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Commission for Impartial Courts: Final Report

RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA

AUGUST 2009

JUDICIAL COUNCIL OF CALIFORNIA

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Judicial Council of California
Commission for Impartial Courts
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688
www.courtinfo.ca.gov

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Executive Summary

The Commission for Impartial Courts (CIC) was formed by Ronald M. George, Chief Justice of California and Chair of the Judicial Council, in September 2007. The CIC's overall charge was to study and recommend ways to ensure judicial impartiality and accountability for the benefit of all Californians. The CIC's membership included not only appellate justices and trial court judges, but also court executive officers; prominent former members of the Legislature; and leaders of the bar, media, law schools, business community, educational institutions, and civic groups.

Problem Statement

California's courts have long been recognized as among the finest in the country. Under the leadership of Chief Justice George, the California judiciary has implemented a number of far-reaching improvements over the past several years, and during that time there have been few threats to the impartiality of California's judiciary. This is not the case elsewhere, however. As has been widely reported in the press, many states have seen a rise in attacks on courts and judges by partisan and special interests seeking to influence judicial decisionmaking. Likewise, in many states, judicial elections have increasingly begun to take on the qualities of elections for other political office in that they are becoming more expensive, negative, and politicized.

At a two-day summit convened by the Judicial Council in November 2006, California's judicial leaders concluded that unless the Judicial Council took decisive action, the trends seen in other states would inevitably spread to California. Summit participants identified four basic approaches to preserving the impartiality of and the public's confidence in California's judiciary: (1) changes to improve judicial candidate campaign conduct; (2) changes to improve the financing of judicial campaigns; (3) activities to improve voter information about judicial candidates and public understanding of the role of the courts and nature of judicial decisionmaking; and (4) modification of the current method of judicial selection and retention. Chief Justice George thereafter established the 88-member CIC—which was divided into a steering committee and four separate task forces—to study and report on each of the approaches the summit identified.

The CIC's overall goal was to identify the specific problems that are either currently facing California or that could arise here in connection with the four substantive areas listed above, and then to make recommendations to the Judicial Council to allow it effectively to exercise leadership in addressing California's need for a nonpartisan and impartial judiciary. The work of the CIC focused on furtherance of the public good and finding solutions that serve the long-term and common interests of all Californians.

Structure of the CIC

The CIC was composed of a steering committee and four separate task forces:[1] Judicial Candidate Campaign Conduct, Judicial Campaign Finance, Public Information and Education, and Judicial Selection and Retention. The membership of the steering committee and the task forces is detailed in Appendixes A–E.

Steering committee

The steering committee was chaired by Associate Justice Ming W. Chin of the California Supreme Court and was charged with overseeing and coordinating the work of the CIC's four task forces, receiving periodic task force reports and recommendations, and presenting its recommendations in a report to the Judicial Council.[2]

Task forces and working groups

Each task force was given a charge pertaining to one of the CIC's primary focus areas. The task forces in turn divided into a number of working groups to address specific subject matter areas.

Task Force on Judicial Candidate Campaign Conduct

This task force, chaired by Associate Justice Douglas P. Miller, of the Court of Appeal, Fourth Appellate District, was charged with making recommendations to the steering committee regarding proposals to promote ethical and professional conduct by candidates for judicial office, including through statutory change, promulgation or modification of canons of judicial ethics, improving mechanisms for the enforcement of the canons, and promotion of mechanisms that encourage voluntary compliance with ethics provisions.[3] The task force broke into two working groups: (1) one charged with considering whether the task force should recommend that the Supreme Court amend the California Code of Judicial Ethics[4] or that the judicial branch should seek changes to the disqualification provisions in the Code of Civil Procedure in response to *Republican Party of Minnesota v. White*[5] and its progeny; and (2) one charged with addressing what types of campaign conduct are permissible and desirable.

Task Force on Judicial Campaign Finance

This task force, chaired by Judge William A. MacLaughlin, of the Superior Court of Los Angeles County, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to better regulate contributions to, financing of, or spending by candidates on campaigns for judicial office or to improve or better regulate judicial campaign advertising, including through

[1] Task force chairs also served as members of the steering committee.
[2] The charges to the steering committee and the four task forces are attached as Appendix F to this report.
[3] See Appendix F.
[4] The Code of Judicial Ethics is alternatively referred to as "the code" throughout this report.
[5] *White* (2002) 536 U.S. 765.

enhanced disclosure requirements.[6] The task force broke into two working groups: (1) one responsible for proposals to better regulate contributions to, financing of, or spending by candidates on campaigns for judicial office; and (2) one responsible for proposals to improve or better regulate judicial campaign advertising and financial reporting, including through enhanced disclosure requirements. The issue of public financing was not specific to either working group and was considered by the task force as a whole.

Task Force on Public Information and Education

This task force, chaired by Administrative Presiding Justice Judith D. McConnell, of the Court of Appeal, Fourth Appellate District, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to improve public information and education concerning the judiciary—both during judicial election campaigns and otherwise. Such proposals could include methods to improve voter access to accurate and unbiased information about the qualifications of judicial candidates and to improve public understanding of the role and decisionmaking processes of the judiciary.[7] The task force broke into four working groups, which focused on the following areas: (1) public outreach and response to criticism; (2) education; (3) voter education; and (4) accountability.

Task Force on Judicial Selection and Retention

This task force, chaired by Associate Justice Ronald B. Robie, of the Court of Appeal, Third Appellate District, was charged with evaluating and making periodic reports and final recommendations to the steering committee regarding (1) any proposals to improve the methods and procedures of selecting and retaining judges, and (2) the terms of judicial office and timing of judicial elections.[8] The task force broke into two working groups, one on judicial selection and one on judicial retention.

Consultants

Each task force was assigned a consultant with expertise within the area of the task force's charge.

Charles Geyh, a national expert on judicial independence, accountability, administration, and ethics, served as consultant to the Task Force on Judicial Candidate Campaign Conduct. Mr. Geyh has been a law professor at Indiana University since 1998. He is the author of *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press, 2006) and co-author of *Judicial Conduct and Ethics* (4th ed., Lexis Law Publishing, 2007) with James Alfini, Steven Lubet, and Jeffrey Shaman. In addition, Mr. Geyh was co-reporter to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.

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[6] See Appendix F.
[7] *Ibid.*
[8] *Ibid.*

Deborah Goldberg served as consultant to the Task Force on Judicial Campaign Finance. Ms. Goldberg was formerly the director of the Democracy Program at the Brennan Center for Justice, a nonpartisan public policy and law institute that is a part of the New York University School of Law, and currently serves as a managing attorney with Earthjustice, a nonprofit public interest law firm dedicated to environmental issues. Ms. Goldberg is the principal author and editor of *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws,* and a co-author of three editions of *The New Politics of Judicial Elections* (covering election cycles 2000, 2002, and 2004). She is a graduate of Harvard Law School and served as law clerk to Justice Stephen G. Breyer, then on the U.S. Court of Appeals for the First Circuit, and to Judge Constance Baker Motley, U.S. District Court for the Southern District of New York.

Bert Brandenburg served as consultant to the Task Force on Public Information and Education. Mr. Brandenburg is the executive director of the Justice at Stake Campaign, a national partnership working to keep courts fair, impartial, and independent. He serves on the board of directors of the National Institute on Money in State Politics and on the National Ad Hoc Advisory Committee on Judicial Campaign Conduct.

Seth S. Andersen served as consultant to the Task Force on Judicial Selection and Retention. Mr. Andersen is the executive vice-president of the American Judicature Society (AJS). Founded in 1913, AJS is a national, nonpartisan organization of judges, lawyers, and members of the public who work to maintain the independence and integrity of the courts and to increase public understanding of the judiciary. Among its primary areas of focus are judicial independence and judicial selection. Mr. Andersen was assisted by Malia Reddick, Ph.D., director of research and programs at AJS.

Public Forum

The CIC held a public forum in Sacramento on July 14, 2008. It was attended by more than 150 members of the public and the media and had the goal of exploring the political pressures that threaten the fairness and impartiality of the judicial branch. The CIC sought commentary and recommendations from the following prominent government, justice system, academic, and civic leaders:

Hon. Gray Davis, former Governor of California
Hon. Pete Wilson, former Governor of California
Hon. Don Perata, former President pro Tempore of the California Senate
Hon. Thomas J. Moyer, Chief Justice of Ohio
Hon. Ira R. Kaufman, President, California Judges Association
Mr. Jeffrey L. Bleich, President, State Bar of California
Professor Kathleen M. Sullivan, Stanford Law School
Professor Laurie L. Levenson, Loyola Law School, Los Angeles

Mr. Manny Medrano, Reporter/Anchor, KTLA News, Los Angeles
Ms. Mary G. Wilson, President, League of Women Voters of the United States

Chief Justice Moyer, chair of the Conference of Chief Justices' Task Force on Politics and Judicial Selection, spoke on the record about spending on judicial races and the increase in negative campaigning over the last decade in Ohio and in other states across the country.

Former California governors Pete Wilson and Gray Davis both stressed the need for judicial independence and public trust in our judiciary. Governor Wilson was particularly concerned with the abuse of political questionnaires. Governor Davis suggested that more information about all candidates for trial court judicial elections should be available to voters.

Legal scholars Laurie Levenson and Kathleen Sullivan both spoke about the principles of judicial independence and impartiality and about the rule of law by which judges decide cases with regard to law but without regard to personal belief, voter views, and financial support and without fear of reprisals for making unpopular decisions.

The steering committee and task forces reviewed and considered the recommendations made by the above speakers. Where appropriate, those recommendations have informed the recommendations of the task forces.

Findings

The findings underlying this report are presented below, grouped by general subject matter.

Findings related to judicial candidate campaign conduct

In arriving at its recommendations concerning judicial candidate campaign conduct, the steering committee was guided by the following findings:

- Although *White* has raised concerns about the validity of any provision regulating judicial campaign speech and courts in other jurisdictions have taken various views on *White's* scope, that decision should be interpreted so as not to prohibit restrictions on judicial campaign speech other than the "announce clause."
- One of the greatest threats to judicial independence comes from third-party interest groups making significant campaign contributions and engaging in other campaign-related activity, and many states have responded by creating judicial campaign oversight committees to monitor conduct by these third-party groups and to address misconduct by candidates.
- Judicial candidates should be educated about the differences between judicial elections and elections to political office and about ethical campaign conduct.

- Although judges are prohibited by canon 3B(9) from publicly commenting on pending cases, this prohibition does not apply to attorney candidates.
- Judicial questionnaires propounded by special interest groups are often designed to elicit "commitments" from candidates on controversial issues; candidates who respond to these questionnaires risk violating canon 5B(1), which prohibits making statements to the electorate "that commit . . . the candidate with respect to cases, controversies, or issues that could come before the courts," and may be required to recuse themselves from cases in the future that involve those issues.
- The use of slate mailers and endorsements in judicial elections raises several issues related to judicial ethics, including the appearance that a judge is endorsing other candidates or measures listed on the slate mailer in violation of canon 5.
- Misrepresentations by judges or attorney candidates in speeches, advertisements, or mailers can affect public trust and confidence in the judiciary.

Findings related to judicial campaign finance

There have been increasing concerns throughout the country about the impact of money—whether in the form of campaign contributions or independent expenditures—in the elections of public officials. And there has been particular concern both within and from outside the judiciary about the impact of money in judicial elections, given the unique role of the judiciary in our structure of government. The public expects and is entitled to impartiality in judicial decisions and, as a result, the more influence that moneyed interests have or appear to have on judicial candidates, the more harm is done to the public's trust and confidence that judicial decisions are based on the rule of law as opposed to other considerations.

In response to these concerns, the steering committee has considered and recommended changes that could reasonably be made to reduce the potential influence of money on judicial decisionmaking and improve the public's confidence in the impartiality of that process. Those recommendations were guided by the following findings:

- There has been a significant increase in the amount of campaign contributions and independent expenditures in judicial elections in other states during the past decade, nearly all of which have occurred in contested supreme court elections.[9]
- Polling data reflect that the public and a significant number of judicial officers perceive that campaign contributions in judicial elections have an effect on

[9] See James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign, 2007), available at *www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006*. See also Bert Brandenburg and Roy A. Schotland, *Sandra Day O'Connor Project on the State of the Judiciary: Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, (2008) 21 Geo. J. Legal Ethics 1229; Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races*, (The Institute on Money in State Politics, Aug. 2005), available at *www.followthemoney.org/press/Reports/200508251.pdf*.

judicial decisionmaking.[10]

- Recently, high levels of judicial campaign spending and independent expenditures have occurred in states with contested supreme court elections, but not in states with retention elections.[11]
- The most effective method of promoting the public's trust and confidence in the impartiality of the judiciary is to adopt requirements for effective disclosure of contributions and mandatory disqualification at both the trial and appellate levels.
- California's current statutory and regulatory requirements regarding (1) what information must be disclosed pertaining to contributions and expenditures and (2) the timing of such disclosures are among the most comprehensive in the nation and do not need substantive change at this time.
- Although disclosures pertaining to judicial candidates' contributions and to expenditures and independent expenditures are public information, access to such information should be improved.
- California's current definition of independent expenditures should be expanded to the maximum extent permitted under the Constitution.
- The use of treasury funds by corporations and unions for direct political contributions or independent expenditures in judicial elections should be prohibited, as it undermines the public's trust and confidence in the impartiality of the judiciary.
- There is currently no demonstrated need for public financing of judicial elections in California.

