

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP11-09

Title	Action Requested
Proposed Amendments to Canon 4 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
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes several amendments to canon 4 of the code. Canon 4 provides: “A Judge Shall So Conduct the Judge’s Quasi-Judicial and Extrajudicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.” After receiving and reviewing comments on the 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 4 arise from the 2007 revisions to the American Bar Association’s Model Code of Judicial Conduct. 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.

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

1. New canon 4A(4) and commentary

The proposed adoption of new canon 4A(4) (see attachment, p. 1, line 17) is based on rule 3.1(B) of the model code, which states that when engaging in extrajudicial activities, a judge shall not participate in activities that will lead to frequent disqualification. The committee noted that this

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concept is addressed in canon 4D(4), but that canon is limited to financial activities. Other canons, such as canons 3A, 4C(3)(c), and 4A(3), also touch on the issue, but do not state the idea directly. The committee proposes adopting the language of rule 3.1(B) as new canon 4A(4) because it would be useful to state the concept specifically as it relates to *all* of a judge’s extrajudicial activities. The canon would read: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not lead to frequent disqualification of the judge.”

The committee also proposes adding an explanatory sentence to the commentary following canon 4A (p. 1, lines 27–29). The sentence would read: “Because a judge’s judicial duties take precedence over all other activities (see Canon 3A), a judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified.”

The commentary following canon 4A states: “Expressions which may [cast reasonable doubt on the judge’s capacity to act impartially] include jokes or other remarks demeaning individuals on the basis of a classification such as their race, sex, religion, sexual orientation, or national origin.” The committee proposes changing this sentence to read: “Expressions which may [cast reasonable doubt on the judge’s capacity to act impartially] include jokes or other demeaning remarks.” This change would expand the list of classifications without setting forth every category and clarify that judges should not make any demeaning remarks at all, as opposed to demeaning remarks specifically about the listed classifications.

2. Commentary following canon 4C(1) and commentary following canon 4C(3)(d)

Both of these canons use the phrase “the law, the legal system, or the administration of justice.” Canon 4C(1) provides that 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” Canon 4C(3)(d)(ii) states that a judge “may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice.”

This phrase, which also appears in numerous other places in canons 4 and 5, has never been defined, and its scope has often been the subject of discussion and consternation. The committee acknowledges the difficulty of defining the term, but notes that it often serves as a limitation on certain types of extrajudicial activity addressed in the canons in which it appears. The committee wishes to emphasize that judges cannot disregard other canons when engaged in activity related to the law, the legal system, or the administration of justice. Therefore, the committee proposes that the term be added to the terminology section (see the Invitation to Comment on Proposed Amendments to the Terminology Section, item #11, p. 5) with a list of factors and other canons a judge should consider before engaging in the activity. Wherever that term appears in the code, there will be an asterisk indicating that the term is listed in the terminology section.

With regard to canons 4C(1) and 4C(3)(d), in addition to the asterisks, the committee believes it would be helpful to mention specifically that when deciding whether to engage in the activity described in those canons, a judge should consider whether the conduct would violate any other

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provision of the code. The committee therefore proposes that the commentary following canon 4C(1) be amended (p. 2, lines 18–24) to read:

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.

Likewise, the committee proposes that the following be added to the commentary following canon 4C(3)(d) (p. 5, lines 12–17):

When deciding whether to make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provision 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.

3. Commentary following canon 4C(2), canon 4C(3)(b) and commentary, commentary following canon 4C(3)(d)

These provisions all contain a reference to “fraternal organizations” or “fraternal institutions.” The committee proposes changing all such references in the code (including one in canon 3E(5)(d)) to “service organization” (p. 3, lines 2, 16, and 25–26; p. 4, lines 40–41) because use of the term “fraternal” may be perceived as sexist. To ensure that the proposed change does not lead anyone to conclude that certain fraternal organizations are no longer covered by the canons, the committee also proposes adding that term to the terminology section as follows: “‘Service organization’ includes any organization commonly referred to as a ‘fraternal organization.’” (See the Invitation to Comment on Proposed Amendments to the Terminology Section, item #13, p. 6.)

4. Canon 4C(3)(d)(i)

The proposed amendment to canon 4C(3)(d)(i) (p. 4, lines 17–22) is based on rule 3.7(A)(2) of the model code, which addresses judges soliciting contributions for organizations in which they are involved. Specifically, that rule states that a judge may solicit contributions from family members in addition to other judges. The rationale behind the ABA provision is that with respect to soliciting family members and other judges, an element of coercion is unlikely to be present. In addition, the perception that the person making the contribution, i.e., a family member or another judge, is attempting to influence the judge in his or her judicial duties is unlikely to arise. The committee noted that canon 4C(3)(d)(i) does not address the issue of judges soliciting funds

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from family members. Therefore, the committee proposes adding language specifically allowing a judge to solicit funds from family members.

The canon also provides that a judge may not solicit funds from “court commissioners, referees, retired judges, and temporary judges.” The reason is that, unlike with family members and other judges, solicitation of funds from someone over whom the judge exercises some type of supervisory authority raises the issue of coercion. Judges do not exercise supervisory authority over retired judges except those serving in the Assigned Judges Program. Therefore, the committee proposes that the term “retired judges” be qualified by adding the phrase “serving in the Assigned Judges Program” (p. 4, lines 21–22).

