



1-1-2010

California Judicial Council's Commission for Impartial Courts

Ronald B. Robie

Richard Fybel

Mary-Beth Moylan

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Ronald B. Robie, Richard Fybel & Mary-Beth Moylan, *California Judicial Council's Commission for Impartial Courts*, 42 MCGEORGE L. REV. (2016).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol42/iss1/8>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

California Judicial Council’s “Commission for Impartial Courts”*

Justice Ronald B. Robie,** Justice Richard Fybel,*** and Mary-Beth Moylan****

I. INTRODUCTION

In 2006, a Judicial Council summit concluded that unless California’s judicial leaders took decisive steps, problems in other states involving judicial elections and attacks on courts and judges by partisan and special interests could spread to California.¹ Responding directly to this prediction, California Chief Justice Ronald M. George created the Commission for Impartial Courts in September of 2007.² In establishing the Commission, he stated:

We are forming the Commission . . . in response to developments in other states that have changed the tone, tenor, and cost of judicial elections. The manner in which judges are selected, retained, and removed from office can have a serious impact on the independence of the judiciary. It is essential that we make every effort to avoid politicizing the judiciary so that public confidence in the quality, impartiality, and accountability of judges is protected and maintained.³

Accordingly, Chief Justice George charged the Commission with the overall responsibility “to study and recommend ways to ensure judicial quality, impartiality, and accountability for the benefit of all Californians.”⁴

* The views expressed in these remarks are the authors’ own and do not reflect the views of the California Supreme Court, its Advisory Committee on the Code of Judicial Ethics, or the Commission. The authors wish to thank Dean Parker, Professor Paton, and the staff of the Pacific McGeorge Capital Center for inviting them to participate in this symposium.

** Justice Robie is an Associate Justice of the California Court of Appeal, Third Appellate District and is the first Chair of the California Supreme Court Committee on Judicial Ethics Opinions. He was a member of the Commission on Impartial Courts.

*** Justice Fybel is an Associate Justice of the California Court of Appeal, Fourth Appellate District, Division Three (Santa Ana) and is the Chair of the California Supreme Court’s Advisory Committee on the Code of Judicial Ethics. He was also a member of the Commission on Impartial Courts.

**** Mary-Beth Moylan is the Director of Global Lawyering Skills at Pacific McGeorge. She also teaches Election Law and the California Initiative Seminar and was a member of the Commission on Impartial Courts.

1. COMM’N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., FINAL REPORT: RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA 1 (2009) [hereinafter FINAL REPORT].

2. Press Release, Judicial Council of Cal., Chief Justice George Names Statewide Commission for Impartial Courts (Sept. 4, 2007) (on file with the *McGeorge Law Review*).

3. *Id.*

4. *Id.*

The Commission for Impartial Courts was composed of a single steering committee, chaired by Justice Ming Chin of the California Supreme Court, and four task forces organized around the following issues identified by the Judicial Council summit: (1) judicial campaign conduct, (2) judicial campaign finance, (3) public information and education, and (4) judicial selection and retention.⁵

A total of 88 persons participated on the Steering Committee and task forces,⁶ and the authors of this article, Justice Robie, Justice Fybel, and Professor Moylan, were all participants. Their presentation at the *Judicial Ethics and Accountability At Home and Abroad* Symposium focused on their experience working with the Commission. This article memorializes that presentation and offers a short report of the work done by the Commission, in addition to discussing the ongoing implementation of its recommendations.

II. OVERVIEW OF THE COMMISSION'S RECOMMENDATIONS

In December of 2009, the Commission issued its *Final Report* with seventy-one recommendations for maintaining respectable standards of "judicial impartiality, quality, and accountability" in California.⁷ These recommendations reflect the work and studies done by the four task forces, which were then adopted and proposed by the Steering Committee.⁸

The Commission's recommendations relating to the Task Force on Public Information and Education were based on various findings made by the judges, lawyers, and experts working in that group. For example, the Commission found that there is not only a serious lack of civics education in California secondary schools, particularly with regard to the Courts,⁹ but also that "[t]here is an urgent, immediate and long-term need to inform and educate the public . . . about the importance of fair, impartial and accountable courts."¹⁰ It also found that "[n]o consistent response mechanism is in place to deal with unwarranted attacks on the judicial process."¹¹

The Commission's recommended solutions to these problems included the following: (1) public outreach and response to criticism;¹² (2) education;¹³ (3) voter

5. *Id.*

6. For a description of the overall structure of the commission, including its steering committee and task forces, see *id.* at 3-5. For a complete list of membership, see *id.* at apps. A-E, 109-118; see also *id.* at 5-6 (noting that each task force had a consultant with expertise in the area of its charge).

