



Judicial Council of California

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M E M O R A N D U M

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Action Requested

Please Review

To

Mr. Cory Jaspersen, Director
Governmental Affairs

Deadline

N/A

From

Deborah C. Brown, Chief Counsel
Charles E. Perkins, Supervising Attorney
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Legal Services

Subject

Ethical Principles Applicable to Judicial
Officers Engaged in Legislative Activities

You asked Legal Services to provide an information sheet addressing the ethical principles that pertain to judicial officers who participate in legislative activities that can be distributed to judicial officers who engage in Bench-Bar Coalition legislative outreach activities. To assist judicial officers, this memorandum provides the following information: (1) the applicable canons from the California Code of Judicial Ethics; (2) an analysis of the Supreme Court's Committee on Judicial Ethics Opinions' (CJEO's) formal opinion addressing this issue; (3) relevant excerpts from the *California Judicial Conduct Handbook*; and (4) a brief discussion of potential disqualification and disclosure implications. It replaces the prior memorandum on this subject dated October 24, 2014, and it is not intended to be legal advice.

Relevant Canons¹

Governmental activities

Canon 4C(1) is the canon most directly on point for judges who wish to participate in legislative activity.² It prohibits a judge from appearing at a public hearing or consulting with an executive or legislative body or a public official except on matters concerning the law, the legal system, and the administration of justice. In deciding whether to engage in such activities, a judge must also consider whether that conduct would violate any other provision of the Code of Judicial Ethics. For example, the activity must uphold the integrity, impartiality, and independence of the judiciary (canons 1 and 2A), and it must not cause the judge to be frequently disqualified (canon 4A(4)).

Political activity

Canon 5 provides that judges may not be involved in political activity that is inconsistent with the independence, integrity, or impartiality of the judiciary, or that creates the appearance of political bias or impropriety. Canon 5D states that a judge is not permitted to engage in political activity unless it is related to the law, the legal system, or the administration of justice and consistent with the Code of Judicial Ethics.

Extrajudicial activities, appearance of impropriety, lending the prestige of office

There are several other canons that judges must consider when engaged in legislative activity. Canon 4A requires judges to conduct any extrajudicial activity so that such activity does not (1) reasonably cast doubt on a judge's impartiality, (2) demean the judicial office, (3) interfere with judicial duties, or (4) lead to frequent disqualification. Canon 2 provides that a judge must not engage in conduct that creates the appearance of impropriety. Canon 2A prohibits a judge from making any statement that commits the judge with respect to cases, controversies, or issues that are likely to come before the court. Finally, canon 2B(2) states that a judge must not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others.

CJEO Formal Opinion No. 2014-006

In 2014, the Supreme Court's Committee on Judicial Ethics Opinions issued a formal opinion entitled "Judicial Comment at Public Hearings and Consultation with Public Officials and Other

¹ The text of the canons discussed in this section is provided in the attachment at the end of this memorandum.

² Canon 6A explains that the term "judge" applies to "[a]nyone who is an officer of the state judicial system and who performs judicial functions" and thus encompasses subordinate judicial officers. All the canons cited in this memorandum apply to judges and subordinate judicial officers, and we use the term "judge" to refer to justices, judges, and subordinate judicial officers.

Branches of Government.”³ The opinion addressed the circumstances under which a judge may appear at a public hearing or officially consult with executive or legislative bodies on “matters concerning the law, the legal system, or the administration of justice.” (See canon 4C(1).) The committee concluded that canon 4C(1) allows comment and consultation concerning the court system or matters of judicial administration. The canon permits a judge to appear before or consult with representatives of the other two branches of government “when the subject of the appearance or consultation is one with respect to which the judge’s experience and perspective *as a judge* gives him or her unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public.” (CJEO Formal Opn. 2014-006 (2014), *Judicial Comment at Public Hearings and Consultation with Public Officials and Other Branches of Government*, California Supreme Court Committee on Judicial Ethics Opinions, p. 2, emphasis in original.)