The revised canon would read as follows:

(d) a judge as an officer, director, trustee, or nonlegal advisor, or as a member or otherwise

(i) may assist such an organization in planning fundraising and may participate in the management and investment of the organization’s funds; However, a judge shall not personally participate in the solicitation of funds or other fundraising activities, except that a judge may privately solicit funds for such an organization from members of the judge’s family or from other judges (excluding court commissioners, referees, retired judges serving in the Assigned Judges Program, and temporary judges);

5. Canon 4C(3)(d)(ii)

Canon 4C(3)(d)(ii) states that judges “may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice.” The committee proposes a slight change in the wording of the canon that it believes will make the canon clearer (p. 4, lines 24–25). The canon would be revised to say that judges “may make recommendations to public and private organizations that grant funds for projects and programs concerning the law, the legal system, or the administration of justice.” This proposed change is not intended to alter the meaning of the canon.

6. New canon 4C(3)(e) and commentary

The proposed adoption of new canon 4C(3)(e) (p. 5, line 26) is based on rule 3.7(B) of the model code, which states that a judge may encourage lawyers to provide pro bono publico legal services. The proposed new paragraph for the commentary following canon 4C(3)(e) (p. 5, lines 28–32) is based on comment 5 to rule 3.7 of the model code. The ABA adopted rule 3.7(B) because it is consistent with permitting judges to participate in activities sponsored by or on behalf of educational, religious, charitable, service (i.e., fraternal), or civic organizations.

The committee agreed that the California code should include the same provision with commentary cautioning judges about not coercing attorneys or abusing the prestige of judicial

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office in encouraging attorneys to offer pro bono services. The new canon would read as follows: “A judge may encourage lawyers to provide pro bono publico legal services.” The new paragraph for the commentary would state:

In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion or abuse the prestige of judicial office.

7. Canon 4D(4)

Canon 4D(4) states: “As soon as reasonably possible, a judge shall divest himself or herself of investments and other financial interests that would require frequent disqualification.” The committee proposes adding a specific one-year time limit to this canon (p. 6, lines 41–42) so that it would read: “As soon as reasonably possible, but in any event within one year of taking the oath of office, a judge shall divest himself or herself of investments and other financial interests that would require frequent disqualification.” In making this recommendation, the committee considered canon 6F, which provides that, with two exceptions, the canons become applicable to judges immediately upon taking the bench. As to those two exceptions, canon 6F provides that judges must comply “as soon as reasonably possible and shall do so in any event within a period of one year.” To make canon 4D(4) consistent with canon 6F and to provide more specific guidance to judges, the committee proposes adding the one-year time limit to canon 4D(4).

8. Commentary following canon 4D(5)

The commentary following canon 4D(5) currently states:

Because a gift, bequest, or favor to a member of the judge’s family residing in the judge’s household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them.

The committee noted that because a judge’s family members are not bound by the code, it is technically incorrect to make a reference to family members violating “ethical constraints upon the judge.” Therefore, the committee proposes amending the language to read (p. 7, lines 16–18):

Because a gift, bequest, or favor to a member of the judge’s family residing in the judge’s household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and urge them to take these constraints into account when making decisions about accepting such gifts, bequests, or favors.

9. Canon 4D(6)(a)

In reviewing various model code provisions related to acceptance of gifts, the committee noted that the reference in canon 4D(6)(a) to “books and tapes” is outdated. Canon 4D(6)(a) contains

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an exception to the gift prohibition for “books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use.” The committee proposes changing this phrase (p. 7, line 28) to “educational or resource materials supplied by publishers on a complimentary basis for official use.”

10. Canon 4D(6)(b) commentary

Canon 4D(6)(b) is an exception to the gift prohibition for advances or reimbursement for travel related to participation in a judicial, educational, civic, or governmental program or bar-related activity devoted to the improvement of the law, the legal system, or the administration of justice. The committee proposes adding to the commentary following canon 4D(6)(b) a cross-reference to canon 4H(2) (p. 7, lines 42–43), which addresses expense reimbursement for travel costs.

11. Canon 4D(6)(d) and commentary

In discussing the exception in canon 4D(6)(d) to the gift prohibition for “ordinary social hospitality,” the committee agreed the exception should contain a provision stating that the judge should accept such hospitality only if a reasonable person would conclude that it was not intended to influence the judge in the performance of judicial duties (p. 8, lines 8–9). Canon 4D(6)(d) would read: “(d) ordinary social hospitality, provided that acceptance could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.” This proposed phrase is taken from canon 4D(6)(c), which addresses gifts to a judge’s family members.

To ensure that judges do not accept gifts pursuant to an exception without considering all the implications, the committee also proposes amending the commentary following canon 4D(6)(d) (p. 8, lines 12–17) to include references to canons 2 (appearance of impropriety) and 2A (integrity and impartiality of the judiciary). The committee would also add the concept of independence of the judiciary as a consideration.

Finally, the committee agreed that the phrase “between members of the bench and bar” in the commentary should be eliminated because the canon addresses all ordinary social hospitality, not just hospitality between members of the bench and the bar. The proposed commentary would read:

Although Canon 4D(6)(d) does not preclude ordinary social hospitality, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or any appearance that the judge is misusing the prestige of judicial office. See Canons 2 and 2B. A judge should also consider whether acceptance would affect the integrity, impartiality, or independence of the judiciary. See Canon 2A.