7. *Id.* at 7, 12.

8. *Id.* at 12.

9. See *id.* at 10 ("In California, the public, legislators, students, and voters are not sufficiently educated about the role of the courts and the importance of judicial impartiality. . . . Civics instruction in the schools has been dramatically limited during the past decades, and while positive efforts have been made in court-community outreach and educational programs, more is needed.").

10. *Id.*

11. *Id.*

12. *Id.* at 60. The commission suggested several actions for the judicial branch to take to achieve this solution. Among other proposed objectives, they encouraged the judicial branch to: (1) "identify and

education;¹⁴ (4) education of potential applicants for judgeships;¹⁵ and (5) accountability and judicial self-improvement.¹⁶

The Commission's recommendations emerging from the Task Force on Selection and Retention focused on retaining the present California modified merit system for appointment of judges, a process currently handled by the State Bar's Commission on Judicial Nominees Evaluation ("JNE").¹⁷ An inspection of the JNE process was one of the task force's key actions, and the *Final Report* contains a lengthy discussion concerning merit selection and the JNE process.¹⁸

Aided by the task force's work, the Commission made several recommendations to further improve the JNE process including: (1) giving greater publicity to JNE members' background and diversity;¹⁹ (2) "requir[ing] that a JNE rating of 'not qualified' . . . for a trial court judge be made public automatically at the time of appointment";²⁰ (3) mandating by legislation "the current practice of releasing the JNE rating for a prospective appellate justice";²¹ (4) excluding a statement of reasons from the JNE rating;²² (5) explaining the JNE and judicial appointment processes on three linked websites;²³ (6)

disseminate essential information [to] increase . . . the public's access to justice"; (2) "solicit[] . . . public feedback on issues such as judicial performance and satisfaction"; (3) "train[] . . . judges on how to present . . . court decisions in a way that can be easily understood by . . . the public"; (4) educate elected officials "on the importance of the judicial branch"; (5) train court personnel and the media to report on legal issues; (6) and develop "a model for responding to unwarranted criticism of the judicial branch" while "ensur[ing] that valid criticism are referred to the appropriate bodies for response." *Id.* at 60-66.

13. *Id.* at 66. To accomplish this goal, the commission recommended ensuring that "every child in the state . . . receive a quality civics education" including instruction on "the judiciary and its function in a democratic society." *Id.* at 67.

14. *Id.* at 71. This proposed solution involved "ensur[ing] that voters can make informed choices about candidates for judicial office . . ." *Id.* at 72.

15. *Id.* at 73 (the commission recommended that the State Bar be "asked to offer [such] an educational course.").

16. *Id.* at 74. To attain this goal, the judicial branch was asked to: (1) develop "[a] model self-improvement program . . . for voluntary use by courts and individual judges"; (2) inform the public of existing systems "to deal with judicial performance issues in fair and effective ways . . ."; and (3) encourage courts "to use CourTools or similar court performance measures." *Id.* at 75-76.

17. *See id.* at 77 ("The State Bar's Commission on Judicial Nominees Evaluation process, a unique form of a merit-based screening and selection system that has served California well, should be retained."). The task force's following findings supported this recommendation: "Under the present system of judicial selection in California, the State Bar's Commission on Judicial Nominees Evaluation (JNE) evaluates and reports to the Governor on every person before appointment as a . . . judge or justice. The California system functions largely in the same manner as the merit selection systems in some other states. . . . California's JNE system works well and is partially responsible for the high quality of judicial appointments in California." *Id.* at 10-11.

18. *Id.* at 77-81.

19. *Id.* at 81.

20. *Id.* The task force also recommended that the current similar practice for appellate justices be made mandatory. *Id.* at 82.