Findings related to public information and education

In reaching its recommendations about public information and education, the steering committee was guided by the following findings:

- In California, neither the public, legislators, students, nor voters are sufficiently educated about the role of the courts and the importance of judicial impartiality.
- There is an urgent, immediate, and long-term need to inform and educate the public—particularly students, voters, and the media—about the importance of fair, impartial, and accountable courts.
- Lack of information and misinformation about the role of the courts in a democracy makes the judiciary and judicial institutions more vulnerable to unwarranted attacks.
- Civics instruction in the schools has been dramatically limited over the past decades, and while positive efforts have been made in court-community outreach and educational programs, more is needed.

[10] Memorandum from Stan Greenberg (chairman and CEO, Greenberg Quinlan Rosner Research) and Linda DiVall (president, American Viewpoint) to Executive Director Geri Palast, Justice at Stake Campaign, Feb. 14, 2002, available at *www.gavelgrab.org/wp-content/resources /polls/PollingsummaryFINAL.pdf*.

[11] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, *supra*, at pp. 59–60.

- No consistent response mechanism is in place to help deal with unwarranted attacks on the judicial process.

Findings related to judicial selection and retention

In recent years, many states have seen a dramatic increase in threats to both the impartiality of and the public's confidence and trust in state judiciaries. A number of these threats pertain in some way to issues involving the selection and retention of judges, especially the increased politicization and partisanship in judicial selection and the perceived lack of appropriate accountability by some judges to the public they serve.

While California has been fortunate so far in the overall nonpartisan, nonpolitical nature of judicial elections, there seems to be general agreement that the state is not immune to these issues, which could arise at any time. An improved selection process that highlights the importance of merit and seeks to improve the diverse nature of the bench will certainly increase public trust and confidence in the judiciary, as will increasing appropriate accountability of the bench. Finally, removing aspects of the system that might encourage partisanship will reduce the likelihood of a highly politicized judiciary.

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 trial court judge or an appellate court justice.[12] The California system functions largely in the same manner as the merit selection systems in some other states. The primary difference between California's system and the traditional merit selection system is that in the traditional system, the commission screens all applicants for the position and forwards the names of the best qualified to the Governor.

Subject to the above, the steering committee's recommendations concerning judicial selection and retention are founded on the following findings:

- Because California's system works well and is partially responsible for the high quality of judicial appointments in California, it is not necessary to adopt formally an alternative form of merit selection in which nominating commissions perform prior screening of all applicants. Rather, the basic operation and logistics of the JNE system are working well and should not be modified. JNE should be retained in lieu of adopting another form of merit selection such as the so-called Missouri Plan.
- Voters in contested and open elections are often not well informed about judicial candidates. Public opinion surveys and social science research support this finding. According to a 2001 national survey, only 22 percent of Americans

[12] Gov. Code, § 12011.5.

know "a great deal" about what their state courts and judges do.[13] Another indicator of the low level of knowledge that voters have about judicial candidates is ballot roll-off, or the percentage of the electorate that casts votes for the major offices on the ballot but does not vote in judicial races. Between 1980 and 2000, the average roll-off in state supreme court elections was 25.6 percent, with the highest levels of roll-off for nonpartisan and retention elections.[14]

- Based on detailed consideration of state-sponsored judicial evaluation programs in other states, formal, public judicial evaluation programs are uniquely suited to trial courts that hold retention elections; any other form of judicial evaluation should be voluntary and for the judge's own self-improvement.[15]
- California's present system of elections for superior court judges and appellate court justices is working appropriately, although certain specific changes could improve the system.

[13] Justice at Stake Campaign and Greenberg Quinlan Rosner Research, Inc., *National Survey of Voters* (Oct. 30–Nov. 7, 2001), available at *www.gavelgrab.org/wp-content/resources/polls /JASNationalSurveyResults.pdf*. This national figure coincides with results from two recent state polls. According to a 2008 survey by Decision Resources, Ltd., only 5 percent of Minnesotans know "a lot" about the state's court system; according to a 2007 survey by Public Opinion Strategies, only 12 percent of Missourians know "a great deal" about the state's courts and judges.

[14] See Melinda Gann Hall, "Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives" (2007) 69 *Journal of Politics* 1147.

[15] See Rebecca Love Kourlis and Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Accountability* (2007) 90 Judicature 200. As shown in the table on page 204, of those states with official JPE programs, only those states with retention elections make public the evaluation results for individual judges. Two states in which judges are appointed (Hawaii and New Hampshire) release summary reports for their courts.

Recommendations

The four task forces met individually over a period of 16 months. They each worked with consultants and formed working groups to study the primary focus areas of their charges. Preliminary recommendations were developed and presented to the steering committee at a joint business meeting in February 2009. The steering committee reviewed the recommendations and agreed to present the following 109 recommendations to the Judicial Council.

Judicial Candidate Campaign Conduct

Amendments to the Code of Judicial Ethics in the Wake of *Republican Party of Minnesota v. White*[16]

As discussed at length in Appendix G, California does not have an announce clause; rather, canon 5B contains the commit clause, which provides that a judicial candidate must not "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." The *White* case did not address either the commit clause or the pledges and promises clause.

The steering committee believes that the California Supreme Court reacted reasonably and conservatively to *White* when it amended the Code of Judicial Ethics in 2003. The court amended canon 5B only to delete the phrase "appear to commit" from the commit clause. Prior to that amendment, the canon prohibited candidates from making statements that "commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts." But while the steering committee does not believe that any other changes to the canons are mandated by *White*, it recommends that a number of suggestions be made to the Supreme Court.[17]

Recommendation 1

The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."

Discussion: The code does not contain a definition of "impartiality," although the term is used frequently in the canons and commentary. In contrast to California, the model code includes the following definition of "impartiality," which was added in response to *White*:

[16] A detailed analysis of the *White* decision was prepared by the Task Force on Judicial Candidate Campaign Conduct and is attached to this report as Appendix G.

[17] The steering committee is aware that any changes to the Code of Judicial Ethics must be adopted by the Supreme Court, which typically refers proposed amendments to its Advisory Committee on the Code of Judicial Ethics.

> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

The steering committee agrees that the model code's definition of "impartiality" should be incorporated into the Code of Judicial Ethics. Reasons for adopting the model code definition are (1) the definition tracks the language in the *White* decision by couching itself in terms of an absence of bias or prejudice toward parties and maintaining an open mind on issues, (2) it would be beneficial to have a uniform definition nationwide, and (3) there appears to be no good reason to diverge from the model code definition.

Recommendation 2
The commentary to canon 4B of the Code of Judicial Ethics should be amended to encourage judges to take an active role in educating the public on the importance of an impartial judiciary.

Recommendation 3
The commentary to canon 5B of the Code of Judicial Ethics should be amended to encourage judicial candidates to discuss matters such as their qualifications for office and the importance of an impartial judiciary.

Discussion of recommendations 2 and 3: California's Code of Judicial Ethics generally does not use hortatory language. The model code and some state codes, however, expressly encourage certain judicial conduct. For example, comment 2 to rule 2.1 of the model code provides: "Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system." Canon 4 of the Florida Code of Judicial Conduct states: "A judge is encouraged to engage in activities to improve the law, the legal system, and the administration of justice."

The steering committee considered whether hortatory provisions should be added to the Code of Judicial Ethics that would encourage judges to (1) take an active role in educating the community on the meaning of an impartial judiciary, and (2) discuss certain topics such as qualifications of candidates, impartiality, and the courts.

After initially considering amending the commentary to canon 2A,[18] the steering committee recommends that the commentary to canon 4B[19] of the Code of Judicial Ethics be amended by adding the following language:

> Public confidence in the judiciary depends, in part, on the public's understanding of the judicial role. A judge is encouraged to take an active role in educating the public on the meaning and importance of an impartial judiciary.

The steering committee also considered whether the commentary to canon 4B should be amended to expressly "encourage" judges "to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law." Ultimately this proposal was not pursued because it could be interpreted as encouraging judges to advocate for changes in the law.

The steering committee agreed that the commentary to canon 5B of the Code of Judicial Ethics, which addresses conduct during judicial campaigns, should be amended by adding the following language:

> When making statements to the electorate, judges and candidates are encouraged to discuss matters such as their own qualifications for office and the meaning and importance of an impartial judiciary.

It is recommended that the phrase "their own" in the proposed amendment be included to encourage candidates to discuss why they are qualified for office rather than why their opponents are not qualified.

Recommendation 4
Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

Discussion: The steering committee recommends that the Supreme Court Advisory Committee on the Code of Judicial Ethics reexamine canon 5 for consistency in its use of the terms "judge" and "candidate." For example, although canon 5A addresses conduct by "[j]udges and candidates for judicial office," the advisory committee commentary following the canon discusses only conduct by judges.

[18] Canon 2A states: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
[19] Canon 4B states: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code."

Recommendation 5
The Code of Judicial Ethics should be amended by adding a new canon 3E(2), providing that a judge is disqualified if he or she, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that a reasonable person would believe commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Discussion: In response to *White*, the ABA in 2003 added the following disqualification provision to the model code, now codified as rule 2.11(A)(5), under which a judge is disqualified if

> [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

The steering committee agreed that California should adopt a similar provision, but with two distinctions. First, members would include an objective standard in the provision. Second, although the model code provision includes the phrase "appears to commit," the steering committee determined that adding a reasonableness standard to cover implied commitments is a better approach and is consistent with the Code of Judicial Ethics and the Code of Civil Procedure. Many members also felt that the "appears to commit" phrase is vague and subject to constitutional attack. Finally, the steering committee noted that adding a disqualification provision for commitment statements would provide judges with an express and sound basis to explain to the electorate that if they announce their views on certain issues, they may later be disqualified from hearing cases involving those issues. The steering committee thus recommends adoption of the following language:

> <u>A judge is disqualified if the judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that a reasonable person would believe commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.</u>

The steering committee recommends that the new rule be added to the Code of Judicial Ethics (as new canon 3E(2)) instead of amending Code of Civil Procedure section 170.1. Placement in canon 3E(2) would make the provision applicable to appellate justices and trial court judges, unlike placement in section 170.1, which applies only to trial judges. Adding this new language to the canons would also unify in the Code of Judicial Ethics both the rule prohibiting commitments (canon 5B) and the rule setting forth the consequence of making a commitment.

Recommendation 6
A definition of "commitment" that includes "pledges" and "promises" should be added to the Code of Judicial Ethics.

Discussion: In *White*, the U.S. Supreme Court specifically declined to address the constitutionality of the pledges and promises clause. Although California does not have this clause, it existed in the model code until the 2003 revisions and is still contained in many state codes. Rule 4.1(A)(13) of the Model Code of Judicial Conduct currently prohibits judges and judicial candidates from making, in connection with cases, controversies, or issues that are likely to come before the court, "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

When it considered revisions to the Code of Judicial Ethics after *White*, the Supreme Court Advisory Committee on the Code of Judicial Ethics decided against recommending to the court that it add the pledges and promises clause to the code because doing so might fuel speculation about its meaning. The steering committee considered, however, whether pledges and promises language should be added somewhere in the Code of Judicial Ethics in order to be consistent with the model code and to prevent a distinction from being drawn between statements prohibited by the California code and those prohibited by the model code. It was noted that adding this language may not be necessary because "pledges" and "promises" may already fall within the prohibition on commitments in canon 5B.

The steering committee recommends that a definition of "commitment" be added to the Code of Judicial Ethics stating that the term includes "pledges" and "promises." This clarification should also be explained in the commentary to canon 5B and in the commentary to the proposed new disqualification provision in canon 3E(2).

Voluntary Codes of Conduct and Judicial Campaign Conduct Committees

There is a growing movement nationwide to establish judicial campaign conduct committees that encourage and support appropriate conduct by judicial candidates. Such committees educate candidates about appropriate campaign conduct and criticize inappropriate campaign conduct. Unlike the Commission on Judicial Performance (CJP), they are designed to address allegations of misconduct on an expedited basis, and while they do not have disciplinary authority per se, they may publicly address inappropriate conduct and may report such conduct to the relevant disciplinary authorities.

Recommendation 7
An unofficial statewide fair judicial elections committee should be established 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.

Recommendation 8
The formation of unofficial local committees should be encouraged, and resources should be provided to aid in their development.

Recommendation 9
A model campaign conduct code for use by the state and local oversight committees should be developed.

Recommendation 10
Consideration should be given to merging the recommended unofficial statewide campaign conduct committee with the rapid response team recommended below in recommendations 53 and 54.

Discussion of recommendations 7-10: In considering the advisability of developing judicial campaign conduct committees in California, the steering committee agreed that one of the greatest threats to judicial independence comes from significant third-party and special interest group involvement in judicial elections. The steering committee believes that California should be in the vanguard in aggressively addressing the conduct of third parties and special interest groups during judicial elections, in addition to ensuring that candidates conduct themselves and their campaigns in a manner that ensures judicial integrity, confidence in the judicial process, and judicial independence.

The steering committee considered two different approaches to this issue. One approach would be to establish an official statewide committee with authority to prescribe ethical rules for all judicial elections and to take action against candidates who violate those rules. Under this approach, there would be a uniform statewide standard of conduct separate from the Code of Judicial Ethics and a single government oversight entity that would address the conduct of all participants, including candidates and third parties, in judicial elections. Such a uniform statewide approach would cover both contested superior court elections and appellate court retention elections. For example, the Legislature could establish a statewide oversight committee with authority to monitor not only candidates' campaign conduct but also the conduct of partisan and special interest groups in judicial elections. An official committee might be effective because it could be granted authority to take immediate action against a candidate engaged in unethical conduct.

One concern with an official committee, however, is that as a government body its actions could provide the basis for First Amendment challenges; any disciplinary action or enforcement by an official committee may be tantamount to state action that limits

political speech. Additionally, an official committee may be perceived as a protection mechanism for incumbents. Because of these concerns, most oversight committees are unofficial.