12. Canon 4D(6)(f)

The proposed amendment of canon 4D(6)(f) (p. 8, lines 28–31) is based, in part, on rule 3.13(B)(2) of the model code, which creates an exception to the gift prohibition for “gifts, loans,

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bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge” Canon 4D(6)(f) restricts the exception to relatives and “close personal friends.” The committee believes this limitation is unnecessary if the donor would be disallowed from appearing before the judge in any event. Therefore, the committee proposes that the phrase “relative or close personal friend whose appearance or interest in a case would in any event require disqualification” be replaced by “person whose preexisting relationship with a judge would prevent the judge under Canon 3E from hearing a case involving that person.”

13. New commentary following canon 4D(6)(f)

Noting that canon 4D(6)(a) contains an exception to the gift prohibition for “any gift incidental to a public testimonial,” the committee discussed whether the public testimonial itself should be added to the list of exceptions. Many new judges have inquired about the propriety of their former law firms holding and funding an event in their honor after they are appointed or elected to the bench. The committee noted that if a new judge’s former law firm sponsored an event of this type, the judge may be disqualified for a period of time from hearing any matter involving that law firm. (See Code of Civil Procedure section 170.1(a)(2).) Therefore, the committee agrees that a commentary to canon 4D(6)(f) should be adopted that incorporates two concepts: the judge may accept the public testimonial if (1) the judge would otherwise be disqualified from hearing any case involving the person or entity holding or funding the event, and (2) a reasonable person would not conclude that the event undermines the judge’s integrity, impartiality, or independence.

The proposed commentary following canon 4D(6)(f) (p. 8, lines 33–39) would read:

Upon appointment or election as a judge or within a reasonable period of time thereafter, a judge may attend an event honoring the judge’s appointment or election as a judge provided that (1) the judge would otherwise be disqualified from hearing any matter involving the person or entity holding or funding the event, and (2) a reasonable person would not conclude that attendance at the event undermines the judge’s integrity, impartiality, or independence.

14. Canon 4D(6)(g)

The proposed amendments to canon 4D(6)(g) (p. 8, lines 41–43; p. 9, lines 1–2) are based on rule 3.13(B)(4) of the model code, which is an exception to the gift prohibition for “commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges.” Canon 4D(6)(g) is the California equivalent of rule 3.13(B)(4), but it is limited to “a loan in the regular course of business on the same terms generally available to persons who are not judges.” This canon is based on the ABA predecessor to rule 3.13(B)(4). The ABA expanded the exception because if these additional benefits are equally available to similarly situated persons

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who are not judges, it would allay any fears that the benefits are being extended to influence the judge's decision making or to curry favor with the judge.

The committee proposes that canon 4D(6) be replaced by the language from rule 3.13(B)(4) because it is more inclusive than our canon and the added items are acceptable gifts.

15. New canon 4D(6)(i)

The proposed adoption of new canon 4D(6)(i) (p. 9, lines 7–8) is based on rule 3.13(B)(5) of the model code, which allows a judge to accept “rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges.” The California code does not have an equivalent exception. The ABA offered the same explanation for the adoption of this rule as for rule 3.13(B)(4), discussed above in item #14.

The committee concluded that judges should be permitted to accept rewards and prizes that are equally available to people who are not judges. The committee therefore proposes adoption of rule 3.13(B)(5) as canon 4D(6)(i).

16. New canon 4D(6)(j)

The proposed adoption of new canon 4D(6)(j) (p. 9, lines 10–14) is based on rule 3.13(C)(2)(b) of the model code, which permits a judge to accept an invitation to an event sponsored by an organization with which the judge is involved as long as the same invitation is extended to other persons involved in the same activity who are not judges. The committee agreed that this is an appropriate exception and proposes adoption of the following as new canon 4D(6)(j):

(j) an invitation to the judge and the judge's spouse, registered domestic partner, or guest to attend an event sponsored by an educational, religious, charitable, service, or civic organization with which the judge is associated or involved, if the same invitation is offered to persons who are not judges who are engaged in similar ways with the organization.

17. Canon 4H

Canon 4H covers compensation and reimbursement of expenses, but does not address honoraria. Code of Civil Procedure section 170.9(g) states: “No judge shall accept any honorarium.” Because compensation and expense reimbursement are closely related to the concept of honoraria, the committee proposes expanding canon 4H to include the prohibition from section 170.9(g) as well as its definition of the term (p. 10, lines 34–42; p. 11, lines 1–2). New canon 4H(3) would read as follows:

No judge shall accept any honorarium. “Honorarium” means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. “Honorarium” does not include earned income for personal services that are customarily provided in connection with the practice of a bona fide

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business, trade, or profession, such as teaching or writing for a publisher, and does not include fees or other things of value received pursuant to Section 94.5 of the Penal Code for performance of a marriage. For purposes of this canon, “teaching” shall include presentations to impart educational information to lawyers in events qualifying for credit under Mandatory Continuing Legal Education, to students in bona fide educational institutions, and to associations or groups of judges.