21. *Id.*

22. *Id.* The concern behind this recommendation was that a "release of reasons would compromise [the] confidentiality [of the JNE fact gathering process] and ultimately the value and validity of the rating system." *Id.*

23. *Id.* at 83. The three websites are the California Court's website for the judicial branch, the State

2010 / California Judicial Council's "Commission for Impartial Courts"

encouraging law schools "to provide information about the judicial appointment process to law students";²⁴ (7) encouraging JNE "members [to] speak to local and specialty bar associations, service organizations, and other civic groups";²⁵ and (8) requiring that any member of the State Bar Board of Governors who attends a "JNE meeting comply with the JNE conflict of interest rules."²⁶ The task force was also concerned about the low level of public knowledge on candidates for judicial office and their qualifications.²⁷ It thus recommended a study to develop methods of increasing this knowledge including developing a model of judicial candidate evaluation.²⁸

Equally important to the effective selection and retention of judges is enhancing diversity on the bench. In this area, the Commission recommended actions such as: (1) directing courts "to consider, when making appointments of subordinate judicial officers,"²⁹ both the diverse aspects of the applicants and the applicants' exposure to and experience with diverse populations and their related issues";³⁰ (2) arranging for JNE to "gather information regarding judicial applicants' exposure to and experience with diverse populations and issues related to those populations and . . . communicate this information to the Governor";³¹ (3) encouraging the Governor to "consider an applicant's exposure to and experience with diverse populations . . . and request this information on the judicial application form";³² (4) insisting that the "judicial branch's public outreach programs . . . encourage qualified members of the bar to consider applying for judicial office."³³

On the suggestion of the task force, the Commission rejected significant modification of the current election system, preferring the status quo over any increase in the length of judicial terms of office including lifetime appointments.³⁴ It also declined to adopt any measures to substitute retention elections at the trial court level³⁵ or eliminate open elections.³⁶ The Commission

Bar's JNE website, and the Governor's judicial application website. *Id.*; see The Judicial Branch of California, California Courts, <http://www.courtinfo.ca.gov/> (last visited Aug. 30, 2010) (on file with the *McGeorge Law Review*); The State Bar of California, Judicial Nominees Evaluation, <http://www.calbar.ca.gov/AboutUs/JudicialNomineesEvaluation.aspx> (last visited Aug. 30, 2010) (on file with the *McGeorge Law Review*); Office of the Governor, Judicial Appointments, <http://gov.ca.gov/appointments/judicial> (last visited Aug., 30, 2010) (on file with the *McGeorge Law Review*).

24. FINAL REPORT, *supra* note 1, at 83.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 84-86.
29. Many subordinate judicial officers go on to be selected as judges.
30. FINAL REPORT, *supra* note 1, at 87.
31. *Id.*
32. *Id.* at 88.
33. *Id.* at 89.
34. *Id.* at 90 (trial judges); *id.* at 94-95 (appellate judges).
35. *Id.* at 90-91.

did, however, recommend a series of statutory and constitutional changes to improve the existing election system.³⁷

These suggested modifications included: (1) changing the provision for recall of a judge by petition so that the required amount of signatures would be equal to the twenty percent of those who turned out to vote for the county district attorney at the most recent election, rather than the twenty percent of those who turned out to vote for a judge;³⁸ (2) amending the California constitution to provide that a judge serve “at least two years before his or her first election”;³⁹ (3) changing the number of signatures needed to place an unopposed judicial election on the ballot for a potential write-in election from 100 signatures to the lesser of 100 signatures or one percent of the vote for district attorney in the last election;⁴⁰ (4) permitting a challenge to an unopposed judge only at the primary election;⁴¹ (5) reordering and making minor clarifying changes to California’s constitutional provisions concerning judicial elections;⁴² (6) modifying the time frame for appellate retention elections to provide that they are to be held every two years instead of every four years;⁴³ and (7) adjusting the initial election term for an appellate justice to a full twelve year term rather than a term equal to the remainder of the previous justice’s term.⁴⁴

In addition to these suggested changes, the task force also recommended further study of methods for ensuring prompt satisfaction of judicial vacancies.⁴⁵ This recommendation resulted from a finding that lengthy judicial vacancies often “contribute to a backlog in the courts, delay justice, and potentially reduce the quality of justice.”⁴⁶

The remaining two task forces—Judicial Campaign Conduct and Judicial Campaign Finance—suggested recommendations which will be discussed in more detail below.

