

Ethics in Judicial Elections

A guide to judicial election campaigning under the California Code of Judicial Ethics

This pamphlet covers the most common questions that arise in the course of judicial elections. If your question is not answered here, please call CJA's Judicial Ethics Hotline at (916) 239-4068 or (866) 432-1252.



***Prepared for judicial candidates
by the California Judges Association
Committee on Judicial Ethics***

(February 2018)

ETHICS IN JUDICIAL ELECTIONS

In this pamphlet, the California Judges Association Committee on Judicial Ethics answers common questions about applying the Code of Judicial Ethics to judicial elections. The goal: to heighten awareness of how candidates can participate fully in this Constitutional process while maintaining the ethical standards set for the judiciary.

The *California Code of Judicial Ethics* is issued by the Supreme Court of California and is enforced by the Commission on Judicial Performance (Cal. Constitution Art. VI, §§. 8, 18, 18.5). Canon 5 applies specifically to political activities. The complete Code can be found in the Rules of Court, or obtained from CJA.

The views of the CJA Committee on Judicial Ethics expressed here are not binding on the Supreme Court or the Commission on Judicial Performance.

As of the date of publication of this pamphlet, the California Supreme Court is considering proposed revisions to the Code of Judicial Ethics that may change ethical responsibilities in judicial campaigns if adopted. The CJA Committee on Judicial Ethics urges candidates to monitor the progress of these pending revisions during the 2016 election process. As always, judicial candidates can contact the CJA Ethics Hotline at (916) 239-4068 for the latest information.

I. Scope of Application

Q. *Who is bound by the Code of Judicial Ethics during judicial elections? How is it enforced?*

A. All candidates for judicial office are required to adhere to Canon 5 of the Code of Judicial Ethics. (See Canon 6E and California Rule of Professional Conduct 1-700.) This includes sitting judges and attorneys who seek the office. The Commission on Judicial Performance handles complaints about misconduct of judges, and can investigate and discipline attorneys who win judicial elections for ethical campaign

violations once they take the oath of office. Rule 1-700 gives the State Bar authority to discipline unsuccessful candidates for judicial election who violated the Canon during their campaign. Of course, candidates who are judges must also adhere to all of the Canons, not just to Canon 5.

II. Financial Matters

Q. *Are there ethical restraints on what a judicial officer can do to raise funds needed for a campaign?*

A. All judicial candidates have essentially the same rights to raise funds as other candidates for public office, including the right to solicit and hold fundraisers, subject to rules of disclosure and disqualification. No fundraising may be done in the courthouse.

Q. *When may I begin fundraising activities?*

A. Candidates may begin fundraising activities after filing a “Form 501- Candidate Intention Statement” with the FPPC, no matter how far in advance of the election that may be.

Q. *May I accept contributions from attorneys who will appear regularly before me after the election, and if so, are there any limits to the size of the contribution?*

A. Unlike the prohibition on accepting gifts from attorneys, a judicial candidate may accept contributions from attorneys even if they appear in his or her court. There is no limit on the amount that may ethically be accepted from an individual attorney, although some authorities recommend setting a maximum to minimize the risk that the contribution will have the appearance of impropriety. A contribution in excess of \$1,500 will require recusal in future proceedings involving the contributing attorney. (Code Civ. Proc., sec. 170.1(a)(9)(A).)

Q. *May I attend fundraisers and other political events during the campaign?*

A. Yes, as long as these activities do not appear to endorse political parties, issues or candidates for non-judicial office. Subject to these restrictions, judicial candidates may attend, hand out their own promotional material, solicit funds, and meet voters and supporters.

Q. *Are there any restrictions on where fundraisers for a judge can be held?*

A. The Commentary to Canon 2C cautions judges from arranging a meeting at a club which the judge knows is practicing invidious discrimination. Judges should thus ensure that campaign events such as fundraisers not be held at such locations. Also, no fundraising or other campaign activity may occur at the courthouse.

Q. *May I contribute to the campaigns of my non-judicial supporters?*

A. The Code of Judicial Ethics limits a judge's contributions to a non-judicial candidate, political party or political organization to \$500 in any calendar year, with an aggregate limit of \$1,000 in any calendar year for all non-judicial candidates, political parties or political organizations.

III. Endorsements & Speaking Out on Issues

Q. *Whom may I endorse and who may endorse me as a candidate?*

A. Anyone may formally endorse a judicial candidate, including other judges, elected officials, political parties, news media and community leaders not subject to other restrictions of their positions. However, judicial officers may only endorse candidates for judicial office; they may not endorse non-judicial candidates. Judges may not endorse candidates for City Attorney, District Attorney, or Sheriff. These positions are considered non judicial offices.

