds for an attorney running for judicial office who then appeared before the judge, the judge must consider disclosing the solicitation. The proposed commentary would also provide that a judge should consider canons 4A(1) and 4A(4), which require a judge to conduct extrajudicial activities so they do not cast reasonable doubt on the judge’s capacity to act impartially or lead to frequent disqualification.

Finally, the committee proposes including a sentence stating that “judicial elections” includes recall elections. In the committee’s view, there is no distinction between these types of elections in terms of soliciting funds or endorsements. If a judge may solicit endorsements and campaign contributions for another judicial candidate, a judge should also be allowed to do so for a judge who is the subject of a recall election.

The committee believes the cautionary language in both the proposed canon and the commentary are sufficient to prevent abuses. Given that a judge is permitted to solicit funds or endorsements for his or her own campaign, the committee agreed that it is no more coercive to do so for someone else’s election contest than for the judge’s own campaign.

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<sup>5</sup> Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 11:43, p. 757.

Canon 5 would be amended to read:

**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.

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 \$500 in any calendar year per political party or political organization or candidate, or in excess of an aggregate of \$1,000 in any calendar year for all political parties or political organizations or nonjudicial candidates.

*ADVISORY COMMITTEE COMMENTARY: Canon 5A*

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*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 would reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions.*

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

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47 (1) – (3) \* \* \*

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49 *ADVISORY COMMITTEE COMMENTARY: Canon 5B*

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53 *Candidates for judicial office must disclose campaign contributions in accordance with*  
54 *Canon 3E(2)(b).*

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58 (4) In judicial elections, judges may solicit campaign contributions or endorsements for their  
59 own campaigns or for other judges and attorneys who are candidates for judicial office. Judges  
60 are permitted to solicit such contributions and endorsements from anyone, including attorneys  
61 and other judges, except that a judge shall not solicit campaign contributions or endorsements  
62 from court commissioners, referees, retired judges, court-appointed arbitrators, hearing officers,  
63 and temporary judges, or from court personnel. In soliciting campaign contributions or  
64 endorsements, a judge shall not use the prestige of judicial office in a manner that would  
65 reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B.

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67 *ADVISORY COMMITTEE COMMENTARY: Canon 5B(4)*

68 *Regarding campaign contributions for a judge’s own campaign, see Canon 3E(2)(b) and*  
69 *accompanying Commentary addressing disclosure of campaign contributions. See also Code of*  
70 *Civil Procedure section 170.1, subdivision (a)(9), which provides that a judge is disqualified if*  
71 *the judge has received a campaign contribution exceeding \$1,500 from a party or an attorney in*  
72 *the proceeding. Although it is improper for a judge to receive a gift from an attorney subject to*  
73 *exceptions noted in Canon 4D(6), a judge’s campaign may receive attorney contributions.*

74 *Even though it is permissible for a judge to solicit endorsements and campaign funds for*  
75 *attorneys who are candidates for judicial office, the judge must be cautious. Such solicitation*  
76 *may raise issues of disqualification and disclosure under Code of Civil Procedure section 170.1,*  
77 *subdivision (a), and Canon 3E. Even if the judge is not disqualified, disclosure may be required*  
78 *under Canon 3E(2)(a). For example, a judge who has solicited campaign funds or endorsements*  
79 *for a candidate who is an attorney must consider disclosing that solicitation in all cases in which*  
80 *the attorney candidate appears before the judge. The judge should also consider Canon 4A(1)*  
81 *and Canon 4A(4), which require a judge to conduct extrajudicial activities so they do not cast*  
82 *reasonable doubt on the judge’s capacity to act impartially or lead to frequent disqualification.*

83 *“Judicial elections” includes recall elections.*

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