

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 (415) 263-4600.

The California Judges Association is the largest independent, private, professional association of Active and Retired Judges, Justices, Commissioners and Referees in the country. With over 2,500 members, CJA is THE VOICE of the Judiciary

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

California Judges Association

88 Kearny Street, Suite 1850 • San Francisco, CA 94108-5523
(415) 263-4600 • Fax (415) 263-4605



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

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.

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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, 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 principle purpose of which is to further the election or appointment of candidates to nonjudicial office.

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.

B. Conduct During Judicial Campaigns

A candidate* for election or appointment to judicial office shall not (1) make 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, or (2) knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent.

ADVISORY COMMITTEE COMMENTARY

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). The phrase “appear to commit” has been deleted because, although judicial candidates 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(2) prohibits making knowing misrepresentations, including false or misleading statements, during an elections campaign because doing so would violate Canons 1 and 2A, and may violate other canons.

C. Speaking at Political Gatherings

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

D. Measures to Improve the Law

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.

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 fund-raisers, subject to rules of disclosure and disqualification.
- Q. *When may I begin fund-raising activities?*
- A. Candidates may begin fund-raising 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.
- Q. *May I attend fund-raisers 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.

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.

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

A. You may offer private advice on campaign matters, including strategy, fund-raising, and by identifying persons or entities who might be helpful to the candidate. However, you may not publicly assist the candidate in any way, such as by introducing the candidate to potential supporters or contributors, or by allowing your name to be used by the candidate.

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.

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 from signing a petition to qualify a measure for the ballot without the use of the judge's 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. 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 directly affecting the administration of justice otherwise prohibited by this Canon.*

Subject to the monetary limitation herein to political contributions, a judge 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 another judicial candidate. Such endorsements are permitted because judicial officers 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.*

Although members of the judge's family are not subject to the provisions of this Code, a judge shall not avoid compliance with this Code by making contributions through a spouse or other family member.*

(Excerpt from Code of Judicial Ethics)

CANON 5

A JUDGE OR JUDICIAL CANDIDATE * SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

Judges 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 political activity that may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates* for judicial office.

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 in any calendar year per political party or political organization* or candidate,* or in excess of an aggregate of one thousand dollars 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.

- 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. Most reputable slate mailer organizations are sensitive to this requirement, but you should discuss the issue with your contact person or insist on seeing a mock-up of the mailer before it is printed.
- Q.** *May I speak to political organizations on my own behalf?*
- A.** Yes. It is not improper 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.
- 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 Canons of Judicial Ethics require that disclosure be made of significant contributions by parties, attorneys, or material witnesses (usually in excess of \$100), including substantial non-monetary contributions. These disclosures must be specifically made on the record. With respect to monetary contributions, the judge may advise the parties and counsel on the record that a current list of contributors is available in the courtroom. The judge will not satisfy the disclosure requirements by simply posting a copy of the judge's FPPC filing in the courtroom. The judge must inform the parties and counsel, on the record, of the posting and explain, on the record, that the FPPC filing contains the names of those who contributed \$100 or more to the judge's election campaign. 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. 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 should avoid the use of any governmental resources for campaign purposes. This includes a prohibition on the use of staff, equipment 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 8, 2003 to all judges and justices of the California courts. Intended to provide "general principles and authorities," the memorandum states that "the use of court resources for election activities creates a serious risk of legal or ethical violations." 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 judges pro tem call themselves "Judge"?*
- A.** Lawyers who serve as judges *pro tem* may refer to that prior service, but may not refer to themselves as "judges".
- 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.