The other approach considered by the steering committee would be to create unofficial statewide and local oversight committees. Such committees could seek to preserve fair judicial elections by educating candidates, the public, and the media about the differences between judicial and political elections, by mediating conflicts, and, as a last resort, by issuing public statements regarding improper campaign conduct, i.e., a "speech vs. speech" approach. These committees could formulate voluntary codes of conduct for all judicial candidates and ask candidates to sign pledges to comply with the code. Before taking a public position on specific conduct, these committees could discuss questionable conduct with the participants, and if matters cannot be resolved, provide a hearing process.

Ultimately, the steering committee agreed that the factors favoring unofficial statewide and local committees outweigh those in favor of an official statewide committee. However, because an official committee could potentially be the most effective approach, it should be reconsidered periodically as the constitutional constraints on the regulation of judicial campaign conduct evolve.

Therefore, the steering committee recommends the creation of an independent, unofficial statewide campaign conduct committee to be named something such as the "Fair Judicial Elections Committee." This committee would address campaign conduct in appellate retention elections and in superior court elections in counties that do not have a local campaign conduct committee (discussed below). It could create a model voluntary code of campaign conduct and ask all judicial candidates under its jurisdiction to sign a pledge to adhere to the code. The committee would lay the foundation for fair judicial elections by publicly explaining how they fundamentally differ from political elections and how a campaign conduct code helps to ensure the impartiality and integrity of our courts; a network of media relationships could be created to convey this message to the public. The committee's educational sessions would be open to candidates, campaign managers, the media, and the public. All complaints lodged with the committee would be confidential to prevent candidates from using the complaint process as a campaign tool. And the committee must be capable of employing an expedited procedure that allows it to address conduct in the days immediately preceding an election.

An unofficial statewide committee as recommended should not, however, supplant local campaign conduct committees with local codes of conduct. Because most judicial election controversies in California occur in superior court races, the formation of local committees may be more appropriate as a means of addressing complaints and educating candidates, the public, and the local media. The statewide committee could encourage the

formation of local committees and provide resources such as model standards, model codes, and other tools to aid in their development. Where there is no local committee, however, the statewide committee would be available for oversight.

Composition of the unofficial committees, both statewide and local, must be balanced because their effectiveness will rest largely on their credibility with the public, the judicial candidates, and special interest groups. Such committees should be nonpartisan (or bipartisan) and should include well-respected members of the community such as lawyers, media experts, former judges, ethics experts, community and religious leaders, academics, and representatives of nonpartisan organizations such as the League of Women Voters.

The committees will work best if they are independent, self-governing, and self-perpetuating. Ideally, they would be funded by sources not identified with any group having an interest in judicial election outcomes, e.g., judges, lawyers, or political groups. However, other than grants from such organizations as the National Center for State Courts (NCSC), the League of Women Voters, or the State Justice Institute, it may be difficult to identify funding sources outside the legal community that have an interest in preserving fair judicial elections. The steering committee also considered obtaining money from judicial election campaign surplus funds, state and local bar associations, bar foundations, or a nonprofit organization created by the Judicial Council, but does not make any specific recommendations regarding funding.

Finally, the steering committee recommends that consideration be given to merging the unofficial statewide committee with the rapid response team that is proposed in connection with recommendations 53 and 54 below.

Discussion of nonbinding standards and campaign guidelines for judicial candidates
In October 2006, the Oregon judiciary adopted a resolution entitled “Resolution Regarding Professionalism and Fairness in Judicial Election Campaigns.” The resolution sets forth nonbinding standards and campaign guidelines for judicial candidates. The Constitution Project issued a similar document entitled “The Higher Ground: Standards of Conduct for Judicial Candidates.” It explains that judges are not politicians and sets forth principles for judicial candidates to follow in judicial elections.

The steering committee rejects the idea of the California judiciary, either alone or jointly with the State Bar, adopting and issuing a similar resolution because it would be ineffectual and subject to accusations of protectionism by the public and special interest groups. Rather, the type of information contained in these documents should come from the independent oversight committees and through other kinds of public education.

Judicial Candidate Training and Advisory Opinions

Recommendation 11
The Code of Judicial Ethics should be amended to require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct.

Discussion: The steering committee recommends that all candidates for judicial office, including incumbents, be required to complete training in ethical campaign conduct. Other states, including New York and Ohio, have mandatory judicial candidate ethics training. The AOC's Education Division and the State Bar could collaborate to develop a training program that would be made available online so that candidates in remote counties need not travel to attend a course. The training should include an interactive component so participants can ask questions. In addition, the training requirement should be incorporated into the Code of Judicial Ethics, as opposed to a rule of court, because attorney candidates are governed by the code but not by court rules.[20] Judges and attorneys who complete the training program should receive continuing legal education credit.

Recommendation 12
Judicial questionnaires should be included as a component of candidate training.

Discussion: Judicial candidate training should involve alerting candidates to the issues raised by questionnaires and highlighting the parameters of the *White* decision. The training should not, however, involve advising candidates on whether or how to respond to questionnaires.

Recommendation 13
Candidate Web sites should be included as a component of candidate training.

Discussion: The creation and content of Web sites by judicial candidates should also be included as a component of mandatory candidate training.

Recommendation 14
Both the California Judges Association's Judicial Ethics Hotline and the new Supreme Court Committee on Judicial Ethics Opinions should be publicized as resources that sitting judges and attorney candidates can use to obtain advice on ethical campaign conduct.

[20] Article VI, section 18(m), of the California Constitution provides that the Supreme Court "shall make rules for the conduct of judges . . . and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics."

Discussion: The CJA's Judicial Ethics Committee operates a hotline that offers ethics advice to judicial officers and candidates for judicial office. It is rare, however, for an attorney candidate to contact the hotline for ethics advice. Given that CJA already provides ethics advice to all judicial candidates, the steering committee agreed that efforts should be made to publicize the existence of CJA's service rather than create a new hotline. Further, once the new Supreme Court Committee on Judicial Ethics Opinions has been formed, efforts should also be made to publicize the existence of this body, which will provide ethics opinions to both sitting judges and attorney candidates.

Recommendation 15
Collaboration among the Administrative Office of the Courts, the State Bar, the California Judges Association, and the National Center for State Courts should be recommended to develop brochures to educate judicial candidates.

Discussion: The steering committee agrees that brochures should be developed and distributed to candidates to educate them on how judicial elections differ from other elections and on appropriate campaign conduct. The brochures also should be provided to county registrars for distribution to candidates. In addition, the brochures should be provided to campaign consultants and campaign managers. The AOC, State Bar, CJA, and NCSC should be asked to develop the brochures.

Public Comment on Pending Cases

Recommendation 16
The sentence "This canon does not prohibit a judge from responding to allegations concerning the judge's conduct in a proceeding that is not pending or impending in any court" should be added to the commentary following canon 3B(9) of the Code of Judicial Ethics, but the prohibition against public comment on pending cases should not be extended to attorney candidates for judicial office.

Discussion: Canon 3B(9) prohibits a judge from making any public comment about a pending or impending proceeding in any court, or any nonpublic comment that might substantially interfere with a fair trial or hearing. There is no similar prohibition applicable to attorney candidates in the Code of Judicial Ethics or the Rules of Professional Conduct.[21]

The steering committee considered whether the prohibition against public comment on pending cases should be extended to attorney candidates in order to avoid public debate on pending matters that could interfere with fair hearing procedures or subject a judge to

[21] Rule 1-700 of the Rules of Professional Conduct requires an attorney candidate for judicial office to comply with canon 5 of the Code of Judicial Ethics.

calculated, groundless attacks to which he or she could not respond. Ultimately, the steering committee opted against such an extension to attorney candidates because it could be subject to a successful attack on First Amendment grounds. Nevertheless, the steering committee agreed that it would be useful to judges to add the following sentence to the commentary following canon 3B(9): "This canon does not prohibit a judge from responding to allegations concerning the judge's conduct in a proceeding that is not pending or impending in any court."

Recommendation 17
The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

Discussion: The steering committee considered whether to recommend revising canon 3B(9) to allow a judge to respond to an attack on a ruling in a pending case. Canon 3B(9) states in part: "This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity." When a judge responds outside of the enumerated circumstances, it may give the appearance that the judge has resorted to inappropriate means to defend the judge's own rulings, which may negatively affect the perception of fairness. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079.) Because there is little direction on how to interpret this provision in canon 3B(9), most judges err on the side of caution and do not make any public statements.

The steering committee recommends that the advisory committee commentary to canon 3B(9) be amended to provide guidance to judges on acceptable conduct by adding the following explanatory language:

> <u>"Making statements in the course of their official duties" and "explaining for public information the procedures of the court" include quoting from or providing an official transcript or partial official transcript of a court proceeding open to the public and identifying and explaining the rules of court and procedures used in a decision rendered by a judge.</u>

There is a concern that adding the proposed language to the commentary could embolden judges to make statements to bolster their rulings or that go beyond the case. The proposed amendment, however, does not create any new exceptions to the prohibition in canon 3B(9); instead, it clarifies conduct that is already permissible under the rule. A public statement by a judge also remains subject to the other canons governing judicial conduct. To the extent possible, a court's public information officer should be involved in issuing any public statement in response to an attack on a judge's ruling.

Recommendation 18
Courts should work with local county bar associations to create independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

Discussion: The steering committee considered whether it would be a violation of canon 3B(9) for a judge to initiate a public response to an attack on the judge through a third party, and agreed that each court should work with the local county bar association to create a standing committee—independent from state or local government—that can respond to inappropriate or unfounded criticism of judges, judicial decisions, or the judicial system, including, but not limited to, criticism made during an election campaign. These committees should not have active judge members but should have some retired judge members to provide judicial perspective.[22]

The steering committee agreed that it would not violate the canon for a judge to file a confidential complaint with such a voluntary standing committee or otherwise to alert such a committee to the fact that someone is attacking a ruling in a pending matter. Voluntary standing committees that respond to attacks on judges by fighting speech with speech also comport with the First Amendment.

Recommendation 19
The California Judges Association's Response to Criticism Team and its network of contacts should be publicized.

Discussion: A judge who has been attacked could also contact the CJA's Response to Criticism Team, which maintains contacts with local bar groups, or a fair judicial elections committee if one exists. Thus, there should be increased publicity of CJA's Response to Criticism Team and its network of contacts.

Judicial Questionnaires

Judicial questionnaires propounded by special interest groups are often designed to elicit commitments from candidates on controversial issues that could come before the courts. Candidates who respond to these questionnaires, which are increasingly popular, may be seen as indicating to the electorate how they will rule on these issues if they are elected. Canon 5B(1) prohibits a judicial candidate from making statements to the electorate "that commit the candidate with respect to cases, controversies, or issues that could come before the courts."

[22] This recommendation may overlap with recommendations 53 and 54 below, which recommend creating a rapid response team to respond to criticism of the judiciary or its members.

Recommendation 20
A model letter and a model questionnaire that candidates can use in lieu of responding to an interest group questionnaire should be developed.

Discussion: The steering committee agreed that a model letter and a model questionnaire that could be used by judicial candidates in lieu of responding to interest group questionnaires would be useful. A model letter could clearly explain why a judicial candidate should not express personal views on hot button issues and the fundamental importance of the impartial and independent application of the law to each case that comes before the court. A model questionnaire would contain questions designed to elicit relevant information about a judicial candidate's background, qualifications, and suitability for the bench but would not ask for the candidate's views on controversial issues.

Consideration was given to asking organizations such as the NCSC, the American Judicature Society, the State Bar, or the CJA to distribute to judicial candidates the model letter and model questionnaire. No decision was reached as to which organizations to approach. There was agreement, however, that these materials could be disseminated by local or statewide fair judicial elections committees or through mandatory judicial candidate training programs. The NCSC could be involved in some manner so that similar materials could be made available in other jurisdictions. The steering committee also agreed that these recommendations should be forwarded to an appropriate group for implementation.

Recommendation 21
Commentary to the Code of Judicial Ethics should be amended to provide guidance to judicial candidates on handling questionnaires.

Discussion: The steering committee recommends that the commentary to the Code of Judicial Ethics be modified to provide guidance to judicial candidates on handling questionnaires by adding language similar to that in comment 15 to rule 4.1 of the model code, which states:

> Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13)[23] does not specifically address

[23] Rule 4.1(A)(13) of the Model Code of Judicial Conduct provides that except as permitted by law, or by other rules, a judge or judicial candidate shall not "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

> judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification.

The language should be placed in the commentary as opposed to the canons themselves because placement in the latter might lead to a First Amendment challenge.

Recommendation 22
The advisory memorandum on responding to questionnaires by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight should be used as part of a comprehensive approach to addressing judicial questionnaires.

Discussion: The National Ad Hoc Advisory Committee on Judicial Campaign Oversight, which was established by the NCSC, issued an advisory memorandum on July 24, 2008, containing advice on how to respond to questionnaires. (See Appendix H.) It contains the following recommendations:

- Do not be rushed in deciding how to handle the questionnaire.
- Never use the preprinted answers provided on the questionnaire.
- Consider responding with a letter.
- Never use a judicial canon to justify a decision not to respond.
- Distinguish general interest, nonadvocacy groups from special interest advocacy groups and be consistent.

The steering committee concluded that the memorandum is useful but limited because it does not provide candidates with a framework for crafting a response. The memorandum contains information that could be used as part of a comprehensive approach to dealing with this issue; for example, it could be included in mandatory candidate training materials or made available to fair judicial elections committees.

Recommendation 23
Candidates should be encouraged to give reasoned explanations for not responding to improper questionnaires rather than simply citing to advisory opinions.