The committee stated judges may testify or advocate at public hearings “only on behalf of the legal system—focusing on court users, the courts, or the administration of justice.” (CJEO Formal Opn. 2014-006, *supra*, at p. 7.) A judge may comment about substantive legal issues where the purpose is to benefit the law and legal system itself rather than any particular cause or group and when the comment or consultation is made from a judicial perspective. (*Ibid.*) Thus, any comments from a *legal* knowledge/experience perspective should be provided by attorneys, not judges. (*Ibid.*) Where a judge has both judicial and attorney experience in a particular area of law, the judge’s comments or consultation should be presented “from a purely judicial perspective.” (*Ibid.*)

The committee noted that, even if the exception in canon 4C(1) applies, the judge must ensure that the appearance or consultation does not violate any other canons, such as those listed in the attachment to this memorandum.

The opinion provides the following examples:

- A judge may comment or consult about “the judicial branch’s budget, or a bond measure for court construction, or a bill proposing to replace court reporters with electronic recording, as these matters clearly relate to the administration of justice.”
- Regarding a proposed constitutional amendment to replace the death penalty with life without parole, “a judge may comment on the dysfunction of the present system from a judicial perspective,” but advocacy for or against the death penalty as a policy matter would violate canon 4C(1).

³ The full opinion can be found on the CJEO website at www.judicialethicsopinions.ca.gov/wp-content/uploads/cjeo_formal_opinion_2014-006.pdf.

- A judge who was an environmental attorney may express their views in support of a new California Environmental Quality Act (CEQA) settlement process, but only from the viewpoint of a judge who is, for example, “seeking to unburden the court’s docket by resolving CEQA cases earlier in the judicial process.”
- A judge who was a prosecutor but has no criminal judicial experience may express support for proposed legislation to reduce the number of peremptory challenges in misdemeanor cases, but those views “should be expressed in terms of how the law would affect the legal system or the administration of justice (for example) by improving juror satisfaction, enhancing jury diversity, and saving court costs, while still providing the full panoply of due process.”
- A judge may not appear at a public hearing of a legislative committee to advocate for longer sentences for certain drug offenders because, even though such comments are about a matter “concerning the law,” advocacy for longer sentences for only a particular type of offender could undermine public confidence in the impartiality of the judiciary, thus violating canons 1 (upholding the integrity and independence of the judiciary), 2A (promoting public confidence in the integrity and impartiality of the judiciary), 3B(9) (commenting publicly on pending cases), and 4A(1) (casting doubt on the judge’s capacity to act impartially). The judge could, however, discuss the impact of such sentences on the courts or the adjudicatory process.
- A judge may advocate for improvements in the administration of justice that would seek to reduce recidivism by providing information about collaborative court programs the judge had presided over or administered that employ alternative sentencing or probation periods for drug offenders.
- A judge may advocate for statewide use of alternative programs based on the judge’s experience but must not comment on the outcome of cases involving particular offenders and must not imply that the judge will be ruling a particular way in a class of cases.
- Judicial advocacy for specific legislation on proposed death penalty or collective bargaining measures could violate the prohibition in canon 2A against making statements that commit a judge with respect to cases, controversies, or issues that are likely to come before the court or that are inconsistent with the impartial performance of duties. But a judge may appear before a public body to explain, from a judicial perspective, the effects of proposed laws on the judicial process or judicial administration.

California Judicial Conduct Handbook

The *California Judicial Conduct Handbook*, also known as the Rothman treatise, addresses judicial involvement in executive and legislative matters:

§ 11.3 Appearances at public hearings and participation in executive or legislative matters

Ethics rules on the subject. A judge . . . must . . . draw the distinction between inappropriate involvement with the legislative and executive branch in what could be called “political” matters as opposed to appropriate involvement in matters that concern the law, legal system, and administration of justice. Thus, for example, a judge may endorse legislation that would provide the court with facilities and services, because such matters deal with the administration of justice.

* * *

Recognition of the separation of powers—urging moderation in advocacy by judges. Judges are frequently active in advocating positions before the legislative and executive branches on a variety of subjects. The Code of Judicial Ethics does not prohibit this activity so long as the activity is limited to issues related to the law, the legal system, or the administration of justice and the activity complies with other canons. The boundary of this limitation should not be stretched.

