

Supreme Court Advisory Committee on the Code of Judicial Ethics

350 McAllister Street, San Francisco, California 94102-3688

INVITATION TO COMMENT

SP15-09

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| Title | Action Requested |
| Proposed Amendments to Canon 4C(3)(d)(iii) and Commentary of the Code of Judicial Ethics | Review and submit comments by December 1, 2015 |
| Proposed by | Proposed Effective Date |
| Supreme Court Advisory Committee on the Code of Judicial Ethics Hon. Richard D. Fybel, Chair | April 1, 2016 |
| | Contact |
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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics (committee) seeks comment on the proposed amendment of canon 4C(3)(d)(iii) and its commentary pertaining to personal solicitation by judges of membership in various organizations. After receiving and reviewing comments on this proposal, the committee will make a recommendation to the Supreme Court regarding the proposed amendments. The full text of the proposed amendments is attached.

Prior Circulation

The committee previously requested public comment on draft amendments addressing this topic in November 2014. Based on the comments and further discussion, the committee has now revised the proposed language.

Discussion

Canon 4C(3)(d)(iii) permits judges to solicit membership in certain organizations (including nonprofit educational, religious, charitable, service, or civic organizations and organizations devoted to the improvement of the law, the legal system, or the administration of justice) as long as the solicitation (1) cannot reasonably be perceived as coercive, and (2) is not essentially a fundraising mechanism. The commentary following canon 4C(3)(d) states that a judge may solicit persons for membership “if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves.”

The committee considered whether, under the language of the canon and the commentary, a judge may encourage a lawyer to join an Inn of Court if that lawyer is likely to appear in the judge’s court. The committee notes the apparent conflict between the canon, which appears to

This proposal has not been approved by the Supreme Court and is not intended to represent the views of the court. This proposal is circulated for comment purposes only.

allow such a solicitation, and the commentary provision regarding solicitation of anyone who is likely to appear before the judge's court.

Given the limitations in subdivision (iii)—that such solicitation is improper if it might reasonably be perceived as coercive or if it is essentially a fundraising mechanism—the committee believes a judge should be permitted to solicit a lawyer for membership in an Inn of Court even if the lawyer is likely to appear before the court on which the judge serves. Encouraging lawyers to become members of organizations such as Inns of Court would enhance the quality of the legal profession, particularly when the organization's goal is primarily educational. In the committee's view, the existing limitations are adequate to protect against the risk of persons feeling coerced into joining or attempting to curry favor with a sitting judge by joining such an organization.

Rule 3.7(A)(3) of the American Bar Association's Model Code of Judicial Conduct permits judges to solicit membership in organizations that are "concerned with the law, the legal system, or the administration of justice." Because of the importance of allowing judges to solicit membership in law-related organizations, the committee proposes adopting this model code language by amending canon 4C(3)(d)(iii) to provide that a judge "may personally solicit membership for organizations concerned with the law, the legal system, or the administration of justice even if those solicited have cases pending before the judge" The proposed amendment would retain the qualifying language that the judge may not solicit membership "if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fundraising mechanism." This change would be consistent with canon 4C(3)(e), which allows a judge to "encourage lawyers to provide pro bono publico legal services."

To address concerns about a judge soliciting membership in law-related organizations from litigants or lawyers who have cases pending before the judge, the committee proposes adding a cautionary sentence to the commentary. The sentence would state that when a solicitation is made to someone with a case pending before the judge, the judge must be mindful of canons 1 (upholding the integrity and independence of the judiciary), 2 (avoiding impropriety and the appearance of impropriety), 2A (promoting public confidence in the integrity and impartiality of the judiciary), and 4A (conducting extrajudicial activities so they do not cast doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper performance of judicial duties, or lead to frequent disqualification).

As to solicitation of membership in organizations that are not law-related, the existing commentary makes it clear that a judge "may solicit membership or endorse or encourage membership efforts for . . . a nonprofit educational, religious, charitable, service, or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fundraising mechanism." The committee proposes retaining this provision by deleting this clarifying language from the commentary and adding it to the canon. The committee also proposes amending the canon to state that, with regard to these types of organizations, a judge may not solicit anyone who has a case pending before the judge.