Discussion: The steering committee discussed the likelihood that the new Supreme Court Committee on Judicial Ethics Opinions will issue advisory opinions to judicial candidates concerning questionnaire-related issues. In addition, as noted above, CJA's Judicial Ethics Committee operates a hotline that offers ethics advice to sitting judges and candidates for judicial office. The steering committee agreed that it would be preferable for a judicial candidate who decides not to respond to a judicial questionnaire or a particular question to give a reasoned explanation for why he or she believes it would be inappropriate to respond, rather than simply citing to an advisory opinion.

Possible constitutional or legislative amendment

The steering committee also considered a proposal made by former Governor Pete Wilson at the July 14, 2008, Public Forum to amend the California Constitution by adding a provision that expresses the public's desire that judicial candidates refrain from stating their positions on controversial issues. Similar proposals for a new statute or legislative resolution that would encourage judges not to comment on issues that could come before the courts were also considered. The steering committee determined not to pursue these proposals at this time because the other, less drastic options discussed should be adequate for handling questionnaire-related issues and would be easier to implement.

Slate Mailers, Endorsements, and Misrepresentations

Recommendation 24

The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.

Recommendation 25

An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose candidates.

Discussion of recommendations 24 and 25: A slate mailer is defined as a "mass mailing which supports or opposes a total of four or more candidates or ballot measures." (Gov. Code, § 82048.3.) The mailers generally contain endorsements or recommendations for various partisan and nonpartisan offices—including judicial offices—and ballot measures. A candidate can pay to be placed on a mailer, or an organization publishing the mailer can list a candidate without the candidate's permission. One ethical concern with these mailers is the perception that a candidate listed on the mailer is endorsing the other candidates or measures on the mailer. Canon 5 requires judges to refrain from inappropriate political activity and canon 5A(2) prohibits judges from publicly endorsing candidates for nonjudicial office. The judicial candidate has no control over the message or the presence in the mailer of other candidates, whose views may not be consistent with

notions of judicial impartiality or whose presence on the mailer may suggest an endorsement by the judge.

Government Code section 84305.5(a)(2) requires that a notice be placed on slate mailers stating: “Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer.” The same section also requires inclusion of the admonition that the sender of the mailer is “not an official political party organization.”

The steering committee recommends sponsoring a number of amendments to the statute. First, the statute should be amended to require that the slate mailer cite explicitly to canon 5 and remind the reader that judges are not permitted to endorse partisan political candidates or causes. Second, the statute should be amended to require that when a candidate is placed on the mailer without his or her consent, the lack of consent be prominently disclosed. Finally, the task force recommends that the Legislature revisit Government Code section 84305.5 to consider whether it should be expanded so that it applies to organizations that support or oppose *candidates.* Currently, the statute on its face appears to apply only to an “organization or committee primarily formed to support or oppose one or more *ballot measures*.” [Emphasis added.]

Recommendation 26
Judicial campaign instructional material setting forth best practices regarding the use of slate mailers should be developed.

Discussion: The steering committee concluded that it would be useful to develop judicial campaign instructional material to inform candidates that they may run afoul of certain canons if they allow their names to be placed on mailers espousing certain views. Candidates should be instructed that not only the title of the mailer, but the context, layout, and inclusion of other messages and individuals in the mailer may combine to make the mailer an inappropriate vehicle for a judicial race.

The steering committee considered a proposal that would require judicial candidates to inspect a slate mailer before agreeing to purchase a place on it. That proposal was rejected as unworkable because the mailers are assembled quickly, there are many prospective purchasers, and the contents can change without notice.

Recommendation 27
Judicial candidates should be advised to obtain written permission before using an endorsement and to clarify which election the endorsement is for, to honor any request by an endorser to withdraw an endorsement, and to request written confirmation of any oral request to withdraw an endorsement.

Discussion: The steering committee recommends that judicial candidates be advised to (1) obtain written permission before using an endorsement and to clarify whether the endorsement is for the primary or general election, or both; (2) honor any request by an endorser, oral or written, to withdraw an endorsement; and (3) request written confirmation of any oral request to withdraw an endorsement. These best practices could be included in pre-campaign instructional material and in voluntary pledges signed by the candidates.

Regarding the types of individuals or entities that a candidate should accept as endorsers, elected public officials and persons holding partisan political office, such as a local senator, are permissible. The candidate should be alerted, however, to the consequence that such an endorsement could lead to subsequent recusals in the courtroom.

Recommendation 28
Judicial candidates should be prohibited from seeking or using endorsements from political organizations.

Recommendation 29
The Code of Judicial Ethics should be amended to explain why partisan activity by candidates is disfavored.

Discussion of recommendations 28 and 29: The steering committee concluded that there should not be a statute, rule, or canon amendment that would prohibit judicial candidates from (1) publicly identifying themselves or their opponents as members of a political organization, or (2) running on a slate associated with a political organization. There are constitutional concerns with such prohibitions. In *Unger v. Superior Court* (1984) 37 Cal.3d 612, the Supreme Court held that a provision in the California Constitution (article II, section 6) providing that judicial elections shall be nonpartisan did not prohibit political parties from endorsing or opposing candidates for judicial office. Although the California Constitution was later amended to prohibit political parties from endorsing, supporting, or opposing candidates for nonpartisan office, two subsequent federal court cases held that this new provision violates the First Amendment. (*Geary v. Renne* (9th Cir. 1990) 911 F.2d 280 (en banc); *California Democratic Party v. Lungren* (N.D. Cal. 1994) 860 F.Supp. 718.)

Despite some expressed reservations about constitutionality, the steering committee does, however, recommend that judges be prohibited from *seeking or using* endorsements from political organizations. Rule 4.1(A)(7) of the model code contains such a prohibition, providing that “a judge or judicial candidate shall not seek, accept, or use endorsements from a political organization.”

Underlying this proposed prohibition is the concept that all judicial offices in California are nonpartisan. (Cal. Const., art. II, § 6(a).) Barring judicial candidates from seeking or using such endorsements would help maintain the nonpartisan nature of judicial elections. Although political parties are free to endorse or oppose judicial candidates (see *Unger v. Superior Court* (1984) 37 Cal.3d 612), there is no authority for the proposition that a judicial candidate must be permitted to seek and use those political party endorsements.

In contrast to the model code language, on the other hand, the steering committee does not recommend that judicial candidates be prohibited from *accepting* such endorsements, as that would require the candidate proactively to reject an endorsement. The steering committee concluded that banning candidates from seeking and using political organization endorsements meets the objective of keeping judicial elections nonpartisan.

The steering committee also agreed, however, that the Code of Judicial Ethics (perhaps the commentary to canon 5, which states that a judge shall "avoid political activity that may create the appearance of political bias or impropriety") should be amended to explain why partisan elections are disfavored and why partisan activity among judicial candidates is discouraged. In addition, voluntary campaign codes of conduct promulgated by fair judicial elections committees may include pledges from candidates that they will eschew references to political affiliations or organizations.

Recommendation 30
Instructional material about the importance of truth in advertising should be developed.

Discussion: Canon 5B(2) provides that a candidate shall not "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." To promote compliance with this canon, the steering committee recommends that the pre-campaign instructional material discussed above include information about the importance of truth in advertising. In addition, voluntary pledges signed by the candidates should include a commitment to the goal of truth in advertising.

Recommendation 31
Canon 5 of the Code of Judicial Ethics or its commentary should be amended to require candidates to take reasonable measures to control the actions of campaign operatives and the content of campaign statements.

Discussion: The steering committee recommends that canon 5 or its commentary be amended to place an affirmative duty on judicial candidates to take reasonable measures to control the actions of campaign operatives and the content of campaign statements. This would include a duty to review and approve campaign statements and materials produced by campaign committees, consultants, campaign volunteers, and members of informal, honorary committees. It would also require candidates to take reasonable measures to protect against oral or informal written misrepresentations being made on their behalf, including by third parties, and would obligate candidates to take appropriate corrective action if they learn of such misrepresentations.

Recommendation 32
The Code of Judicial Ethics should be amended to add a list of prohibited campaign conduct.

Discussion: After reviewing rule 4.1 of the model code,[24] which contains an exhaustive list of prohibited campaign conduct, the steering committee agreed to recommend that the canons be amended to include a list—similar in style to rule 4.1—of improper campaign conduct.

[24] Rule 4.1, entitled "Political and Campaign Activities of Judges and Judicial Candidates in General," is set forth here as a stylistic example California may wish to follow. It states:
"(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
(1) act as a leader in, or hold an office in, a political organization;
(2) make speeches on behalf of a political organization;
"(3) publicly endorse or oppose a candidate for any public office;
(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
(6) publicly identify himself or herself as a candidate of a political organization;
(7) seek, accept, or use endorsements from a political organization;
(8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
(10) use court staff, facilities, or other court resources in a campaign for judicial office;
(11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.
(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A)."

Recommendation 33
A letter—to be sent by the courts to county registrars before each election cycle—should be developed addressing permitted use of the title "temporary judge" by candidates.

Recommendation 34
Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" may be properly used.

Discussion of recommendations 33 and 34: The steering committee considered the issue of misuse of the title or position of "temporary judge." Typically, the misuse involves an attorney allowing the title to be used in campaign literature or in a ballot statement. In addition to the mandatory ethics training for temporary judges under rule 2.812(b) of the California Rules of Court, the steering committee recommends that a letter from the local court containing a set of instructions and explanations about the permitted use of the title be provided to the registrar of voters before each judicial election cycle. This letter could be developed by the Judicial Council.

The steering committee also considered whether canon 6D(8)(c) should be clarified by the Supreme Court. That canon allows an attorney to use his or her judicial title to "show [his or her] qualifications." This open-ended statement has resulted in attorneys using the title as if it were an occupation, such as "deputy district attorney." Canon 6D(9)(b) permits use of the title or service in a variety of employment application scenarios, including when the title or service is contained in a "descriptive statement submitted in connection with an application . . . for appointment *or election* to a judicial position." (Emphasis added.) The steering committee recommends that canon 6 be revisited with a view toward clearing up ambiguities on how and when the title may be used.

Recommendation 35
The State Bar should be encouraged to discipline attorney candidates who engage in campaign misconduct.

Discussion: Unsuccessful attorney candidates who engage in misconduct are under the jurisdiction of the State Bar, not the CJP. According to State Bar officials, no California attorney has been disciplined for misconduct in connection with a campaign for judicial office. Consequently, the steering committee recommends that voluntary fair judicial elections committees emphasize addressing attorney candidate misconduct. In addition, the State Bar should be urged to pursue disciplinary actions against attorneys who violate the Code of Judicial Ethics during judicial campaigns. It should be stressed that an attorney's conduct during a campaign can have a major effect on public perception of the judiciary.

Judicial Campaign Finance

Contribution Limits

While the steering committee ultimately did not make recommendations as to contribution limits in judicial elections, it is necessary to begin this section of the report with a discussion of contribution limits as a foundation for the recommendations that follow.

Under California law, there currently are no limits on the amount one can contribute to a judicial candidate. The steering committee considered whether to recommend imposing limits on contributions to judicial candidates by various persons or entities but decided instead to recommend that a system of mandatory disclosure and disqualification be adopted to enhance the public's trust and confidence that judicial decisionmaking will not be affected by monetary contributions. Had the steering committee recommended the imposition of contribution limits, it likely would have recommended that those limits be uniform across all types of contributors, whether individual or entity.[25]

Imposing contribution limits on judicial candidates

One way to limit the influence of money on judicial decisionmaking is to limit the amount that a person or entity may contribute to a judicial candidate. The steering committee recognized that the current lack of contribution limits applicable to judicial candidates in California could lead to a public perception that judges can be "bought." Indeed, data support that both the public and a number of sitting judges believe that contributions to judges, especially in large amounts, can affect judicial decisionmaking.[26] Thus, even if not needed to prevent actual high-dollar spending in California, the lack of contribution limits might itself negatively affect the public's trust and confidence in an impartial judiciary. That is, the mere presence of contribution limits arguably could enhance the public's perception of a judiciary free from outside moneyed influence.

On the other hand, studies also show that most attempts to influence judicial decisionmaking through campaign contributions occur in contested elections at the supreme court level.[27] In California, however, Court of Appeal and Supreme Court justices are subject only to nonpartisan retention elections, where large spending amounts arguably have less of an impact than they would in partisan or contested elections. Thus,

[25] The steering committee concluded that restricting contributions from attorneys who appear before a judge candidate is inadvisable and impractical because it would impair a sitting judge's ability to raise money while not subjecting attorney challengers to the same restriction. In addition, to the extent that campaign contributions to judicial candidates may create the appearance that the successful candidate is beholden to the contributors, this concern can be addressed through disclosure and disqualification requirements. Therefore, the steering committee did not recommend restricting contributions from attorneys who appear before a judge candidate.

[26] Greenberg and DiVall memorandum to Palast, Feb. 14, 2002, *supra*.

[27] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006, supra*.

there is a question of whether contribution limits are necessary given California's judicial election system.

In examining the potential need for contribution limits, the steering committee recognized that judicial candidates—unlike candidates for legislative or executive office—do not generally have an established voter base from which they can readily obtain campaign funding. Thus, judicial candidates are likely to find it more difficult than other candidates to raise the money needed to run a campaign for contested office at the trial court level or to run a retention campaign where significant independent expenditures (IEs) are being made to unseat the incumbent. The ability to raise needed sums of money from what could be a limited number of contributors would be hindered if those contributors were faced with contribution limits. That is, judicial candidates would have no choice but to expand their voter base, which could be difficult given other limits on those candidates' abilities to campaign and raise funds.

In addition to concerns over unduly limiting the ability of judicial candidates to raise necessary funds, there are other bases for the steering committee's decision. For example, data from recent California Fair Political Practices Commission (FPPC) hearings addressing the issue of IEs show that where contribution limits are imposed, spending by IE groups rises dramatically, negatively affecting the public's ability to get accurate data on who is truly funding certain election-related efforts.[28] In other words, imposing contribution limits may actually make it more difficult for the public to "follow the money."