Judges should consider limiting advocacy of issues before the legislative and executive branches to only the clearest and most urgent of circumstances. When judges frequently engage in such advocacy, they may be perceived as encroaching on legislative and executive prerogatives. Separation of powers and preservation of the independence of the judiciary require judges to ration their advocacy.

Special position of juvenile and family court judges. The special demands of juvenile and family court assignments frequently involve judges in proactive efforts to improve the law. These judges are expected to regularly make recommendations concerning civil procedure and the development of programs to help children. For example, the presiding judge of a juvenile court, when asked by a local service-provider agency, may cosign a letter to the local Board of Supervisors requesting that it impose a moratorium on collection of, and subsequently eliminate, fines and fees levied against children and families appearing in juvenile court.

Examples of appropriate advocacy. Is it proper for a judge to be involved in writing a statute that increases or reduces child support, or deals with the length of sentences in juvenile or criminal cases? Judges regularly advocate for additional judicial officers, but would it be improper for them to advocate for additional police officers?

Judges do not agree on the answers to these questions. Some believe that such activity is part of the judicial function and is permissible. Others, however, believe that the test is whether such advocacy could “cast reasonable doubt on the judge’s capacity to act impartially.”

It would be proper for a judge to endorse a bond measure that increases county revenues, which would increase funding for judicial-related activities as well as increasing revenues for non-legal system county projects, provided the endorsement was carefully phrased to focus on judicial needs, while avoiding endorsement of nonjudicial issues. Because of the Trial Court Funding Act, local judicial-related funding advocacy would be very limited, if any, at the local level.

A judge may write a letter to the Legislature regarding a bill proposing to replace court reporters with electronic recording as this plainly concerns the administration of justice. Although the Trial Court Funding Act centralized funding of courts, local courts and judges throughout the state have an important role in advocating for adequate funding to assure access to justice. Absent adequate funding, fairness, justice and the rule of law will decline. The conduct of judges meeting with lawyers who practice before the courts in order to seek their assistance in securing public and legislative support for adequate funding for the courts was found to be ethical conduct under canon 5D in Formal Opinion No. 2013-2001 of the California Supreme Court CJEO. Although the opinion determined that such activity was proper, it discussed in detail the ethical issues judges must keep in mind in such meetings and advocacy.

A judge may write a letter to the Legislature regarding a bill proposing to replace court reporters with electronic recording as this plainly concerns the administration of justice. A judge, acting in a private capacity, may write a letter on private stationery to elected officials to express concern about the increase in the number of mentally ill people coming onto the grounds of the judge’s church and the need for more mental health services.

A judge, who was formerly a member of the Legislature, should not be further involved in legislation or consult with legislators or others except on legislation

and other matters concerning the law, the legal system or the administration of justice.

(David M. Rothman et al., *California Judicial Conduct Handbook*, 4th ed. (Thomson Reuters, 2017), pp. 736–739.)

The *California Judicial Conduct Handbook* also discusses judicial support of or opposition to ballot measures:

§ 11.24 Supporting or opposing ballot measures

* * *

“A judge or candidate for 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 [the] code.” The Terminology section of the California Code of Judicial Ethics explains the phrase “[l]aw, the legal system, or the administration of justice.”

Measures not related to improvement of the law, legal system or administration of justice. Although one might argue that anything on the ballot relates to the improvement of the law, such is not the case. For example, it would be improper for a judge to draft, promote, or be listed publicly as supporting a school bond ballot proposal as such a proposal is not related to improvement of the law, the legal system or the administration of justice. A commissioner may not publicly take a position on a ballot proposal regarding public funding of a sports stadium.

Proper and improper comment by judges on ballot measures. Appropriate judicial activity related to ballot measures includes public support of a tax measure or other ballot proposition that would provide revenue for court operations or jail construction because the objects of the funding pertain to the administration of justice. A court and its judges may also take a public position on a ballot proposition that affects judicial funding and the administration of justice.