Under the committee’s proposal, the first paragraph of the commentary would be deleted. The first sentence of that paragraph states: “A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice, or a nonprofit educational, religious, charitable, service, or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fundraising mechanism.” If the proposed amendments to canon 4C(3)(d)(iii) are adopted, the first sentence of the first paragraph of the commentary would be superfluous.

The second sentence of that paragraph states: “Solicitation of funds or memberships for an organization similarly involves the danger that the person solicited will feel obligated to respond favorably if the solicitor is in a position of influence or control.” The committee notes that canon 4C(3)(d)(iii) uses an objective standard, i.e., whether the solicitation might reasonably be perceived as coercive. By contrast, the second sentence adds a subjective element—whether “the person solicited will feel obligated to respond favorably.” In the committee’s view, the subjective standard in the second sentence is inconsistent and confusing. Accordingly, it should be deleted.

The third sentence of that paragraph contains three exceptions to the prohibition against direct, individual solicitation of funds or memberships. The first exception provides that a judge may solicit other judges, but not court commissioners, referees, retired judges, court-appointed arbitrators, hearing officers, or temporary judges. The committee proposes deleting this language for two reasons. First, as to soliciting *funds*, the language in the commentary is superfluous because canon 4C(3)(d)(i) contains essentially the same language. Second, as to solicitation of *memberships*, it is counterproductive to not allow the judicial officers listed to be solicited for memberships by judges. In response to the proposed amendments circulated for public comment in November 2014, a judge commented that when she was a court commissioner, she was personally solicited by several judges for membership on various committees and boards as well as an Inn of Court. She was grateful for the solicitations and never felt coerced. In the committee’s view, the language prohibiting any solicitation that might reasonably be perceived as coercive is adequate.

The proposed deletion of the second exception, which allows a judge to solicit membership from anyone who is not likely to appear before the court on which the judge serves, has been addressed above.

The third exception allows a judge who is an officer of a nonprofit organization to send a general membership solicitation mailing over the judge’s signature. The committee proposes retaining this provision in the commentary, but adding the qualification that the mailing is permissible only if it cannot reasonably be perceived as coercive and is not essentially a fundraising mechanism.

Finally, the current commentary limits only “direct, individual solicitation[s].” In the committee’s view, this is a proper interpretation of the phrase “personally participate” in canon

4C(3)(d)(iii) (a judge “shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or the membership solicitation is essentially a fundraising mechanism”). To clarify the meaning of the proposed new phrase “personally solicit,” the committee proposes adding the following sentence to the commentary: “The term ‘personally solicit’ in Canon 4C(3)(d)(iii) refers to direct, personal solicitation by the judge.”

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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. – B. * * *

C. Governmental, Civic, or Charitable Activities

(1) – (2) * * *

(3) Subject to the following limitations and the other requirements of this code,

(a) – (c) * * *

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

(i) – (ii) * * *

(iii) may personally solicit membership for organizations not conducted for profit as described in Canon 4C(3)(b) so long as those being solicited, including lawyers and parties, do not have cases pending before the judge, and may personally solicit membership for organizations concerned with the law, the legal system, or the administration of justice even if those solicited have cases pending before the judge, except that a judge shall not personally participate in any membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fundraising mechanism, except as permitted in Canon 4C(3)(d)(i);

(iv) * * *

ADVISORY COMMITTEE COMMENTARY

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system, or the administration of justice, or a nonprofit educational, religious, charitable, service, or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fundraising mechanism. Solicitation of funds or memberships for an organization similarly involves the danger that the person solicited will feel obligated to respond favorably if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone except in the following cases: (1) a judge may solicit other judges (excluding court commissioners, referees, retired judges, court-appointed arbitrators, hearing officers, and temporary judges) for funds or memberships; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge’s signature.

1 The term “personally solicit” in Canon 4C(3)(d)(iii) refers to direct, personal solicitation
2 by the judge.

3 In soliciting membership, especially when the solicitation is made to a party or a lawyer
4 who has a case pending before the judge, the judge must be mindful of Canons 1, 2, 2A, and 4A.

5 A judge who is an officer of an organization may send a general membership solicitation
6 mailing over the judge’s signature so long as the mailing cannot reasonably be perceived as
7 coercive and is not essentially a fundraising mechanism.

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