There are also practical and logistical obstacles to establishing a workable system of contribution limits applicable to judicial candidates. For example, an ideal contribution limit scheme would somehow account for the fact that the cost of running a judicial election varies widely from county to county in California, based in part on the varying costs of the candidates' statements. Similarly, the system would account for the possibility that the public's perception of the size of a contribution that would cause a judge to appear to lose impartiality could also vary from county to county. While not insurmountable, challenges such as these could require time and resources that would not be necessary if an alternative plan were pursued.

Ultimately, because the issue of concern is not contributions in themselves, but rather the effect that they may have or appear to have on judicial decisionmaking, the steering committee concluded that there is a better solution—mandatory disclosure coupled with mandatory disqualification—that would be less likely to impair the ability of candidates to finance a campaign, yet that would still address the focal issue of the effect of money on actual or perceived judicial impartiality.

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[28] See generally California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance* (June 2008), available at *www.fppc.ca.gov/ie/IEReport2.pdf*.

Limitations on a judicial candidate's ability to solicit contributions
The steering committee noted that several federal appellate courts have held that state provisions prohibiting judicial candidates from personally soliciting campaign funds are unconstitutional. (See *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d 738; *Weaver v. Bonner* (11th Cir. 2002) 309 F.3d 1312; *Siefert v. Alexander* (W.D.Wis. Feb. 17, 2009, No. 08-CV-126-BBC) 2009 U.S. Dist. Lexis 11999); *Yost v. Stout* (D.Kan. Nov. 16, 2008, No. 06-4122-JAR) 2008 U.S. Dist. Lexis 107557); *Carey v. Wolnitzek* ((E.D.Ky. Oct. 15, 2008, No. 3:06-36-KKC) 2008 U.S. Dist. Lexis 82336); but see *Wersal v. Sexton* (D.Minn. Feb. 4, 2009, No. 08-613 ADM/JSM) 2009 U.S. Dist. Lexis 10900) (court upheld constitutionality of canon prohibiting a candidate from personally soliciting campaign contributions except from groups of more than 20 persons or by signing a letter); *Simes v. Judicial Discipline and Disability Commission* (2007) (247 S.W.3d 876) (the Arkansas Supreme Court held that prohibition on candidates personally soliciting campaign contributions is constitutional).) Because the constitutionality of such a provision is questionable and because this would unfairly restrict a judicial candidate's ability to raise funds, however, the steering committee opted not to recommend pursuing such a prohibition.

Mandatory Disclosure and Disqualification

Recommendation 36
A system should be adopted under which each trial court judge is required to disclose, to litigants, counsel, and other interested persons appearing in the judge's courtroom, all contributions of $100 or more made to the judge's campaign, directly or indirectly. Specifically:

- The commentary to the disclosure provision in canon 3E(2) of the Code of Judicial Ethics should be amended to require a trial judge to maintain an updated list of campaign contributions of $100 or more and to orally disclose on the record to litigants appearing in court that the list is available for viewing in the courthouse and online;
- The commentary to canon 3E(2) should be amended to state that the obligation to disclose campaign contributions continues for a minimum of one year after the judge assumes office; and
- The commentary to canon 5B should be amended to cross-reference the proposed new commentary to canon 3E(2).

Recommendation 37
Each trial court judge should be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a

monetary contribution of a certain amount to the judge's campaign, directly or indirectly, subject to the following:

- The contribution level at which disqualification shall be mandatory shall be the same as the level, set forth in Code of Civil Procedure section 170.5(b), at which a judge is considered to have a "financial interest" in a party, requiring disqualification;
- Notwithstanding the above mandatory disqualification amount, trial court judges shall continue to disqualify themselves based on contributions of lesser amounts where doing so would be required by Code of Civil Procedure section 170.1(a)(6)(A);
- The Judicial Council should recommend that the amount set forth in Code of Civil Procedure section 170.5(b)—which, as of the date of this tentative recommendation, is $1,500—be periodically reviewed and adjusted as appropriate;
- The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
- The obligation to disqualify shall begin immediately upon receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

Recommendation 38
Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

Recommendation 39
Appellate justices' disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State's Web site.

Recommendation 40
Each appellate justice should be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the justice's campaign, directly or indirectly, subject to the following:

- For justices of the Courts of Appeal, the contribution level at which disqualification shall be mandatory shall be the same as the level, set forth in canon 3E(5)(d) of the Code of Judicial Ethics, at which a justice is considered to have a "financial interest" in a party requiring disqualification;
- For justices of the Supreme Court, the contribution level at which disqualification shall be mandatory shall be the same as the contribution limit, set forth in

Government Code section 85301(c) and Administrative Code title 2, section 18545, in effect for candidates for governor;
- Notwithstanding the above mandatory disqualification amounts, appellate justices shall continue to disqualify themselves based on contributions of lesser amounts where doing so would be required by canon 3E(4) of the Code of Judicial Ethics;
- The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
- The obligation to disqualify shall begin immediately upon receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

Discussion of recommendations 36–40: Sub-issues associated with disclosure and with mandatory disqualification at all court levels are addressed separately below.

Disclosure at the trial court level

In the steering committee's view, mandatory disclosure by judges and appellate justices of all contributions of $100 or more—the level at which contributions are reportable—would enhance public trust and confidence in an impartial judiciary without the need for contribution limits. For example, if the public knows that an affected litigant will be told of—and presumably have the chance to act on—a contribution made to a judicial officer by the litigant's opponent or another interested party, then the public will have a "check" to help ensure that money given to judges and justices will not result in biased decisions.

However, disclosure alone—i.e., without mandatory disqualification based on some level of contribution—would not sufficiently bolster public trust and confidence in judicial decisionmaking free from the influence of campaign contributions. In recent high-profile instances in other states, judges have disclosed accepting millions of dollars from interested litigants or lobbies yet have not disqualified themselves.[29] When the public becomes aware of extreme examples like this, trust and confidence in the integrity of judges as a whole declines.

The concept of disclosure raises logistical issues as to how, when, and for how long the recommended disclosures must be made. The steering committee noted that canon 3E(2) of the Code of Judicial Ethics provides: "In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." In determining whether a particular campaign contribution amount should trigger a disclosure requirement, the steering

[29] The most notable example is from West Virginia. There, a recently elected justice of West Virginia's Supreme Court refused to disqualify himself from a case involving Massey Coal, despite the fact that that company's CEO had contributed a reported $3 million on independent expenditures tending to support the justice's election campaign and oppose his opponent.

committee agreed that a judge should disclose on the record any contribution from an attorney, law firm, party, witness, or other interested party appearing before the judge in an amount equal to or greater than the amount that must be reported to the FPPC. Currently, the minimum amount a candidate must report to the FPPC is $100. (See Gov. Code, § 84211(f).) Tying the amount to the figure in section 84211(f) would allow for an increase if the statute is later amended. Notably, the $100 figure is also consistent with CJA's Formal Ethics Opinion #48 (1999), which states that a judge should disclose on the record any contribution of $100 or more when the contributor is involved in a case before the judge.

Regarding how long a judge must continue to disclose a contribution to parties appearing before him or her, the steering committee concluded that the required disclosure period should continue for a minimum of one year after the date on which the judge assumes office. CJA Opinion #48 recommends a period of two years, but the steering committee agreed that two years is unnecessarily long for disclosure.

Finally, the steering committee considered how a judge may satisfy the requirement that disclosure be made "on the record." First, judges should be required to maintain a list of contributors of $100 or more, updated weekly or as soon after receipt of the contribution as practical. In most circumstances, a judge could comply with the disclosure requirement by orally advising the parties on the record that the list of contributions is available for viewing at a specified, accessible location in the courthouse. A judge could also orally advise the parties on the record that the list is available on the court's Web site if such posting is feasible. Under this proposal, a judge who knowingly receives a campaign contribution from a party or attorney in between the weekly updates would be obligated to disclose that contribution as soon as practical. Depending on the circumstances, this may require disclosure before the next weekly update is prepared. If a judge has reason to believe that disclosure of a particular campaign contribution will not be communicated effectively by reference to the list, or if there is some other circumstance warranting disclosure on the record in open court, the judge cannot rely on referring the parties to the list and must directly disclose.

The steering committee considered whether posting a list in the courtroom would be more effective, but serious concerns were raised about the coercive effect this may have on litigants and attorneys, who may feel compelled to make a contribution. For this reason, the steering committee concluded that in most circumstances a judge should be permitted to comply with disclosure requirements in the manner described above.

Thus the steering committee recommends that the following language be placed in the advisory committee commentary following canon 3E(2):

A judge shall disclose to the parties any judicial election campaign contribution received, directly or indirectly, from a person or entity appearing before the judge in a proceeding if the contribution is in an amount required to be reported to the Fair Political Practices Commission (FPPC) pursuant to Gov. Code § 84211(f). A judge is not required to disclose a contribution below the FPPC threshold amount unless there are other circumstances that would mandate such disclosure in accordance with this Code.

Except as set forth below, a judge may satisfy the disclosure requirements under this Canon by orally advising the parties on the record that a list of all contributions to the judge's election campaign of $100 [or the current minimum amount required by the FPPC] or more is available for viewing at a specified, accessible location in the courthouse and, if feasible, on the court's Web site. A judge must update the list on a weekly basis or as soon after receipt of the contribution as practicable.

A judge will not satisfy the disclosure requirements under this Canon if the judge has reason to believe that disclosure of a particular campaign contribution will not effectively be communicated to a party by reference to a list of FPPC-reported contributions, or there is some other circumstance warranting disclosure of a specific contribution on the record in open court.

The obligation to disclose a judicial campaign contribution continues from the date on which the contribution is received until a minimum of one year after the date on which the judge assumes office following election.

In addition, canon 5B, which addresses conduct during judicial campaigns, should cross-reference to this proposed new commentary to canon 3E(2) because some candidates may look to canon 5 for information on campaign conduct.

Disclosure at the appellate court level

Ultimately, the steering committee's goal was to provide for a similar level of disclosure at both the appellate and trial court levels, although the steering committee recognized that differences in court administration and procedure as between the two levels would make identical disclosure recommendations impractical. For example, the steering committee discussed whether the requirements of canon 3E(2), which applies only to trial court judges, should apply to justices of the Courts of Appeal and the Supreme Court; it ultimately concluded that it would be difficult to impose a disclosure requirement on the appellate courts because the parties typically are in court for the first time at oral argument. In addition, disclosure does not have the same practical effect at the appellate

level because there is no existing mechanism for a litigant to disqualify an appellate justice following disclosure. Nevertheless, the steering committee recommends that appellate courts be required in some fashion to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming election or there was a recent election. This could, for example, be accomplished via rule of court promulgated by the Judicial Council.

Disqualification at the trial court level

The steering committee is of the view that mandatory disqualification of judicial officers at all levels, in conjunction with mandatory disclosure, would be more effective than contribution limits, i.e., it would enhance the public's confidence that the system has safeguards in place to prevent judicial decisionmaking from being influenced by monetary contributions. While the steering committee considered whether disqualification should be left entirely to the discretion of the judicial officer—albeit perhaps subject to more detailed benchmarks than are currently provided for by law[30]—it ultimately concluded that some objective standard should be adopted for the sake of greater public confidence in the impartiality of the judiciary as well as to avoid the unlikely potential of a "Massey Coal"-type situation in which a judicial officer fails to recuse even when he or she has received significant economic support from a party appearing before the court.

Mandatory disqualification raises a number of sub-issues, including the threshold amount at which the disqualification must occur, how to determine whether the disqualification threshold has been met with respect to multiple contributions made by individuals employed by or affiliated with the same entity, the need for the disqualification to be waivable in order to prevent "gaming" of the system—i.e., making contributions to a judicial officer for the express purpose of causing his or her disqualification—and the length of time for which the disqualification obligation exists. These same issues—as well as additional ones, discussed below—exist not only for the trial courts, but also at the Court of Appeal and Supreme Court levels.

Disqualification threshold amount. Concerning the dollar level at which disqualification should be mandatory, the steering committee considered whether to recommend a fixed amount or whether instead to recommend a variable amount such as some percentage of a

[30] Currently, when trial judges receive contributions from persons or entities appearing before them, they must look to Code of Civil Procedure section 170.1(a)(6)(A) to determine whether they are disqualified. Section 170.1(a)(6)(A) provides that a judge is disqualified if (1) the judge believes his or her recusal would further the interests of justice, (2) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (3) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Rule 2.11(A)(4) of the model code addresses this situation specifically by mandating disqualification if a judge accepts a campaign contribution of a certain amount, leaving the amount for each state to determine.

candidate's total contributions received. Ultimately the steering committee determined that a uniform, fixed amount would be the most efficient and effective solution. With respect to what that amount should be, a variety of factors were considered, including the public's perception of the effect of certain sums of money on judicial decisionmaking and the need of judicial candidates to raise sufficient sums to allow them to campaign effectively. The steering committee also recognized a concern that an increased need for fundraising by judges who are already on the bench, which could be the result if the threshold were set too low, has the potential to be both a burden and a distraction affecting judicial productivity.