The committee also proposes adding “honoraria” to the title of the canon (p. 10, line 19), which currently is “Compensation and Reimbursement.”

18. Commentary following canon 4H—first paragraph

The proposed adoption of the first paragraph of the commentary following canon 4H (p. 11, lines 5–7) is based on rule 3.13(A) of the model code, which states that a judge may not accept any gifts, loans, or other things of value if it would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality. The committee agreed that a similar qualification should be added to the commentary pertaining to compensation and reimbursement. The paragraph would read: “Judges should not accept compensation or reimbursement of expenses if acceptance would appear to a reasonable person to undermine the judge’s integrity, impartiality, or independence.”

19. Commentary following canon 4H—second paragraph

The proposed adoption of the second paragraph of the commentary following canon 4H (p. 11, lines 8–41) is based on comment 3 to rule 3.14 of the model code. That comment sets forth several factors a judge should consider in deciding whether to accept reimbursement of expenses or a fee waiver for attendance at a particular event. The list includes such factors as whether the sponsor is an educational institution or bar association rather than a trade association or a for-profit entity, whether the content is related to any litigation pending before the judge, and whether information concerning the activity and its funding sources is available upon inquiry. The comment also incorporates the concept discussed above in item #18 that a judge should not accept reimbursement or a fee waiver if it would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.

20. Commentary following canon 4H—third paragraph

The committee proposes deleting the reference to “honoraria” from the existing commentary (p. 12, lines 1–2), which states: “Judges should be aware of the statutory limitations on accepting gifts, including honoraria.” Under this proposal, the statutory limitation on accepting honoraria would be added to canon 4H, so reference here to a statutory limitation would be unnecessary.

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Canon 4 of the California Code of Judicial Ethics would be amended to read:

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CANON 4

**A JUDGE SHALL SO CONDUCT THE JUDGE’S QUASI-JUDICIAL AND
EXTRAJUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF
CONFLICT WITH JUDICIAL OBLIGATIONS**

A. Extrajudicial Activities in General

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; or
- (3) interfere with the proper performance of judicial duties; or
- (4) lead to frequent disqualification of the judge.

ADVISORY COMMITTEE COMMENTARY

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which ~~the judge~~ he or she lives. Expressions of bias or prejudice by a judge, even outside the judge’s judicial activities, may cast reasonable doubt on the judge’s capacity to act impartially as a judge. Expressions which may do so include jokes or other demeaning remarks ~~demeaning individuals on the basis of a classification such as their race, sex, religion, sexual orientation, or national origin.~~ See Canon 2C and accompanying Commentary.*

Because a judge’s judicial duties take precedence over all other activities (see Canon 3A), a judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified.

B. Quasi-Judicial and Avocational Activities

A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code.

ADVISORY COMMITTEE COMMENTARY

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice,* including revision of substantive and procedural law* and improvement of criminal and juvenile justice. To the extent that time permits, a judge*

1 may do so, either independently or through a bar or judicial association or other group
2 dedicated to the improvement of the law.* It may be necessary to promote legal
3 education programs and materials by identifying authors and speakers by judicial title.
4 This is permissible, provided such use of the judicial title does not contravene Canons 2A
5 and 2B.

6 Judges are not precluded by their office from engaging in other social, community,
7 and intellectual endeavors so long as they do not interfere with the obligations under
8 Canons 2C and 4A.

10 **C. Governmental, Civic, or Charitable Activities**

11
12 (1) A judge shall not appear at a public hearing or officially consult with an executive or
13 legislative body or public official except on matters concerning the law, the legal system,
14 or the administration of justice* or in matters involving the judge's private economic or
15 personal interests.

17 **ADVISORY COMMITTEE COMMENTARY**

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

25
26 (2) A judge shall not accept appointment to a governmental committee or commission or
27 other governmental position that is concerned with issues of fact or policy on matters
28 other than the improvement of the law, the legal system, or the administration of justice.*
29 A judge may, however, serve in the military reserve or represent a national, state, or local
30 government on ceremonial occasions or in connection with historical, educational, or
31 cultural activities.

33 **ADVISORY COMMITTEE COMMENTARY**

34 Canon 4C(2) prohibits a judge from accepting any governmental position except
35 one relating to the law, legal system, or administration of justice* as authorized by
36 Canon 4C(3). The appropriateness of accepting extrajudicial assignments must be
37 assessed in light of the demands on judicial resources and the need to protect the courts
38 from involvement in extrajudicial matters that may prove to be controversial. Judges
39 shall not accept governmental appointments that are likely to interfere with the
40 effectiveness and independence* of the judiciary, or which constitute a public office
41 within the meaning of the California Constitution, article VI, section 17.