From a procedural standpoint, the Commission’s *Final Report* was accepted by the Judicial Council in December 2009. In January 2010, the Judicial Council began considering and acting upon each of the seventy-one detailed recommendations at its regular meetings. It will continue to do so regularly

36. *Id.* at 91-92.

37. *Id.* at 92-94.

38. *Id.* at 92. The concern addressed by this recommendation was the low number of votes for a typical judicial election. The district attorney election, on the other hand, is the only countywide election in every county. *Id.*

39. *Id.* (trial court judges); *id.* at 96 (appellate justices).

40. *Id.* at 93.

41. *Id.*

42. *Id.* at 93-94; *see also* CAL. CONST. art. VI, § 16 (a)-(d) (where subdivisions (a) and (d) refer to appellate offices and subdivisions (b) and (c) address superior court offices in a somewhat confusing arrangement).

43. *Id.* at 95.

44. *Id.*

45. *Id.* at 96.

46. *Id.*

throughout 2011.

III. BACKGROUND AND RELEVANT LAWS RELATING TO JUDICIAL ELECTIONS IN CALIFORNIA

Over the past decade, the United States Supreme Court decided several close and controversial cases involving the campaign conduct of judicial candidates and the financial contributions they receive.⁴⁷ The amount of money that is annually contributed to judicial campaigns by corporations, unions, lawyers, and others is astounding. According to the nonprofit national partnership Justice at Stake Campaign, amounts raised in the decade from 1989 to 1998 in judicial campaigns were about \$85 million.⁴⁸ In contrast, from 1999-2008 that amount rose to \$200 million.⁴⁹

To best understand the Commission's recommended changes to the law, it is helpful for one to review existing California law on these subjects. California laws on disclosure and disqualification of judges are contained in the canons of the California Code of Judicial Ethics (judicial ethics canons) and the California Code of Civil Procedure (CCP).⁵⁰ The judicial ethics canons are promulgated by the California Supreme Court pursuant to article six, section eighteen of the California Constitution, which states that "[t]he Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates in conduct of their campaigns."⁵¹ Judges may be disciplined for violations of the judicial ethics canons by the Commission on Judicial Performance, subject to discretionary review by the California Supreme Court.⁵² The judicial ethics canons cover disclosures by trial judges and disqualification of both trial judges and appellate justices.⁵³ The preamble to the judicial ethics canons recognizes the principle that the California legal system requires independent and fair judges who "respect and honor the judicial office as a public trust" under the rule of law.⁵⁴ The judicial ethics canons also contain commentary by the Supreme

47. See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (holding that a law prohibiting judicial candidates from "announcing" their opinions was unconstitutionally restrictive of free speech rights); *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) (holding that a due process violation could be asserted where a State Supreme Court Justice refused to recuse himself from a case in which a major campaign donor was a party); *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) (holding that corporations could not be precluded from exercising free speech rights in political campaigns).

48. Bert Brandenburg, *Is Justice For Sale?*, 16 EXPERIENCE 11 (2009), available at http://www.justiceatstake.org/media/cms/Brandenberg_B77CDA83E0029.pdf (on file with the *McGeorge Law Review*).

49. *Id.*

50. CAL. CODE OF JUD. ETHICS Canon 3(E) (2009); CAL. CIV. PROC. CODE §§ 170.1 (2005)-170.6 (2004).

51. CAL. CONST. art. VI, § 18(m).

52. *Dodds v. Comm'n on Judicial Performance*, 12 Cal. 4th 163, n. 2 (1995).

53. See CAL. CODE OF JUD. ETHICS Canon 3(E) (2009) (referencing the disqualification provisions in the CCP and applies other standards of disqualification for appellate justices).

54. CAL. CODE OF JUD. ETHICS pmb1. (2009).

Court's Advisory Committee (Advisory Committee).⁵⁵

The existing law on disclosure by trial judges is set forth in canon 3E(2) of the judicial ethics canons. This canon provides that "in all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under [the mandatory disqualification standards of] CCP section 170.1."⁵⁶ Notably, there are no existing disclosure requirements for appellate justices contained in the judicial ethics canons or the CCP.