In arriving at its recommended threshold for trial court judges, the steering committee observed that Code of Civil Procedure section 170.5—which defines a "financial interest" mandating disqualification as, among other things, a financial interest in a party of $1,500 or more—arguably reflects a legislative determination that that amount is meaningful with respect to a judge's ability to be impartial, or at least to give the appearance of impartiality.[31] The steering committee was concerned, however, that that dollar figure has not changed in recent years and thus has recommended that while mandatory disqualification be tied to the level at which a judge must disqualify himself or herself because of a financial interest, the actual dollar figure at which that occurs should be reexamined periodically and amended accordingly. Further, the steering committee crafted its recommendation to emphasize that while $1,500 is the current amount at which it recommends that disqualification be mandatory, that recommendation in no way is meant to supplant the requirements of Code of Civil Procedure section 170.1(a)(6)(A). That code provision may require disqualification in additional circumstances relating to contributions—including the receipt of a contribution in an amount lower than the recommended threshold—if, for example, the contribution would cause a reasonable person to question whether the judge who received the contribution can be impartial.[32]

[31] In reaching this conclusion, the steering committee consulted the results of a database that was commissioned and prepared under the guidance of the Task Force on Judicial Campaign Finance for the purpose of examining whether actual fundraising differed from expected norms. That database was created by obtaining and inputting information from all available campaign disclosure/reporting statements, from 2000 through 2006, filed by candidates for judicial office in the counties of Alameda, Orange, Los Angeles, and Sacramento. The database was programmed to permit the compilation of the following data: (a) highest contribution received per candidate; (b) mean contribution amount received per candidate; (c) total number of contributions received per candidate; and (d) total expenditures per candidate. The database also contains limited information about the source of each contribution. Having reviewed the average contribution amounts received by the judicial candidates examined, as well as the relatively small number of contributions received in excess of $1,500, the steering committee was persuaded that setting the mandatory disqualification amount at that level would not significantly impede the right of potential contributors to participate in the political process, nor the ability of judicial candidates to raise the necessary level of campaign funding.

[32] Likewise, Code of Civil Procedure section 170.1(a)(6)(A) might, in some circumstances, require disqualification beyond the two-year period recommended by the steering committee and discussed below.

Effect of multiple contributions on the disqualification threshold. The steering committee also recognized the potential issues that could arise if a candidate were to receive multiple contributions from individuals who are employed by or otherwise affiliated with the same entity. If such individual contributions meet or exceed the recommended disqualification threshold, then the steering committee's intent is that its recommendation would mandate disqualification. The steering committee acknowledges, however, that it may not always be apparent to a judicial officer whether contributions are indeed coming from individuals within the same entity, and the steering committee's intent is not to impose an additional burden on judicial officers to go beyond the readily ascertainable information pertaining to the contributions they receive. Rather, the steering committee intends that a judicial officer disqualify himself or herself if he or she knows or reasonably should know that multiple individual contributions that would, in the aggregate, amount to the recommended threshold are all affiliated with the same entity.

Waiver of mandatory disqualification. Mandatory disqualification carries with it the possibility of a litigant "gaming" the system, i.e., making a large contribution to a particular judge for the express purpose of forcing that judge to disqualify himself or herself. Thus, any mandatory disqualification system, at any court level, must account somehow for this possibility. The steering committee concluded that the best means of doing so is through a provision under which the noncontributing party may waive a disqualification that would otherwise occur because of another party's or counsel's campaign contributions.

Length of mandatory disqualification obligation. The steering committee considered when the obligation to disqualify should arise and how long it should last. For incumbents, it is logical for the obligation to arise as soon as the contribution is received; any other result would undermine the purpose of the disqualification, which is to prevent a judge from adjudicating a matter involving a contributor of $1,500 or more. For candidates who are elected, the obligation would arise upon them taking office. In terms of how long the obligation should continue, the steering committee agreed that two years is reasonable—given, for example, the length of time it takes for matters to move through the courts and the logistical burden if judges were subject to the obligation for too long a period of time—although it considered alternatives ranging from one year to the entire election cycle (which is currently six years for trial court judges). The steering committee also agreed that the two years should be measured from the date that the candidate takes office or from the date that the contribution is received, whichever is later.

Disqualification at the Court of Appeal level

The issue of whether appellate justices at both the Court of Appeal and Supreme Court levels should be subject to mandatory disqualification at all gave rise to considerable discussion, as such a requirement would present unique challenges at the appellate level.

For example, appellate justices currently are not subject to a peremptory challenge the way that trial court judges are, which arguably reflects a policy decision that appellate justices should not be subject to disqualification on the same bases as trial court judges. On the other hand, canon 3E(5)(d) of the Code of Judicial Ethics requires disqualification at the appellate level where a justice has a financial interest of $1,500 or more in a party, which parallels the law applicable to trial court judges.

Ultimately, the steering committee agreed that public trust and confidence is even more an issue with appellate decisions because of their considerably greater impact and the attention and scrutiny that they receive. Thus, the steering committee has recommended that justices at both the Court of Appeal and Supreme Court level be subject to mandatory disqualification based on contributions, the same as trial court judges.[33]

Turning to the disqualification sub-issues discussed in connection with trial court judges above, the same concerns about waivers and timing exist at the appellate level, so the steering committee's recommendations on those sub-issues are parallel across all court levels. The issue of the monetary level at which Court of Appeal justices (and, as discussed below, Supreme Court justices) must disqualify themselves is more complex at the appellate level, however. For example, campaign contribution data obtained from the California Secretary of State's Cal-Access database suggests that while Court of Appeal justices standing for retention often raise no money (e.g., where they are not subject to any IE-based effort to defeat their retention bid), when those justices are required to raise money, it is often in greater amounts than at the trial court level.[34] This may be because of the higher dollar amounts that appear to be spent to unseat retention candidates, because of the larger jurisdiction served by justices of the Courts of Appeal, or both. Regardless, the steering committee carefully considered whether Court of Appeal justices should be subject to a higher disqualification threshold than trial court judges.[35]

However, the steering committee ultimately concluded that the $1,500 threshold strikes the best balance between the competing values of maintaining public trust and confidence in impartial judicial decisionmaking and allowing judicial candidates to engage in necessary fundraising and should apply to both the trial courts and the Courts of Appeal,[36] especially given that the parallel "financial interest" provisions of the Code of

[33] The chair of the Task Force on Judicial Campaign Finance reported that he conducted an informal survey of Court of Appeal justices on this issue and that the overwhelming majority of them favored the idea of mandatory disqualification at the appellate level.

[34] The Cal-Access database can be searched online, by candidate and year, at *http://cal-access.ss.ca.gov/Campaign/Candidates*.

[35] For example, the threshold disqualification amount for Court of Appeal justices could be tied to the current contribution limit for candidates for statewide office other than the Governor, or for candidates for the Legislature.

[36] Again, this is the level at which mandatory disqualification applies. A justice may still be required to disqualify himself or herself based on a lower contribution amount in accord with canon 3E(4) of the Code of Judicial Ethics.

Civil Procedure and the Code of Judicial Ethics use the same $1,500 figure for the disqualification at both the trial and appellate levels.[37] It bears noting that the recommended threshold would not prohibit a potential contributor from instead making IEs in support of a retention candidate, although doing so could still trigger a disqualification requirement—albeit not mandatory—under the Code of Judicial Ethics.

Disqualification at the Supreme Court level

Mandatory disqualification at the Supreme Court level raises many of the same issues discussed above in connection with the trial courts and Courts of Appeal. Rather than revisit those issues, the discussion in this section will focus on issues unique to the steering committee's recommendations about the Supreme Court.

The primary issue of difference is the dollar level of the disqualification threshold for the Supreme Court. As noted above, a reasonable position is that Supreme Court justices—like all other judicial officers—should be subject to mandatory disqualification based on a contribution of $1,500 or more. However, the steering committee agreed that in actual practice, that amount would be too low and likely would not be workable.

As has been noted, data from other states show that most spending in judicial elections—particularly high-dollar spending—occurs at the supreme court level.[38] Thus, when a Supreme Court justice's retention bid is challenged, there is a strong possibility that spending against that justice would be in the millions of dollars. As such, the steering committee considered the amount of money that Supreme Court justices reasonably could be expected to need to raise in determining the appropriate disqualification threshold. In other words, assuming that the amount that a Supreme Court justice would need to raise exceeds that of a trial court or Court of Appeal justice by a significant factor, it would not make sense to subject the former to the same disqualification threshold as the latter.

In the steering committee's view, which is supported by spending trends in other states, a higher disqualification threshold at the Supreme Court level is reasonable and will permit necessary fundraising while at the same time ensuring judicial impartiality. Thus, the steering committee has recommended that the disqualification threshold amount for Supreme Court justices should be the same as the contribution limit amount applicable to candidates for Governor.[39] That amount arguably reflects a legislative and administrative determination about the appropriate upper level of contribution for a candidate for

[37] It is true that under this rationale, it could be argued that justices of the Supreme Court also should be subject to disqualification based on a $1,500 contribution. That issue, including the steering committee's rationale for recommending a higher disqualification threshold at the Supreme Court level, is discussed below.

[38] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, *supra*, at p. 15.

[39] Of course, there is a clear distinction between Supreme Court justices standing in retention elections and gubernatorial and other candidates for statewide political office, and the steering committee's recommendation is in no way intended to politicize the former or suggest that Supreme Court retention campaigns should be run in the same manner a campaigns for the office of Governor.

statewide office. And while a disqualification is not the same as a contribution limit, the two are functional equivalents with respect to limiting the effect of money on subsequent political behavior.

Limitations on Corporate and Union Financing of Judicial Elections

The steering committee considered whether to recommend limiting direct and/or indirect corporate and union financing of judicial candidates or independent expenditures.[40]

Recommendation 41

Legislation should be sponsored prohibiting corporations and unions from expending treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with campaigns for judicial office.[41]

Discussion: Under current law, it is not permissible to limit the amount that may be spent on IEs, nor is it permissible to limit the overall amount of money that a person or entity engaged in making IEs may raise. It would most likely be legally permissible, however, to limit the ability of corporations and unions to expend treasury funds on IEs and on direct contributions to candidates for judicial office.[42] Instead, corporations and unions would be required to make contributions or spend money through political action committees (PACs). This would mean, in effect, that all corporate and union spending would represent the will of the individual members of those entities who contributed to the PAC, rather than the will of the board of directors charged with managing shareholders' investments or other controlling body.

The steering committee is of the opinion that such a limitation would increase the public's trust and confidence that judicial decisionmaking is free from moneyed influence. Corporations and unions typically are far better poised than individuals to infuse substantial amounts of money into elections. Requiring contributions and expenditures to be made through PACs prevents corporate and union management from seeking influence in the courts without oversight by shareholders, employees, and members of those organizations.

The steering committee is aware that some judicial candidates may rely on endorsements by and funding from certain public unions and corporations, particularly at the trial court

[40] Note that this issue relates to both direct contributions and independent expenditures, and thus is relevant also to the detailed discussion of the latter set forth below.

[41] This recommendation is not intended to prohibit corporations and unions from forming separate, segregated funds or PACs for these purposes.

[42] The steering committee is not aware of any data indicating that corporations and unions have historically been major sources of IEs targeting judicial candidates in California. As discussed below, most IEs are made at the appellate level. However, in a system such as California's, where appellate elections are nonpartisan retention elections—meaning that moneyed interests seeking to unseat an incumbent justice have no ability to affect who that justice's successor will be—it may be the case that corporations and unions have not viewed it as cost-effective to expend money on IEs targeted at retention candidates.

level. Again, however, this recommendation would not limit such support. Rather, the recommendation would require only that corporate and union funding be made through PACs, as opposed to coming directly from treasury funds. Indeed, given federal tax laws, it may already be the case that tax-exempt organizations such as unions cannot or do not spend treasury funds on candidate campaigns. Thus, this recommendation may be viewed as leveling the playing field as between corporations and unions by requiring that both types of entities have individual members' support for whatever political expenditures they make in the entities' names.

Electronic Filing of Judicial Candidate Campaign Finance Disclosures

Judicial candidates, like candidates for other elective office, are required by law to report certain financing information, at specified times, to the California FPPC.[43] Issues arising from those requirements include what must be reported and when, as well as the means by which information is reported and, therefore, made accessible to the public. For the latter, the steering committee considered whether to recommend that judicial candidates be required to electronically file (e-file) their mandatory disclosures, and, if so, with what agency and at what aggregate contribution/expenditure level.

Recommendation 42

Legislation should be sponsored to require that all candidates for judicial office—regardless of their total dollar amount of contributions received and/or expenditures made—be required to file, in some electronic format with the California Secretary of State's Office, all campaign disclosure documents that they would also be required to file in paper form.[44]

Discussion: In arriving at this recommendation, the steering committee first considered what recommendations, if any, to make with respect to the content and timing of judicial candidates' reports regarding contributions received and expenditures made. The current state of California's disclosure law has received praise for its comprehensiveness, suggesting that no changes are necessary. Specifically, in a survey of all 50 states done by the Campaign Disclosure Project, a collaboration of the University of California at Los Angeles School of Law, the Center for Governmental Studies, and the California Voter Foundation, California was ranked second overall (after Washington State) in terms of disclosure of campaign finance information.[45] Significantly, California ranked first overall in terms of the substance of the law itself. As noted by the Campaign

[43] The statutes and regulations governing disclosure reporting are detailed and complex, and a full discussion of those authorities is beyond the scope of this report. Manuals explaining the disclosure requirements can be found on the FPPC's Web site at *www.fppc.ca.gov/index.html?id=505#cam*.

[44] The steering committee has not made any recommendation about the exact electronic format—e.g., scanned PDF file, entry into the fields of the Secretary of State's Cal-Access database—that judicial candidates should be required to use when filing their disclosure documents and instead recommends that that issue be referred to an appropriate group for detailed consideration and further recommendation.

[45] See *www.campaigndisclosure.org/gradingstate/ca.html.*

Disclosure Project:

> California maintained the number one ranking in the law category, and has earned an A in this area in each of the five assessments. Strengths of the law include detailed contributor disclosure, including occupation and employer data; last-minute contribution and independent expenditure reporting; and strong enforcement provisions.[46]

Based on the recognized excellence of California's current legal scheme regarding disclosure reporting, the steering committee decided that it was not necessary to recommend any amendments or additions to that body of law.