42 Canon 4C(2) does not govern a judge’s service in a nongovernmental position.
43 See Canon 4C(3) permitting service by a judge with organizations devoted to the

1 *improvement of the law, the legal system, or the administration of justice* and with*
2 *educational, religious, charitable, ~~fraternal~~ service,* or civic organizations not*
3 *conducted for profit. For example, service on the board of a public educational*
4 *institution, other than a law school, would be prohibited under Canon 4C(2), but service*
5 *on the board of a public law school or any private educational institution would*
6 *generally be permitted under Canon 4C(3).*

7
8 (3) Subject to the following limitations and the other requirements of this Code,

9
10 (a) a judge may serve as an officer, director, trustee, or nonlegal advisor of an
11 organization or governmental agency devoted to the improvement of the law, the legal
12 system, or the administration of justice* provided that such position does not constitute a
13 public office within the meaning of the California Constitution, article VI, section 17;

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15 (b) a judge may serve as an officer, director, trustee, or nonlegal advisor of an
16 educational, religious, charitable, ~~fraternal~~ service,* or civic organization not conducted
17 for profit;

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19 **ADVISORY COMMITTEE COMMENTARY**

20 *Canon 4C(3) does not apply to a judge's service in a governmental position*
21 *unconnected with the improvement of the law, the legal system, or the administration of*
22 *justice.* See Canon 4C(2).*

23 *Canon 4C(3) uses the phrase, "Subject to the following limitations and the other*
24 *requirements of this Code." As an example of the meaning of the phrase, a judge*
25 *permitted by Canon 4C(3) to serve on the board of a ~~fraternal institution~~ service*
26 *organization* may be prohibited from such service by Canon 2C or 4A if the institution*
27 *practices invidious discrimination or if service on the board otherwise casts reasonable*
28 *doubt on the judge's capacity to act impartially* as a judge.*

29 *Service by a judge on behalf of a civic or charitable organization may be governed*
30 *by other provisions of Canon 4 in addition to Canon 4C. For example, a judge is*
31 *prohibited by Canon 4G from serving as a legal advisor to a civic or charitable*
32 *organization.*

33 *Service on the board of a homeowners' association or a neighborhood protective*
34 *group is proper if it is related to the protection of the judge's own economic interests.*
35 *See Canons 4D(2) and 4D(4). See Canon 2B regarding the obligation to avoid improper*
36 *use of the prestige of a judge's office.*

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38 (c) a judge shall not serve as an officer, director, trustee, or nonlegal advisor if it is likely
39 that the organization

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41 (i) will be engaged in judicial proceedings that would ordinarily come before the
42 judge, or
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1 (ii) will be engaged frequently in adversary proceedings in the court of which the
2 judge is a member or in any court subject to the appellate jurisdiction of the court
3 of which the judge is a member.
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5 *ADVISORY COMMITTEE COMMENTARY*

6 *The changing nature of some organizations and of their relationship to the law**
7 *makes it necessary for the judge regularly to reexamine the activities of each*
8 *organization with which the judge is affiliated to determine if it is proper for the judge to*
9 *continue the affiliation. Some organizations regularly engage in litigation to achieve*
10 *their goals or fulfill their purposes. Judges should avoid a leadership role in such*
11 *organizations as it could compromise the appearance of impartiality.**
12

13 (d) a judge as an officer, director, trustee, or nonlegal advisor, or as a member or
14 otherwise
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16 (i) may assist such an organization in planning fundraising and may participate in
17 the management and investment of the organization's funds, ~~but~~ However, a
18 judge shall not personally participate in the solicitation of funds or other
19 fundraising activities, except that a judge may privately solicit funds for such an
20 organization from members of the judge's family* or from other judges (excluding
21 court commissioners, referees, retired judges serving in the Assigned Judges
22 Program, and temporary judges*);
23

24 (ii) may make recommendations to public and private ~~fund-granting~~ organizations
25 that grant funds for ~~or~~ projects and programs concerning the law, the legal system,
26 or the administration of justice*;
27

28 (iii) shall not personally participate in membership solicitation if the solicitation
29 might reasonably be perceived as coercive or if the membership solicitation is
30 essentially a fundraising mechanism, except as permitted in Canon 4C(3)(d)(i);
31

32 (iv) shall not permit the use of the prestige of his or her judicial office for
33 fundraising or membership solicitation but may be a speaker, guest of honor, or
34 recipient of an award for public or charitable service provided the judge does not
35 personally solicit funds and complies with Canon 4A(1), (2), and (3).
36

37 *ADVISORY COMMITTEE COMMENTARY*

38 *A judge may solicit membership or endorse or encourage membership efforts for*
39 *an organization devoted to the improvement of the law, the legal system, or the*
40 *administration of justice,* or a nonprofit educational, religious, charitable, ~~fraternal~~*
41 *service,* or civic organization as long as the solicitation cannot reasonably be perceived*
42 *as coercive and is not essentially a fundraising mechanism. Solicitation of funds or*

1 memberships for an organization and solicitation of memberships similarly involves the
2 danger that the person solicited will feel obligated to respond favorably ~~to the solicitor~~ if
3 the solicitor is in a position of influence or control. A judge must not engage in direct,
4 individual solicitation of funds or memberships in person, in writing, or by telephone
5 except in the following cases: (1) a judge may solicit other judges (excluding court
6 commissioners, referees, retired judges, court-appointed arbitrators, and temporary
7 judges*) for funds or memberships; (2) a judge may solicit other persons for membership
8 in the organizations described above if neither those persons nor persons with whom they
9 are affiliated are likely ever to appear before the court on which the judge serves; and (3)
10 a judge who is an officer of such an organization may send a general membership
11 solicitation mailing over the judge's signature.