The CCP encompasses the current laws pertaining to the disqualification of trial judges.⁵⁷ Under CCP section 170.1, subdivision (a), a judge should be disqualified if that judge: (1) "has personal knowledge of disputed evidentiary facts concerning the proceeding"; (2) "served as a lawyer in the proceeding . . . or gave advice to any party . . . upon any matter involved in the action or proceeding"; (3) "has a financial interest in the subject matter in a proceeding or in a party to the proceeding";⁵⁸ (4) "is related to a party"; (6) believes he or she may be impartial, perceived as impartial, or simply that recusing him or herself would further interest of justice; (7) is physically or mentally impaired; or (8) has negotiated prospective employment in Alternate Dispute Resolution (ADR) and the issues in the case are related to ADR.⁵⁹

In addition to these mandatory recusal standards, CCP section 170.6, subdivision (a)(2) gives a party one timely preemptory challenge to a trial judge presiding over his or her case.⁶⁰ Disqualification of a judge after the one preemptory challenge must be on a basis outlined by the CCP, as each party is only permitted one preemptory challenge per case.⁶¹

CCP section 170.1, subdivision (a)(6)(A)(iii) already requires that a judge is disqualified if a person aware of facts might reasonably entertain a doubt that the judge would be able to be impartial. On this subject, the disqualification of appellate justices is governed by canon 3E(4) which tracks CCP section 170.1, subdivision (a)(6)(A)(iii).

IV. SELECTED RECOMMENDATIONS OF THE COMMISSION RELATING TO JUDICIAL CAMPAIGNS

While the Commission's recommendations are numerous, this paper focuses on several that were already endorsed by the Judicial Council—specifically numbers 29, 30, and 33—and several that will be reviewed by the Judicial

55. *Id.*

56. CAL. CODE OF JUD. ETHICS Canon 3(E)(2) (2009).

57. CAL. CIV. PROC. CODE §§ 170.1 (2005)-170.6 (2004).

58. "Financial interest" is generally defined in the CCP and the judicial ethics canons as an investment of \$1,500 or more in a stock or bond, excluding mutual funds. CAL. CIV. PROC. CODE § 170.1(a)(3) (2005);

59. CAL. CIV. PROC. CODE §§ 170.1(a)(1)-(8) (2005); CAL. CODE OF JUD. ETHICS Canon 3(E)(2).

60. CAL. CIV. PROC. CODE § 170.6(a)(2) (2010).

61. CAL. CIV. PROC. CODE § 170.6(a)(3) (2004);

2010 / California Judicial Council's "Commission for Impartial Courts"

Council in the upcoming months. Recommendations 29, 30, and 33 were already forwarded to the Supreme Court for consideration. If the others are also endorsed, they too will be forwarded to the Supreme Court. Of course, the California Legislature may also enact statutes covering any or all of these topics.

In accordance with its usual practice, the Supreme Court asked its Advisory Committee to review and comment on these proposals. It also requested that the Advisory Committee comment on the ABA's new Model Code of Judicial Conduct; California judges are not covered by the ABA Model Code. As discussed below, some of the Commission's recommendations are similar to new provisions in the ABA Model Code.⁶²

A. *Recommendation No. 29.*

This recommendation requires disclosure by trial judges of campaign contributions to a judge's campaign committee that exceed one hundred dollars,⁶³ an amount based on reporting requirements for the California Fair Political Practices Commission (FPPC).⁶⁴ There are strong arguments in favor of disclosure of these contributions, and not many arguments against it. The key issues regarding disclosure arise with respect to how these amounts will be disclosed and how the people that made them will be defined. As to the manner of disclosure, any potential rule must be clear that disclosure is not made in a way that suggests that a party or lawyer who has not already contributed should do so. The next question is how rules should apply to independent expenditures that are made to a separate organization and not to a campaign committee. How should contributions from persons in the same company or law firm be treated—should their contributions be aggregated? How should a rule treat contributions to an organization that opposes another candidate?