Q. *May I offer any assistance or advice to candidates for non-judicial office, even if I can't publicly endorse them?*

A. Both the CJA Ethics Committee and Professor Rothman would discourage this practice simply because "there are no secrets in politics. Publicity to the effect that a judge undertook the role of confidential advisor to a political cause or non-judicial candidate could undermine the public perception of the impartiality of the judge and the judicial institution." (Rothman, *California Judicial Conduct Handbook*, 3rd Ed.)

Q. *A group of my supporters would like to host a joint reception with several other local candidates for non-judicial office to save costs. May we do so?*

A. Care must be taken to ensure that the event is promoted, advertised and run in a manner that does not appear as if you are endorsing any of the non-judicial candidates. An express disclaimer and/or sign at the event to this effect may be appropriate.

Q. *Some organizations compile slate mailers listing endorsements for a range of state and local candidates which are mailed to target voter groups. May I sign on for one of these mailers?*

A. Yes, but only if the slate mailer is written so as not to imply that you are endorsing the non-judicial candidates listed, and adheres to Government Code section 84305.5, which specifies certain disclosures required on slate mailers, including the use of an asterisk (*) to designate those persons who paid for their appearance on the slate card. Most reputable slate mailer organizations are sensitive to slate mailer requirements, but you should discuss signing on for a mailer with your contact person. While seeing a mock-up of the mailer before it is printed is virtually impossible, you should at least be able to find out who/what else is on the slate.

Q. *May I speak to political organizations on my own behalf?*

A. Yes. It is acceptable for a candidate to speak before such a group on the candidate's own behalf.

Q. *As part of its endorsement process, a local newspaper has sent judicial candidates a questionnaire asking for our views on various issues. What may I say about issues of the day?*

A. Candidates may not make statements that commit the candidate with respect to cases, controversies, or issues that could come before the courts. Candidates are also prohibited from knowingly misrepresenting the identity, qualifications, present position or any other fact concerning the candidate or the candidate's opponent. Judges involved in judicial campaigns must also avoid comment concerning a matter pending or impending in any court. Of course, judges must also avoid any comments, public or private, which might substantially interfere with a fair hearing or trial.

When making comments about judicial candidates, judges must not make a statement with knowing or reckless disregard of the truth of the statement. Such an action would violate Canons 1, 2, 2A, 4A(2), and 5. (CJP (2017), *In the Matter Concerning Judge Kenneth Ferguson*)

Q. *What should I do if there is a misunderstanding and a non-judicial candidate lists me as an endorser?*

A. This happens fairly frequently. Judicial candidates should be as direct as possible about this with other candidates to lessen the chances for a misunderstanding. If an erroneous endorsement occurs, the judicial candidate should write the non-judicial candidate, explain the ethical constraints against such endorsements, and ask that the judicial candidate's name be removed or at least not be used in any future campaign materials. If the endorsement has been published and widely disseminated, a judicial candidate should make significant efforts to publish a disclaimer.

IV. Campaigning in the Courthouse

Q. *You say solicitation of campaign funds is permissible. I see hundreds of attorneys every week in the courthouse. May I ask for their financial support while on the job?*

A. No. It is wrong for a judicial candidate to engage in any form of campaigning in the courthouse.

Q. *As a sitting judge, what type of disclosures about my supporters must I make to litigants and lawyers?*

A. The Canon 3E(b)(1) requires that disclosure be made of any contribution or loan of \$100 or more made by a party, individual lawyer or law office or firm in the matter. These disclosures must be specifically made on the record. The disclosure shall consist of the name of the contributor or lender, the amount of each contribution or loan, the cumulative amount of the contributor's contributions or lender's loans and the date of each contribution or loan. In addition, Canon 3E(2) requires disclosure of anything reasonably relevant to the issue of disqualification, which may include endorsements or contributions made by persons who appear before the judge.

If a campaign contribution from a party, attorney or witness appearing before the judge is disproportionately large when compared to the total amount of the judge's campaign fund, recusal may be required pursuant to CCP 170.1(a)(6)(A), and recusal is required for a contribution in excess of \$1500 from a party or lawyer in the proceeding. Similar disclosure and recusal obligations arise from non-monetary contributions, as where an

individual appearing before the court has been active in the judge's campaign committee.

Q. *May I use my staff, telephone or copying machine for campaign-related activities if those do not interfere with court business?*

A. No. Judicial candidates are prohibited from using any governmental resources for campaign purposes. This includes the use of staff, equipment, facilities, court email and official stationery for campaign purposes. However, staff, colleagues or friends may participate in judicial campaigns away from the courthouse and during their non-duty hours.