12 When deciding whether to make recommendations to public and private
13 fundgranting organizations on projects and programs concerning the law, the legal
14 system, or the administration of justice,* a judge should consider whether that conduct
15 would violate any other provision of this Code. For a list of factors to consider, see the
16 explanation of "law, the legal system, or the administration of justice" in the
17 Terminology section.

18 *Use of an organization letterhead for fundraising or membership solicitation does*
19 *not violate Canon 4C(3)(d), provided the letterhead lists only the judge's name and office*
20 *or other position in the organization, and designates the judge's judicial title only if other*
21 *persons whose names appear on the letterhead have comparable designations. In*
22 *addition, a judge must also make reasonable efforts to ensure that the judge's staff, court*
23 *officials, and others subject to the judge's direction and control do not solicit funds on*
24 *the judge's behalf for any purpose, charitable or otherwise.*

25
26 (e) A judge may encourage lawyers to provide pro bono publico legal services.

27 ADVISORY COMMITTEE COMMENTARY

28 In addition to appointing lawyers to serve as counsel for indigent parties in
29 individual cases, a judge may promote broader access to justice by encouraging lawyers
30 to participate in pro bono publico legal services, as long as the judge does not employ
31 coercion or abuse the prestige of judicial office.
32

33 **D. Financial Activities**

34
35
36 (1) A judge shall not engage in financial and business dealings that

37
38 (a) may reasonably be perceived to exploit the judge's judicial position, or

39
40 (b) involve the judge in frequent transactions or continuing business relationships with
41 lawyers or other persons likely to appear before the court on which the judge serves.
42
43

1 **ADVISORY COMMITTEE COMMENTARY**

2 *The Time for Compliance provision of this Code (Canon 6F) postpones the time*
3 *for compliance with certain provisions of this Canon in some cases.*

4 *A judge must avoid financial and business dealings that involve the judge in*
5 *frequent transactions or continuing business relationships with persons likely to appear*
6 *either before the judge personally or before other judges on the judge's court. A judge*
7 *shall discourage members of the judge's family* from engaging in dealings that would*
8 *reasonably appear to exploit the judge's judicial position or that involve family members*
9 *in frequent transactions or continuing business relationships with persons likely to*
10 *appear before the judge. This rule is necessary to avoid creating an appearance of*
11 *exploitation of office or favoritism and to minimize the potential for disqualification.*

12 *Participation by a judge in financial and business dealings is subject to the*
13 *general prohibitions in Canon 4A against activities that tend to reflect adversely on*
14 *impartiality,* demean the judicial office, or interfere with the proper performance of*
15 *judicial duties. Such participation is also subject to the general prohibition in Canon 2*
16 *against activities involving impropriety* or the appearance of impropriety* and the*
17 *prohibition in Canon 2B against the misuse of the prestige of judicial office.*

18 *In addition, a judge must maintain high standards of conduct in all of the judge's*
19 *activities, as set forth in Canon 1.*

20

21 (2) A judge may, subject to the requirements of this Code, hold and manage investments
22 of the judge and members of the judge's family,* including real estate, and engage in
23 other remunerative activities. A judge shall not participate in, nor permit the judge's
24 name to be used in connection with, any business venture or commercial advertising that
25 indicates the judge's title or affiliation with the judiciary or otherwise lend the power or
26 prestige of his or her office to promote a business or any commercial venture.

27

28 (3) A judge shall not serve as an officer, director, manager, or employee of a business
29 affected with a public interest, including, without limitation, a financial institution,
30 insurance company, or public utility.

31

32 **ADVISORY COMMITTEE COMMENTARY**

33 *Although participation by a judge in business activities might otherwise be*
34 *permitted by Canon 4D, a judge may be prohibited from participation by other provisions*
35 *of this Code when, for example, the business entity frequently appears before the judge's*
36 *court or the participation requires significant time away from judicial duties. Similarly,*
37 *a judge must avoid participating in any business activity if the judge's participation*
38 *would involve misuse of the prestige of judicial office. See Canon 2B.*

39

40 (4) A judge shall manage personal investments and financial activities so as to minimize
41 the necessity for disqualification. As soon as reasonably possible, but in any event within
42 one year of taking the oath of office, a judge shall divest himself or herself of investments
43 and other financial interests that would require frequent disqualification.

1 (5) Under no circumstance shall a judge accept a gift,* bequest, or favor if the donor is a
2 party whose interests have come or are reasonably likely to come before the judge. A
3 judge shall discourage members of the judge’s family* residing in the judge’s household*
4 from accepting similar benefits from parties who have come or are reasonably likely to
5 come before the judge.