It is evident that questions of *from* whom and *to* whom will arise in response to this recommendation. So the question becomes: how exactly should the Code deal with this issue? Should the Code be limited to addressing disclosure of contributions to a campaign committee as proposed or should it also cover contributions to other entities? In all likelihood the FPPC is in the best position to craft rules for disclosure and answer this series of questions posed.

B. *Recommendation No. 30*

This recommendation requires disqualification of a trial judge if the judge's campaign committee receives 1,500 dollars or more as a campaign contribution from a party or lawyer in a case.⁶⁵ This amount is tied to the disqualifying amount

62. See generally MODEL CODE JUD. CONDUCT (2007).

63. FINAL REPORT, *supra* note 1, at 87.

64. *Id.* at 33.

65. *Id.* at 34-35.

of an investment in stocks or bonds under CCP section 170.5. The recommendation of this particular amount raises some questions of its own. Is this amount reasonable? Should the amount differ depending on the locale? The ABA Model Code adopted a similar provision but, as Professor Geyh remarked during the Symposium, the ABA “punted” the amount issue by leaving blanks to fill in the numbers later. Why aren’t the protections of CCP section 170.6, subdivision (a)(6)(A)(iii) and canon 3E of the Code sufficient? Again, there is the persistent problem of identifying *from* whom and *to* whom the contribution is made.

C. Recommendation No. 33.

This recommendation addresses the disqualification of appellate justices.⁶⁶ The threshold amount leading to disqualification differs for justices of the Court of Appeal and the Supreme Court.⁶⁷ The proposal also recommends the same dollar limit for Court of Appeal justices as for trial judges even though some Court of Appeal districts span several large counties.⁶⁸ With this recommendation, many may be left wondering if this is a realistic goal. Notably, the contributions to a campaign committee for a Supreme Court justice would track the limits for a candidate for Governor. And, of course, this recommendation also raises the same questions concerning *from* whom and *to* whom the contributions are made.

D. Recommendation No. 5.

This recommendation pertains to disqualification for certain public statements made by judicial candidates.⁶⁹ Canon 5B of the Code provides that “[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.”⁷⁰ This recommendation would mandate disqualification of a judge on a case if the judge or candidate made such a commitment.

66. *Id.* at 35.

67. *Id.*

68. *Id.*

69. *Id.* at 15.

70. CAL. CODE OF JUD. ETHICS Canon 5(B) (2009).

E. Recommendation No. 22.

This recommendation prohibits a candidate from seeking or using endorsements from political parties.⁷¹ Article VI, section 6, subdivision (a) of the California Constitution provides that all judicial offices are nonpartisan. In the California Supreme Court case of *Unger v. Superior Court*, the Court held that the California Constitution does not prohibit political parties from endorsing judges in nonpartisan elections.⁷² Notably, the case was decided on grounds of the California Constitution regarding its nonpartisan provisions, not on First Amendment grounds.⁷³

The ABA Model Code earlier adopted the same provision on this subject as now recommended by the Commission. Now the question is whether California should follow suit. The recommendation raises serious First Amendment concerns, and the Eighth Circuit Court of Appeals has already held the provision unconstitutional.⁷⁴ The proposal by the Commission also does not address special interest groups who could still endorse a candidate. To take one relevant example, the Symposium featured the Honorable Mr. Justice John Hedigan of the High Court in Dublin, Ireland. He told the story of a recent visit to Chicago, where he saw a campaign placard that read, "Vote Flanagan for Judge" with the word "Democrat" below the candidate's name. The sign did not state "endorsed by the Democratic Party." Under the current wording of Recommendation No. 22, it is unclear whether this sign would be banned; and if so, whether such a ban would violate individual rights under the First Amendment.

Why prohibit the use of endorsements by political parties if a candidate (who receives or does not receive a party endorsement) can simply list his or her party affiliation? Could the Code constitutionally prohibit a candidate from simply saying, "I'm a Republican and my opponent is not"? These rhetorical questions may answer themselves and, in so doing, raise serious concerns about Recommendation No. 22. As suggested by Professor Paul D. Paton this recommendation "will spark fierce debate."⁷⁵

A recent San Francisco case highlights the debate. The race is between a sitting San Francisco County Superior Court judge and a challenger with a focus on partisan differentiation. The November election will determine the winner after a primary race resulted in neither candidate winning 50 percent of the vote.⁷⁶ The presiding Justice of the First District Court of Appeal, Justice

71. FINAL REPORT, *supra* note 1, at 27-28.

72. 37 Cal. 3d 612 (1984).