The steering committee has recommended, however, that legislation be pursued to require that judicial candidates at all levels electronically file their campaign finance disclosures. In addressing its charge, and particular in connection with preparing the limited database described in footnote 31 above, the Task Force on Judicial Campaign Finance desired to review a number of disclosure reporting statements filed by judicial candidates in certain counties for certain election cycles. However, in attempting to obtain those documents—which are public information—the task force discovered that actually accessing them can be logistically difficult and time-consuming. One challenge comes from the fact that while judicial candidates are required to submit this information both to their local county registrars of voters and to the California Secretary of State's Office (SOS), some candidates do not know of the latter requirement. Thus, some judicial candidates' information must be obtained from the local county registrars, and the availability of information and practices for obtaining it vary from county to county.

Further, even reports that are properly submitted to the SOS can be difficult for the public to access. One reason for that difficulty appears to result from the fact that superior court judges are not defined as statewide officers under the Political Reform Act. Thus, unlike appellate court retention candidates, trial court judges are not required to e-file their disclosure reports. As a result, even if a trial court judicial candidate has properly filed reports with the SOS, the public must still request a paper copy of the disclosures and pay the attendant copying and mailing costs. And if the disclosures were made in a past election cycle, it may be necessary to obtain the reports not from the SOS, but rather from the State Archives, which can add an additional layer of complication and delay. In short, the public's right of access, while legally guaranteed, is very difficult to exercise in actual practice.

In light of the above, the steering committee agreed that some system of e-filing of all judicial candidates' disclosure reports would greatly enhance the public's ability to access information about who is contributing to judicial campaigns and in what amounts,

[46] *Ibid.*

and what judicial candidates are spending their campaign funds on and in what amounts. This, in turn, would increase the public's trust and confidence that the judiciary is not subject to influence by monetary contributions. Informal conversations with SOS staff suggested that there would be little resistance from either the SOS or the local county registrars if the SOS were made the official host agency for these e-files. And it appears that the actual statutory changes that would be needed in order to require superior court judicial candidates to e-file would be relatively minimal, with no major legislative rewrites required.

One change that would be required, however, relates to the threshold at which the e-filing requirement is triggered. Under current law, candidates who are required to e-file do not have to do so until they reach an aggregate contribution and expenditure amount of $50,000. Judicial races, however, often do not reach this $50,000 e-filing threshold, which would mean that maintaining that threshold for judicial candidates could result in no actual improvement in the public's ability to access those candidates' disclosure reports. Thus, the steering committee has recommended eliminating the threshold for judicial candidates and requiring all contribution and expenditure reports to be e-filed.

In considering what form the e-filing should take, the steering committee considered Cal-Access, the online e-filing database that the SOS maintains for, among other things, candidates for statewide office. In informal conversations, SOS staff suggested that the cost, in both dollars and staff required, of adapting Cal-Access to accept e-filing by trial court judicial candidates would likely be low.

The steering committee also considered the results of meetings that the Task Force on Judicial Campaign Finance had with actual campaign treasurers to get their perspective on Cal-Access and whether it would be an appropriate vehicle for e-filing trial court judicial candidates' disclosure reports. In those meetings, it was noted that while the SOS makes available free software that can be used to e-file on Cal-Access, that software does not include other necessary functionality such as ledgers. Thus, a candidate who uses the SOS's free software may also need to use third-party ledger software. In practical effect, this may mean that instead of inputting data twice, candidates may opt to use third-party software instead of the SOS's free software, which in turn means that many or most candidates may see a cost associated with being required to e-file on Cal-Access. And while that cost may not be considered expensive in the context of many campaigns, given the relatively low cost of a judicial campaign, it could be financially burdensome on a candidate to have to spend limited funds on e-filing in addition to other expenses.

A second option would be to have judicial candidates simply submit scanned electronic copies (e.g., PDF files) of their reports to the SOS. The benefit of this option is that there would be no cost and little effort associated with the submission; the paper reports could simply be scanned and e-mailed to the SOS for posting to a searchable Web site. One

drawback is that the data in reports e-filed in this manner would not be subject to all of the search and cross-reference functions that are available with a true electronic database such as Cal-Access.

Ultimately, the steering committee decided not to make a recommendation about what form of e-filing would best balance the public's need for access and candidates' need for an efficient, cost-effective filing system. Instead, that issue should be considered further by the appropriate implementation group.

Independent Expenditures

Before discussing specific recommendations as to issues concerning IEs,[47] this report sets forth some general background information that will serve as a framework for the recommendations below and the related discussions. Data show that groups making IEs in judicial elections often have substantial resources with which to influence the campaign process; sometimes they can bring more money to the table than the actual candidates running for judicial office.[48] This phenomenon raises particular concerns when appointed judges who have never run campaigns are standing for retention. But the problems posed by substantial "independent" spending in judicial elections are not limited to that context.

Justices who are up for retention are at a special disadvantage for two reasons. First, unlike some trial court judges, they did not need to raise funds to support their initial selection, so they may not have preexisting contributor lists to which they can turn if they are attacked. That problem is exacerbated when opponents of appointed judicial officers wait until late in the election season to launch opposition campaigns, as IE sponsors often do.

Second, IE groups with substantial monetary resources may be able to buy up large chunks of available airtime in the days before an election, making it difficult even for candidates who do have resources or outside support to respond to their opposition. The candidates may have to use less-effective or more time-consuming means of communication. As a result, the message of the IE may be far more likely to reach voters than would any information coming from the sitting judge.

These features of IEs undermine public confidence not only in the fairness of judicial elections but also in the fairness and impartiality of judicial decisionmaking. When incumbent judicial officers face the threat of attack by high-spending IE groups, the public may come to believe that decisions by those judges will be influenced by their desire to avoid such attacks. That is, the public may conclude that judges and justices are

[47] Recall that the recommendation above concerning limits on corporate and union treasury spending also affects IEs.
[48] See Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, *supra*, at p. 21.

susceptible to the influence of money not only through the contributions to those judicial officers, but also through the threat of large IEs being made against those officers if they render decisions contrary to the interests of the groups funding the IEs.

Another concern raised by IEs is that they may greatly influence the public's perception through advertising or other means of information dissemination that presents false or misleading information about judges, judicial decisionmaking, and the role of the judicial branch generally. Put another way, IE groups seeking to unseat an incumbent judge may, depending on how they paint that judge or his or her actions, give the public an entirely incorrect impression of the role of the judiciary, and the incumbent may be unable to raise sufficient finances to counter any such advertising. The public may be left with an incorrect impression, and this misunderstanding could damage the public's perception of the judicial branch as a whole.

The above concern is related to two additional IE issues. First is the general difficulty that the public may face in attempting to understand exactly who the persons or entities are behind IE groups, which often have bland, nondescriptive names like "Californians for Better Justice." While little can be done to regulate the content of IE-funded advertising, greater transparency may be achievable through disclosure of major contributors to the group making the IE. That is, if the public could more easily learn whose financial interests were funding IEs targeted at unseating or defeating judicial candidates, any negative comments about those candidates could be put into a more accurate context.

Second is the fact that in some states, IE groups have targeted judges as candidates who can be attacked fairly easily and cheaply as a means of motivating a voter base for some unrelated purpose. For example, in a district with a close congressional race, an attack on a justice who has ruled on a controversial issue may be used to motivate a political constituency that is upset with the ruling on that issue to the polls, where they will also vote in the congressional race.

Against the above background, the steering committee considered whether to recommend sponsoring amendments to relevant statutes and/or regulations to broaden California's definition of what constitutes an IE—and therefore is subject to, among other things, laws relating to disclosure and corporate/union spending limits—to the extent permissible under the Constitution. The steering committee also considered whether to recommend sponsoring legislation to (a) expand the scope of what information must be reported by IE groups under applicable campaign finance reporting laws or that must appear in the disclaimers on the face of advertisements funded by IE groups or (b) make changes affecting the timing of disclosures regarding IEs.

Recommendation 43
Amendments should be sponsored to appropriate California statutes and regulations so that California's definition of an independent expenditure—subject to, e.g., disclosure laws—is as broad as possible under current case law, including *McConnell, United States Senator, et al. v. Federal Election Commission* (2003) 540 U.S. 93, and *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007) 127 S. Ct. 2652 ("*WRTL II*")*.*

Discussion: Generally speaking, the regulation—whether through disclosure requirements or limits on corporate/union contributions—of independently funded campaign advertising raises potential First Amendment concerns, in that overly restrictive regulation may be held to have an unconstitutional chilling effect on political speech. Historically, most courts have distinguished between communications that may or may not be regulated by considering whether the ads constituted "express advocacy" (regulation permitted) or "issue advocacy" (protected by the First Amendment). The test for express advocacy was the so-called "magic words" test, under which a communication was considered express advocacy that could be constitutionally regulated only if it used specific "magic words" such as "vote for," "vote against," and the like. Otherwise, a communication was considered "issue advocacy" and was not subject to the same disclosure requirements, contribution limits, and other limits applicable to express advocacy.[49] As discussed below, however, the United States Supreme Court in the *McConnell* case recently rejected the idea that the distinction between express advocacy and issue advocacy is constitutionally required. Therefore, it is now constitutionally permissible to regulate a wider scope of electioneering communications than in the past.

In California, the statutory and regulatory definitions of "independent expenditure" on the books were drafted to be in accord with the opinion of the Ninth Circuit Court of Appeals in *Federal Election Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857.[50] That opinion, however, which was alone among the federal circuits in rejecting the magic words test for express advocacy, was expressly rejected by the Court of Appeal, First Appellate District, in 2002 in *Governor Gray Davis v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449. Under the latter, California adopted the magic words test for campaign advertising subject to regulation in California.

Notwithstanding the *Governor Gray Davis* opinion, the California statutes and regulations defining an IE for purposes of, for example, disclosure laws, were never formally amended to add a magic words test. Nevertheless, the FPPC continues to regulate campaign advertising in a manner consistent with that decision. As noted above, however, subsequent United States Supreme Court opinions allow for California's statutory and regulatory provisions in this area to be revisited.

[49] These regulations do not include limits on how much money IE groups may spend, or on what; such limitations are not constitutionally permissible.
[50] See, e.g., Gov. Code, § 82031; Cal. Code Regs., tit. 2, § 18225.

Specifically, the current constitutional jurisprudence about the permissible definition of an IE is set forth in the *McConnell* and *WRTL II* opinions, cited above. Those opinions allow for a broader definition of an IE than that in *Governor Gray Davis*. Specifically, the *McConnell* court rejected the notion that only advertising that uses "magic words" may be regulated without running afoul of constitutional principles by holding that the distinction between "express advocacy" and "issue advocacy" is not constitutionally mandated. Thus, under *McConnell*, it was held permissible to impose restrictions on corporate and union treasury spending on "electioneering communications"—which restrictions the task force has recommended above—and to impose certain disclosure/reporting requirements in connection with spending on those communications. Notably, it was held constitutional for a statute to define an "electioneering communication" as encompassing far more than simply ads using "magic words"; an "electioneering communication" was defined under the statutory scheme in question as an ad that referred clearly to a candidate (for federal office), targeted that candidate's constituents, and ran within a specified time period before an election. Such a definition clearly would encompass far more than merely "magic words" ads.

The *McConnell* holding was scaled back by the court in *WRTL II*, in that the ban on the use of corporate treasury funds for electioneering communications was held unconstitutional as applied because the ads in question were found not to be express advocacy or its functional equivalent. Nonetheless, even with the limits imposed under *WRTL II*, the current state of the law allows for spending bans on something more than solely magic words-type express advocacy. Moreover, *WRTL II* did not affect the federal disclosure requirements with respect to electioneering communications.

Based on the above, the current interpretation given to California's regulations and statutes—an interpretation that is in line with the *Governor Gray Davis* magic words holding—is narrower than would be legally permissible under current constitutional jurisprudence. Thus, it would be possible to seek legislative and regulatory amendment to broaden the definition of what constitutes an IE in California.

The steering committee recommends that such amendments be sponsored. In the steering committee's view, California's statutory and regulatory schemes should be updated to reflect accurately the current state of the law. Further, given the boost in public trust and confidence that is likely to result if the public is better able to track the sources of monies spent in connection with judicial elections, the steering committee believes that California's legal definition of what constitutes an IE for purposes such as spending bans and disclosure reporting should be as broad as is constitutionally permissible.

Recommendation 44
Amendments to appropriate California statutes and/or regulations should be sponsored to require that disclosures pertaining to advertising in connection with judicial elections—whether funded independently or by a candidate—be made at the time that any person or entity makes a contract for that advertising.

Discussion: The steering committee is aware that sometimes contributions to one IE group come from yet another IE group, making it more difficult for the public to trace the source of the money that is being spent on certain communications. Situations like this arguably would make it desirable to sponsor amendments to current reporting requirements to mandate reporting of information at a deeper level, i.e., reporting not only which groups are contributing to groups that make IEs, but also to require reporting of groups that are contributing to those contributor groups, all in the same report.

However, the steering committee ultimately decided not to recommend sponsoring any changes to California's current law regarding the information that must be disclosed in connection with IEs. As discussed above, California's existing law in this area has been nationally recognized for its comprehensiveness, including with respect to requirements for the reporting of IEs.[51]

Likewise, the steering committee does not recommend sponsoring any amendments to laws setting forth what information must appear in the disclaimers that are displayed in IE-funded advertising. Under current law, the face of political advertisements must display certain information about the two largest contributors of $50,000 or more to the IE group that funded the ad. Because judicial elections in general tend to generate less spending, it is possible that in those elections there would be no contributors of more than $50,000 to IE groups funding advertising. Thus, it would arguably be desirable from the perspective of informing the public to lower the $50,000 disclaimer threshold for judicial elections.