6
7 **ADVISORY COMMITTEE COMMENTARY**

8 *In addition to the prohibitions set forth in Canon 4D(5) regarding gifts,* other*
9 *laws* may be applicable to judges, including, for example, Code of Civil Procedure*
10 *section 170.9 and the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.).*

11 *Canon 4D(5) does not apply to contributions to a judge’s campaign for judicial*
12 *office, a matter governed by Canon 5.*

13 *Because a gift,* bequest, or favor to a member of the judge’s family* residing in*
14 *the judge’s household* might be viewed as intended to influence the judge, a judge must*
15 *inform those family members of the relevant ethical constraints upon the judge in this*
16 *regard and ~~discourage those family members from violating them~~ urge them to take these*
17 *constraints into account when making decisions about accepting such gifts, bequests, or*
18 *favours. A judge cannot, however, reasonably be expected to know or control all of the*
19 *financial or business activities of all family members residing in the judge’s household.**

20 *The application of Canon 4D(5) requires recognition that a judge cannot*
21 *reasonably be expected to anticipate all persons or interests that may come before the*
22 *court.*

23
24 (6) A judge shall not accept and shall discourage members of the judge’s family* residing
25 in the judge’s household* from accepting a gift,* bequest, favor, or loan from anyone
26 except as hereinafter provided:

27
28 (a) any gift* incidental to a public testimonial, ~~books, tapes, and other~~ or educational or
29 resource materials supplied by publishers on a complimentary basis for official use, or an
30 invitation to the judge and the judge’s spouse or registered domestic partner* or guest to
31 attend a bar-related function or an activity devoted to the improvement of the law, the
32 legal system, or the administration of justice;*

33
34 (b) advances or reimbursement for the reasonable cost of travel, transportation, lodging,
35 and subsistence which is directly related to participation in any judicial, educational,
36 civic, or governmental program or bar-related function or activity; devoted to the
37 improvement of the law, the legal system, or the administration of justice;*

38
39 **ADVISORY COMMITTEE COMMENTARY**

40 *Acceptance of an invitation to a law*-related function is governed by Canon*
41 *4D(6)(a); acceptance of an invitation paid for by an individual lawyer or group of*
42 *lawyers is governed by Canon 4D(6)(d). See also Canon 4H(2) and accompanying*
43 *Commentary.*

1 (c) a gift,* award, or benefit incident to the business, profession, or other separate activity
2 of a spouse or registered domestic partner* or other member of the judge’s family*
3 residing in the judge’s household,* including gifts,* awards, and benefits for the use of
4 both the spouse or registered domestic partner* or other family member and the judge,
5 provided the gift,* award, or benefit could not reasonably be perceived as intended to
6 influence the judge in the performance of judicial duties;

7
8 (d) ordinary social hospitality, provided that acceptance could not reasonably be
9 perceived as intended to influence the judge in the performance of judicial duties;

10
11 *ADVISORY COMMITTEE COMMENTARY*

12 *Although Canon 4D(6)(d) does not preclude ordinary social hospitality ~~between~~*
13 *~~members of the bench and bar~~, a judge should carefully weigh acceptance of such*
14 *hospitality to avoid any appearance of impropriety* or bias or any appearance that the*
15 *judge is misusing the prestige of judicial office. See Canons 2 and 2B. A judge should*
16 *also consider whether acceptance would affect the integrity,* impartiality,* or*
17 *independence* of the judiciary. See Canon 2A.*

18
19 (e) a gift* for a special occasion from a relative or friend, if the gift* is fairly
20 commensurate with the occasion and the relationship;

21
22 *ADVISORY COMMITTEE COMMENTARY*

23 *A gift* to a judge, or to a member of the judge’s family* residing in the judge’s*
24 *household,* that is excessive in value raises questions about the judge’s impartiality**
25 *and the integrity* of the judicial office and might require disqualification of the judge*
26 *where disqualification would not otherwise be required. See, however, Canon 4D(6)(f).*

27
28 (f) a gift,* bequest, favor, or loan from a ~~relative or close personal friend~~ person whose
29 ~~appearance or interest in a case would in any event require disqualification~~ preexisting
30 relationship with a judge would prevent the judge under Canon 3E from hearing a case
31 involving that person;

32
33 *ADVISORY COMMITTEE COMMENTARY*

34 *Upon appointment or election as a judge or within a reasonable period of time*
35 *thereafter, a judge may attend an event honoring the judge’s appointment or election as a*
36 *judge provided that (1) the judge would otherwise be disqualified from hearing any*
37 *matter involving the person or entity holding or funding the event, and (2) a reasonable*
38 *person would not conclude that attendance at the event undermines the judge’s*
39 *integrity,* impartiality,* or independence.**

40
41 (g) ~~a loan in the regular course of business on the same terms generally available to~~
42 ~~persons who are not judges~~ commercial or financial opportunities and benefits, including
43 special pricing and discounts, and loans from lending institutions in their regular course

1 of business, if the same opportunities and benefits or loans are made available on the
2 same terms to similarly situated persons who are not judges;

3
4 (h) a scholarship or fellowship awarded on the same terms and based on the same criteria
5 applied to other applicants.

6
7 (i) rewards and prizes given to competitors or participants in random drawings, contests,
8 or other events that are open to persons who are not judges;

9
10 (j) an invitation to the judge and the judge's spouse, registered domestic partner,* or
11 guest to attend an event sponsored by an educational, religious, charitable, service,* or
12 civic organization with which the judge is associated or involved, if the same invitation is
13 offered to persons who are not judges and who are engaged in similar ways with the
14 organization.

15
16 **E. Fiduciary* Activities**

17
18 (1) A judge shall not serve as executor, administrator, or other personal representative,
19 trustee, guardian, attorney in fact, or other fiduciary,* except for the estate, trust, or
20 person of a member of the judge's family,* and then only if such service will not
21 interfere with the proper performance of judicial duties.