73. *Id.*

74. Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005) *cert. denied sub nom.* Dimick v. Republican Party of Minnesota 546 U.S. 1157 (2006).

75. Paul D. Paton, Op-Ed., *Why Judges are Now Defendants in the Court of Public Opinion*, SACRAMENTO BEE, Apr. 4, 2010, at E5.

76. J. Anthony Kline, *Judicial Election Presents Political Dangers*, S.F. DAILY JOURNAL, July 12, 2010 (on file with the *McGeorge Law Review*.)

Anthony Kline, predicts that the unseating of the San Francisco County Superior Court judge on the basis that he was a registered “Republican” and appointed by Governor Schwarzenegger will undermine the independence of the judiciary.⁷⁷ Justice Kline’s main point is that challenges to sitting judges should be brought against those judges who are not properly performing their function, and not for political efficiency reasons.⁷⁸

F. Recommendation No. 10

This recommendation proposes to amend the Code of Judicial Ethics “to require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct.”⁷⁹

Other states (e.g., NY and Ohio) have mandatory training and article VI, section 18(m) of the California Constitution seems to permit it.⁸⁰ In an effort to limit the burden of the requirement, the necessary training would apply only to candidates who appear on the ballot—not to those unopposed superior court judges—and would be available in an on-line form for judges in rural counties.⁸¹ The members of the task force that proposed this training assumed that the Administrative Office of the Courts (AOC), the Center for Judicial Education and Research (CJER), and the State Bar would develop a training program to satisfy the requirement.⁸² With resources of the AOC, CJER, and State Bar significantly strained in these economic times, funding for creation of a new mandatory judicial campaign ethics training program is likely dubious.

G. Recommendation No. 11

Assuming adoption of Recommendation No. 10, the Commission also included a recommendation to address the content that such a judicial candidate training would include.⁸³ The Commission’s recommendation included the following list of training areas: (1) “[i]dentifying issues raised by judicial candidate questionnaires”; (2) “[d]istributing a model letter and a model questionnaire that candidates can use in lieu of responding to an interest group questionnaire”; (3) “[u]sing the advisory memorandum on responding to questionnaires prepared by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight” (this advisory memorandum was attached as Appendix H to the Commission report); (4) “[e]ncouraging candidates to give reasoned

77. *Id.*

78. *Id.*

79. FINAL REPORT, *supra* note 1, at 20.

80. CAL. CONST. art. VI, § 18(m).

81. FINAL REPORT, *supra* note 1, at 20.

82. *Id.*

83. *Id.* at 21.

explanations for not responding to improper questionnaires rather than simply citing advisory opinions"; (5) "[u]sing candidate [w]eb sites"; and (6) "[e]xplaining why partisan activity by candidates is disfavored".⁸⁴

At the task force level, much of the discussion about this list of training areas centered on the issue of judicial questionnaires.⁸⁵ The task force agreed that a model letter and perhaps a model questionnaire could be distributed—either from an organization or through the mandatory training program—for use by candidates at their discretion.⁸⁶ The model letter would serve the purpose of explaining why a judicial candidate should not express his or her personal views on controversial or high-profile issues that might come before him or her.⁸⁷ The idea of a model questionnaire is to show the kinds of questions that should be appropriate and relevant to a judicial campaign.

H. Recommendation Nos. 7-9.

This series of recommendations calls for the establishment of an unofficial statewide fair judicial elections committee "to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in statewide and regional elections and in local elections where there is no local committee."⁸⁸ The idea of the unofficial statewide committee would be to educate candidates, the public, and the media about fair judicial elections. These committees could also "combat speech with more speech" in the event that there was an example of improper campaign conduct.⁸⁹

The recommendations further encourage "formation of unofficial local fair judicial elections committees to educate candidates, the public, and the media about judicial elections; to mediate conflicts; and to issue public statements regarding campaign conduct in local elections."⁹⁰ Additionally, the Commission suggested that "a model campaign conduct code for use by the state and local oversight committees should be developed."⁹¹

These three related recommendations were made in an effort to aggressively address the issue of third parties and special interest groups in judicial campaigns.⁹² There was considerable discussion by the task force about whether

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 17.