A judge may:

- speak and take a public stance against a ballot measure that would take away the power to appoint and retain the chief probation officer from the courts and place it in the hands of the board of supervisors;

- act in support of political goals that directly relate to improvement of the judicial system such as jail construction or renovation of a juvenile detention facility;
- use his or her name in a newspaper advertisement concerning a ballot measure that concerns the improvement of the law, the legal system, or the administration of justice.

A judge may not:

- sign a ballot statement, essentially a public endorsement, for an ordinance advocating criminal penalties for violation of a law/ordinance;
- make public comments with regard to an initiative where the judge's comments appeared to be indulgent of a certain kind of criminal activity.

This conduct implicates canons 1 and 2A because it affects the integrity, impartiality and independence of the judiciary.

(Rothman et al., *supra*, at pp. 748–749, citations omitted.)

Disqualification and Disclosure

Judges who are involved in legislative activity must be aware of the disqualification and disclosure implications if it appears that the judge cannot be impartial in ruling on a matter concerning the issue with which the judge was involved. Code of Civil Procedure section 170.1(a)(6)(A)(iii) provides that a judge is disqualified if “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” A judge is *not* disqualified, however, if the judge “[h]as as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.” (Code Civ. Proc., § 170.2(c).)

The *California Judicial Conduct Handbook* addresses this issue:

A judge's expression of opinions outside of the context of judicial decision may raise disqualification and disclosure issues.

* * *

Drafting or advocating concerning laws. Code of Civil Procedure section 170.2, subdivision (c), provides that a judge is not disqualified if he or she, “[h]as as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.” Code of Judicial Ethics, canon 3E(6), applies this rule to appellate justices.

Although there can be an argument that the use of the term “public official” is not intended to encompass a judge, subdivision (c) of Code of Civil Procedure section 170.2 appears to allow a judge to preside over a case in which he or she may be required to apply or interpret a law that the judge participated in drafting or in advocating for its passage or defeat. Judges have been involved on many occasions in such activities although, as noted in the concluding language of subdivision (c), such involvement has the potential of requiring disqualification.

(Rothman et al., *supra*, at pp. 479–480.)

Judges must also keep in mind canon 4A(4), which states that a judge must conduct all of the judge’s extrajudicial activities so that they do not lead to frequent disqualification of the judge.

Contact Information for Questions

If judicial officers have questions about whether their own conduct would violate any provision of the Code of Judicial Ethics, they may contact the Supreme Court’s Committee on Judicial Ethics Opinions at judicial.ethics@jud.ca.gov or 855-854-5366, or the California Judges Association’s Ethics Hotline at 866-432-1252.

DCB/CEP/DP/zb

Attachment

cc: Michelle Curran, Administrative Director
Robert Oyung, Chief Deputy Director

Relevant Canons and Commentary

Canon 1

A judge shall uphold the integrity and independence of the judiciary.

Canon 2

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

Canon 2A

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Canon 2B(2)

A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.

Canon 4A

A judge shall conduct all of the judge's extrajudicial activities so that they do not

- (1) cast reasonable doubt on the judge's capacity to act impartially,
- (2) demean the judicial office,
- (3) interfere with the proper performance of judicial duties, or
- (4) lead to frequent disqualification of the judge.

Canon 4C(1)

A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice, or in matters involving the judge's private economic or personal interests.

Advisory Committee Commentary: Canon 4C(1)

When deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of this code. For a list of factors to consider, see the explanation of “law, the legal system, or the administration of justice” in the Terminology section. See also Canon 2B regarding the obligation to avoid improper influence.

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.

Canon 5D

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

Advisory Committee Commentary: Canon 5D

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 the explanation of “law, the legal system, or the administration of justice” in the Terminology section.

Explanation of “law, the legal system, or the administration of justice” from the Terminology section

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 the activity 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(1) (Commentary), 4C(2), 4C(2) (Commentary), 4C(3)(a), 4C(3)(b)

(Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(d), 4D(6)(e), 5A (Commentary), 5D, and 5D (Commentary).