22
23 (2) A judge shall not serve as a fiduciary* if it is likely that the judge as a fiduciary* will
24 be engaged in proceedings that would ordinarily come before the judge, or if the estate,
25 trust, or minor or conservatee becomes engaged in contested proceedings in the court on
26 which the judge serves or one under its appellate jurisdiction.

27
28 (3) The same restrictions on financial activities that apply to a judge personally also apply
29 to the judge while acting in a fiduciary* capacity.

30
31 **ADVISORY COMMITTEE COMMENTARY**

32 *The Time for Compliance provision of this Code (Canon 6F) postpones the time*
33 *for compliance with certain provisions of this Canon in some cases.*

34 *The restrictions imposed by this Canon may conflict with the judge's obligation as*
35 *a fiduciary.* For example, a judge shall resign as trustee if detriment to the trust would*
36 *result from divestiture of trust holdings the retention of which would place the judge in*
37 *violation of Canon 4D(4).*

38
39 **F. Service as Arbitrator or Mediator**

40
41 A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions
42 in a private capacity unless expressly authorized by law.*

1 *ADVISORY COMMITTEE COMMENTARY*

2 *Canon 4F does not prohibit a judge from participating in arbitration, mediation,*
3 *or settlement conferences performed as part of his or her judicial duties.*

4
5 **G. Practice of Law ***

6
7 A judge shall not practice law.*

8
9 *ADVISORY COMMITTEE COMMENTARY*

10 *This prohibition refers to the practice of law* in a representative capacity and not*
11 *in a pro se capacity. A judge may act for himself or herself in all legal matters, including*
12 *matters involving litigation and matters involving appearances before or other dealings*
13 *with legislative and other governmental bodies. However, in so doing, a judge must not*
14 *abuse the prestige of office to advance the interests of the judge or member of the judge's*
15 *family.* See Canon 2B.*

16 *This prohibition applies to subordinate judicial officers,* magistrates, special*
17 *masters, and judges of the State Bar Court.*

18
19 **H. Compensation, and Reimbursement, and Honoraria**

20
21 A judge may receive compensation and reimbursement of expenses as provided by law*
22 for the extrajudicial activities permitted by this Code, if the source of such payments does
23 not give the appearance of influencing the judge's performance of judicial duties or
24 otherwise give the appearance of impropriety.*

25
26 (1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person
27 who is not a judge would receive for the same activity.

28
29 (2) Expense reimbursement shall be limited to the actual cost of travel, food, lodging, and
30 other costs reasonably incurred by the judge and, where appropriate to the occasion, by
31 the judge's spouse or registered domestic partner* or guest. Any payment in excess of
32 such an amount is compensation.

33
34 (3) No judge shall accept any honorarium. "Honorarium" means any payment made in
35 consideration for any speech given, article published, or attendance at any public or
36 private conference, convention, meeting, social event, meal, or like gathering.
37 "Honorarium" does not include earned income for personal services that are customarily
38 provided in connection with the practice of a bona fide business, trade, or profession,
39 such as teaching or writing for a publisher, and does not include fees or other things of
40 value received pursuant to Section 94.5 of the Penal Code for performance of a marriage.
41 For purposes of this canon, "teaching" shall include presentations to impart educational
42 information to lawyers in events qualifying for credit under Mandatory Continuing Legal

1 Education, to students in bona fide educational institutions, and to associations or groups
2 of judges.

3
4 *ADVISORY COMMITTEE COMMENTARY*

5 Judges should not accept compensation or reimbursement of expenses if
6 acceptance would appear to a reasonable person to undermine the judge's integrity,*
7 impartiality,* or independence.*

8 A judge must assure himself or herself that acceptance of reimbursement or fee
9 waivers would not appear to a reasonable person to undermine the judge's
10 independence,* integrity,* or impartiality.* The factors a judge should consider when
11 deciding whether to accept reimbursement or a fee waiver for attendance at a particular
12 activity include:

13
14 (a) whether the sponsor is an accredited educational institution or bar association
15 rather than a trade association or a for-profit entity;

16
17 (b) whether the funding comes largely from numerous contributors rather than
18 from a single entity, and whether the funding is earmarked for programs with
19 specific content;

20
21 (c) whether the content is related or unrelated to the subject matter of a pending*
22 or impending* proceeding before the judge, or to matters that are likely to come
23 before the judge;

24
25 (d) whether the activity is primarily educational rather than recreational, and
26 whether the costs of the event are reasonable and comparable to those associated
27 with similar events sponsored by the judiciary, bar associations, or similar
28 groups;

29
30 (e) whether information concerning the activity and its funding sources is
31 available upon inquiry;

32
33 (f) whether the sponsor or source of funding is generally associated with
34 particular parties or interests currently appearing or likely to appear in the
35 judge's court, thus possibly requiring disqualification of the judge;

36
37 (g) whether differing viewpoints are presented;

38
39 (h) whether a broad range of judicial and nonjudicial participants are invited; and

40
41 (i) whether the program is designed specifically for judges.
42

1 *Judges should be aware of the statutory limitations on accepting gifts, including*
2 *honoraria.**

Item SP11-09 Response Form

Title: Proposed Amendments to Canon 4 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.

Internet: <http://www.courtinfo.ca.gov/invitationstocomment/>

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
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Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Thursday, September 1, 2011

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.