89. FINAL REPORT, *supra* note 1, at 18.

90. *Id.*

91. *Id.*

92. *Id.*

an official statewide committee or a series of unofficial, locally-established fair judicial elections committees should be encouraged.⁹³

An obvious benefit of having an official statewide committee would be the ability to have a uniform statewide standard of conduct.⁹⁴ In other words, the California legislature “could establish a judicial oversight committee”—or even expand an arm of an existing oversight commission.⁹⁵ This may, however, lead to a conflict with article VI, section 18(m) of the California Constitution which gives the authority to regulate the conduct of judges to the Supreme Court, not the legislature.⁹⁶

Although it was ultimately recommended that an unofficial statewide committee be created, it was also suggested that this committee not supplant already-existing local committees in various counties (like Santa Clara and Los Angeles) across California.⁹⁷ Additionally, it noted that the statewide committee could provide valuable resources for the state, such as model standards and codes of campaign conduct.⁹⁸

I. Recommendation No. 24.

Canon 5 of the Code of Judicial Ethics or its commentary should be amended to place an affirmative duty on judicial candidates to control the actions of their campaigns and the content of campaign statements, to encourage candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf by third parties, and to take appropriate corrective action if they learn of such misrepresentations.⁹⁹

A compromise regarding this recommendation resulted in the language to “encourage” rather than mandate with respect to oral or informal written misrepresentations made on a candidate’s behalf by third parties.¹⁰⁰ Giving the candidate his or herself the affirmative duty to control those materials coming directly from the campaign committee is appropriate and consistent with the practice in other political campaigns. Placing a burden, even a small one, on a candidate to take corrective action against someone making a non-coordinated statement might seem onerous.

93. *Id.*

94. *Id.* at 18.

95. *Id.*

96. *Id.*; CAL. CONST. art. VI, § 18(m).

97. FINAL REPORT, *supra* note 1, at 19.

98. *Id.*

99. *Id.* at 29.

100. *Id.*

V. NEXT STEPS FOR COMMISSION RECOMMENDATIONS

The Judicial Council reviewed and approved several of the recommendations discussed above at its February 26, 2010 meeting.¹⁰¹ On April 23, 2010, a number of other recommendations, including Recommendation No. 24, were presented to the Judicial Council.¹⁰² On June 25, 2010, twelve recommendations were presented to the Judicial Council, including Nos. 7, 8, 9, 10, and 22 discussed above.¹⁰³ At the last two meetings, recommendations 24 and 7-9 were approved and forwarded to the Supreme Court for implementation.¹⁰⁴ Recommendations 10 and 22 were not approved by the Judicial Council.¹⁰⁵ As noted above, these two recommendations, No. 10 relating to mandatory training and No. 22 prohibiting the use of political party endorsements, were controversial amongst the Commission members.¹⁰⁶ Having failed to gain Judicial Council approval, the recommendations will be presented to the Supreme Court nonetheless, but the likelihood of adoption is much less.

The implementation committee of the Commission has planned continued presentation of recommendations at meetings held regularly until December 2010.

Whatever the ultimate resolution of these recommendations by the Commission, judges will soon have a Supreme Court Committee on Judicial Ethics Opinions to ask for advice on their interpretation. One of this article's authors, Justice Ronald B. Robie, has been appointed by the Supreme Court as the Committee's first Chair.¹⁰⁷

101. The Commission approved recommendations 29, 30, and 33. *See supra* Part IV.

102. California Judicial Council Agenda, <http://www.courtinfo.ca.gov/jc/documents/agn20100423.pdf> (last visited June 2, 2010) (on file with the *McGeorge Law Review*).

103. California Judicial Council Meeting Minutes, <http://www.courtinfo.ca.gov/jc/meetings.htm> (last visited Sept. 14, 2010) (on file with the *McGeorge Law Review*).

104. *Id.*

105. *Id.*

106. *See supra* Part IV.E-F.

107. Justice Fybel and Professor Moylan extend congratulations to Justice Robie on this important role.