A memorandum from the Administrative Office of the Courts was issued on September 28, 2006 to all judges and justices of the California courts. Intended to provide "general guidance on common election-related questions," the memorandum states that "a judge may not use court resources in connection with campaign-related activities," based on statutes and case law. The memorandum discusses Government Code § 8314, Penal Code § 424 and the Code of Judicial Ethics, and is available to judicial officers from any Presiding Judge, Court Executive Officer, or the AOC Legal Opinions Unit.

Q. *May I wear my robe in a campaign photograph if I am a sitting judicial officer?*

A. Yes, as long as the usage does not denigrate the integrity of the office. Judicial officers may wear their robes in posed photographs for campaign literature and in group photographs with other judges.

Q. *May subordinate judicial officers running for judicial position call themselves "Judges" in campaign literature?*

A. Judicial candidates may not mislead voters by the manner in which they refer to themselves. While a commissioner or referee may be called "Your Honor" out of respect in court proceedings, it may be misleading to refer to oneself in that manner in campaign literature.

Q. *May lawyers who serve as temporary judges call themselves "Judge"?*

A. To avoid misleading the public, lawyers who serve as temporary judges may not use the title "judge" or "judge pro tem" or "temporary judge" in campaign sign or prominent in an advertisement. However, such service may be included in a descriptive statement of qualifications, including statements of qualifications provided to the public. Ballot

titles and other official elections material designations are governed by law; candidates should refer to Elections Code sections 10211 and 13107.

Q. *What may I do if I conclude that a candidate has violated the Code of Judicial Ethics in his or her campaign?*

A. If the candidate is another judicial officer, a complaint may be filed with the Commission on Judicial Performance. If the candidate is an attorney, a complaint may be filed with both the Commission and the State Bar. The California Rules of Professional Conduct require that attorneys comply with Canon 5 of the Code of Judicial Ethics when engaged in campaigning for judicial office. If the attorney loses the election, the State Bar may institute disciplinary proceedings. If the attorney wins, the Commission may investigate and discipline for misconduct once he or she takes the oath of office.

(Excerpt from Code of Judicial Ethics)

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 \$1000 in any calendar year for all political parties or political organizations* or nonjudicial candidates.*

* Terms with an asterisk (*) are defined below in the Terminology section.

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 provided the judge does not use 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 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.

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 affecting the law, the legal system, or the administration of justice otherwise prohibited by this canon.*

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

*Under this canon, a judge may publicly endorse a candidate.*for judicial office. 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.*

Although family members of the judge or candidate for judicial office are not subject to the provisions of this code, a judge or candidate for

judicial office shall not avoid compliance with this code by making contributions through a spouse or registered domestic partner or other family member.

B. Conduct During Judicial Campaigns and Appointment Process

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

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

(b) knowingly,* or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning himself or herself or his or her opponent or other applicants.

(2) A candidate for judicial office* shall review and approve the content of all campaign statements and material produced by the candidate or his or her campaign committee before their dissemination. A candidate shall take appropriate corrective action if the candidate learns of any misrepresentations made in his or her campaign statements or materials. A candidate shall take reasonable measures to prevent any misrepresentations being made in his or her support by third parties. A candidate shall 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.

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

ADVISORY COMMITTEE COMMENTARY

The purpose of Canon 5B is to preserve the integrity of the appointive and elective process for judicial office 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.

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

Canon 5B(1)(b) prohibits making knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons. Candidates for judicial office must disclose campaign contributions in accordance with Canon 3E(2)(b).

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

C. Speaking at Political Gatherings

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

D. Measures to Improve the Law

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

ADVISORY COMMITTEE COMMENTARY

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.

CALIFORNIA CODE OF JUDICIAL ETHICS TERMINOLOGY

“Candidate.” 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.

“Law” denotes court rules as well as statutes, constitutional provisions, and decisional law.

“Member of the judge’s family” denotes a spouse, registered domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

“Political organization” denotes a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office.

The California Judges Association is the professional organization which represents the state trial and appellate judges, commissioners and referees in California. Membership is voluntary.

CJA maintains a program of legislative advocacy, judicial education, publishing and public information. Membership services include telephone hot lines for ethics, discipline, response to criticism, and resource information on ethics and retirement. CJA also offers specialized group insurance for judges and their families.

California Judges Association

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(916) 239-4068 / (866) 432-1252 • Fax (916) 924-7323
www.caljudges.org