As noted, however, the steering committee ultimately decided not to recommend sponsoring such an amendment. Again, the primary basis for this decision was the fact that California law is already very comprehensive and stringent with respect to the required disclaimer requirements, meaning that imposing even more stringent requirements could be viewed as unnecessary. Further, the fact that all advertising is expensive, regardless of the type of election involved, makes it likely that even in judicial elections, if there is advertising, some contributors will have met the $50,000 contribution threshold.

[51] See Campaign Disclosure Project Web site at *www.campaigndisclosure.org/gradingstate/ca.html.*

But while the steering committee does not recommend sponsoring changes to the *content* of IE reporting (or IE-funded advertising disclaimers), it does recommend sponsoring changes to the *timing* of certain IE reporting. Candidates (particularly in retention elections, where campaign funds are not typically raised as a matter of course) are highly susceptible to last-minute "attacks" by IE groups,[52] whether in the form of advertising or otherwise. This is because, under current law, reporting is required at the time that the communication is made. In other words, if an IE is made for a television ad designed to unseat an incumbent justice, the reporting of the sources that funded the IE must be made at the time the ad airs (or later, depending on when the next report is due). Thus, in practical terms, an IE group may spend money on and prepare an attack ad that is not run until very close to the election, at which time the candidate will not have had time to prepare and will have little time in which to respond.

The above scenario works not only to the detriment of the candidate, but also to the detriment of the public. Such reporting gives the public less time before the election in which to obtain information about the persons or groups who are behind the IE. Indeed, the report for a last-minute attack ad may not be due until after the election, when it is too late to affect the voters' decisions. Earlier disclosure would allow the public more time to try to understand who is funding attack ads and possibly to discern why. In the steering committee's view, this is a worthy goal, as a public that is well informed about the sources of money being expended both for and against candidates is likely to have more trust and confidence in the system as a whole.

Having decided generally to recommend some earlier disclosure reporting as to IEs targeted at judicial elections, the question then becomes when that earlier reporting should be required to occur. One possibility would be to require reporting at the time a contract for advertising or other public efforts is signed. Ultimately, however, the steering committee was concerned that such a requirement could be "gamed" by delaying the signing of a contract until immediately before the advertisement is to air. Thus, the recommendation is that reporting be required whenever a contract is "made," which is meant to include any level of commitment to expend IE funds on advertising relating to a judicial election.

The steering committee is aware that in some instances, just because money is committed to, or even spent on, advertising or other communications does not mean that those ads or communications will ever be made or run. Further, advertisements may be committed to even before the IE group involved has decided exactly who or what issue will be the

[52] While discussion on this issue focused primarily on advertising funded through IEs, the steering committee recognizes that some advertising might be funded by the candidates themselves. Thus, while the discussion in this report pertains primarily to IE-funded advertising, the steering committee's recommendation is intended to apply to all advertising in judicial elections, whether funded independently or by a candidate.

"target" of those ads. Nonetheless, the steering committee believes it is important that the law require disclosure (a) when a commitment to purchase advertising is made, and (b) when it is clear that that advertising will pertain to a judicial election.

On a related topic, the steering committee also considered whether to recommend sponsoring statutory or regulatory amendments to enhance either the mechanisms that are currently available for ensuring compliance with IE disclosure/reporting requirements or the penalties for violations of those requirements. Currently, if a candidate or IE group violates a provision of the campaign finance disclosure/reporting laws, there are a number of options for addressing that violation. For example, the FPPC may impose monetary penalties. There is also a possibility that criminal charges could be prosecuted against the violator, although this is rare in actual practice. Despite these provisions, the steering committee examined whether to recommend sponsoring amendments to impose even more stringent enforcement or penalty options.

The steering committee ultimately concluded, however, that the current options are sufficient. If those options are not being exercised to the full extent possible, it is likely because of agency understaffing or underfunding (for example, at the FPPC), not to any deficiencies in the available mechanisms themselves. There may be value, however, in outreach or educational efforts designed to inform the public and campaign personnel about the enforcement and penalty provisions that already exist. The steering committee's hope is that doing so will both reduce the number of violations and satisfy the public that adequate protections are in place.

Public Financing of Judicial Elections

Recommendation 45
Spending in connection with judicial elections should be closely observed for developing trends that would indicate a need to reconsider whether to sponsor legislation to create a system of public financing at the trial court or appellate court level, but such legislation should not be sponsored at this time.

Discussion: There has been increased nationwide interest in recent years in the public financing of elections. Some states have adopted systems of full or limited public funding, including for judicial elections. The primary purpose of the latter is to reduce or eliminate the potential influence or appearance thereof of campaign contributions on judicial decisions.

However, as has been noted in this report, the instances of concern that have occurred elsewhere in the country in connection with judicial elections have been at the appellate level, primarily in supreme court races, and it is quite possible that such instances have not yet occurred in California because of its nonpartisan retention elections for the

appellate courts. Whatever the reasons, the steering committee concluded that there has not been a demonstrated systemic need for public financing in California, which, when taken together with the limitations of public financing and the state's continuing fiscal problems, has caused the steering committee to recommend against it at this time. That recommendation is subject to the caveat that future events—such as trends showing increased spending and fundraising in California—may require further consideration of the issue in the future.

In arriving at its conclusion, the steering committee considered several aspects of public financing generally, including how such systems may be structured, the implications for such a system on judicial elections, and how such a system might be structured in connection with retention elections.

Public financing systems in general

The first area of consideration was ways in which public financing systems, all of which are voluntary under constitutional jurisprudence, may be structured. For example, some public financing systems are structured as "clean money" systems, in which candidates collect a certain number of small, qualifying contributions and are then eligible to receive a lump-sum grant to cover the full cost of a basic campaign. In those systems, if one candidate opts in and another does not—and if the nonparticipating candidate raises funds over a certain amount (usually all or a substantial percentage of the participating candidate's spending limit)—the participating candidate gets a 1-to-1 match in public funds up to a certain specified cap, which is typically two or three times the base spending limit. A similar matching program applies to IEs made in support of a nonparticipating candidate or against a participating candidate.

In considering different potential public financing models, the steering committee recognized that, under all of the models, nonparticipating candidates remained free to outspend participating candidates. For example, if a wealthy, self-funded candidate or a well-funded IE group were determined to spare no expense to defeat another candidate, it is likely that no public financing system could ever fund the targeted candidate on an equal level. Thus, any recommended system would, at best, increase the ability of a participating candidate to get out his or her message, and certain hot button issues could cause an influx of money in an election in an amount that exceeds a public financing system's ability to address.

Public financing of judicial elections generally

In judicial elections in particular, the steering committee noted the challenge in convincing the public of the need for and the importance of public financing, especially in light of California's current fiscal crisis. Any recommended system would need to be funded at a level that is both palatable to the public and meaningful to the candidates.

There was also consideration given as to whether a capped public financing system could work in California. Given California's size and the potential amount of money that could be spent on a judicial race here, there is a concern that a cap at any fiscally manageable level would be seen as too limiting, and thus might make public financing an unappealing choice for candidates. On the other hand, no jurisdiction to date has ever implemented a public financing system that did not have some cap in place to limit the overall amount of public funds that any given candidate may receive, and the lack of such a cap could be both politically and financially unworkable.

The steering committee also discussed more limited forms of public financing for judicial elections. For example, it might be possible to use public funds to offset the cost of judicial candidates' candidate statements, the cost of which are currently set on a county-by-county basis, resulting in a significant disparity in the cost of simply entering a judicial race. As an alternative, public funds could be used to prepare educational biographies or some other means of informing the public about judicial candidates.

Assuming a workable, fiscally sound system could be developed, the steering committee agreed that public financing generally could have a positive effect in terms of furthering the appearance of judicial impartiality by lessening the influence of outside monetary contributions to judicial candidates. Put another way, public trust and confidence in the impartiality of the judiciary might increase if the public felt that judges and justices could make rulings free from the threat of disproportionate amounts of money being spent to unseat them if they rule in a particular way. On the other hand, the steering committee recognized that while it is possible and reasonable to distinguish candidates for judicial office from other candidates, it could nonetheless prove difficult to enact a public financing system applicable only to judicial races.

Public financing of trial court (i.e., contested) elections

Preliminarily, the steering committee noted that the few other states that have public financing of judicial elections do so only at the appellate court level; no state has adopted public financing of trial court elections. Considering the issue in the context of California, the steering committee agreed that there has not to date been a demonstrated systemic problem of large sums of money being spent in trial court elections sufficient to warrant creating a system of public financing at that level. Further, it is possible that providing public financing at the trial court level could increase the number of candidates, making judicial elections more competitive and resulting in the types of campaign tactics that have undermined public trust and confidence in other states.

Public financing of appellate (i.e., retention) elections

Currently, only a few states have public financing of judicial elections, and then only for contested appellate races. The steering committee is of the view that in California, with our system of appellate retention elections, public financing would arguably be less

effective than in other states. This is due in large part to (a) the potential public perception that such financing unfairly favors the incumbent, and (b) the unpredictability of an adequate funding level, given the potential resources of IE groups that would be spending money to oppose a candidate's retention bid.

The steering committee's first concern was that any system that provides public funds to retention candidates could be seen as unduly favoring incumbents by giving them public monies, while those seeking to unseat them are forced to rely on private funding for their advertising. On the other hand, and as discussed above, appellate justices in California typically do not have an established voter base, so the presence of public financing might instead be seen as leveling the playing field between those candidates and outside moneyed interests. Further, the role of justices—as with all judicial officers—is to make decisions based on the rule of law, even where those decisions may be unpopular. The steering committee noted that appellate justices, especially those at the Supreme Court level, are particularly susceptible to high-dollar attacks based on rulings that are legally sound yet socially unpopular, which argues in favor of some system of public financing to allow justices to respond at least on some level to campaigns designed to unseat them.[53] One way to alleviate possible concerns about public financing of retention elections would be to make a candidate's receipt of public funds contingent on that candidate being evaluated—possibly in a nonelection year—by an appropriate body and receiving a rating of a certain level.

The steering committee's second major concern related to the fact, discussed above, that where spending occurs at all in an appellate election, it is likely to be at a relatively high level, particularly where an IE group makes a concerted effort to unseat an incumbent candidate. Thus, there is a question about whether it would ever be possible in California to fund an appellate-level public financing system at a meaningful level sufficient to meet the needs of participating candidates.

Assuming that a publicly acceptable and adequately funded system could be put into place, questions remain as to the logistics of how that system would work in the retention context, i.e., where there is no actual "opponent" against whom to track and match funds. One possibility would be to put the available public funds into a sort of "escrow." As IE spending in opposition to a candidate occurred, the candidate could withdraw money from the escrow according to a certain ratio, e.g., for every dollar spent against a candidate, the candidate could withdraw a dollar from the escrow.

The steering committee ultimately concluded that there has not to date been evidence of a systemic problem in California with respect to large sums of outside money being spent in appellate elections. This is likely due in large part to the fact that appellate elections in

[53] It is also possible, however, that IEs could be made in support of a justice's retention campaign, as opposed to being contributed directly to the justice him- or herself.

California are nonpartisan retention elections. Nonetheless, the possibility exists that even though moneyed interests have no ability to select the replacement for a justice who is defeated in a retention bid, such interests might still decide it is worthwhile to spend significant amounts of money in an effort to unseat a justice. This is particularly true with respect to social issues. Given California's budget, it is uncertain whether any system of public financing could ever truly address, on a fiscal level, concerted "attacks" designed to unseat appellate justices.

However, the steering committee recommends that spending trends in California be closely monitored on an ongoing basis, and that this issue be revisited if the trends seen in other parts of the country become more prevalent in California's appellate elections. In the face of such spending trends, even the mere presence of a public financing system could curtail certain "attack" campaigns and would likely increase public trust and confidence by creating a safety net so that justices would not appear to be reluctant to make unpopular decisions simply as a way to avoid having to raise money to respond to such "attack" campaigns.

Public Information and Education

The steering committee's recommendations in this section of the report address the need to educate and inform the public. They also provide practical guidance for dealing with the media, providing information to voters, and defusing unfair criticism. The recommendations call for a branchwide leadership group to identify, coordinate, and facilitate court, community, and education outreach efforts; develop a strategic plan for a meaningful contribution to civics education; and look for opportunities to educate the public, enhance judicial awareness of the media, and cultivate partnerships with other branches of government.

In arriving at its recommendations on public information and education, the steering committee focused on ways to prevent or respond to unfair criticism, personal attacks on judges, and institutional attacks on the judiciary; inappropriate judicial campaign conduct; and other challenges to judicial impartiality arising from unpopular judicial decisions. The steering committee considered available avenues to develop and strengthen partnerships with other organizations, such as state and local bar associations, educational institutions, and the CJA, which has a program for responding to criticism of judges.

In connection with these recommendations, the steering committee has provided a model rapid response plan for responding to unfair criticism (attached as Appendix I), a tip sheet for judges to use when responding to press inquiries (Appendix J), proposed language describing the role of the judiciary in a democracy for inclusion in voter pamphlets (Appendix K), and a detailed guide on developing a strategic plan to promote and implement quality civic education and education about the courts in public schools throughout California (Appendix L).

Public Outreach and Response to Criticism

Democracy can thrive only with the informed participation of its citizens. State and federal constitutions have given the three branches of government different roles and responsibilities. Of the three branches, the judiciary is the least understood by the public. The goal of each of the recommendations below is to better inform the public about the rule of law and the importance of an independent judiciary in its implementation.

Recommendation 46

A leadership advisory group should be appointed to oversee, identify, and coordinate public outreach programs and opportunities; to establish benchmarks of good practice; and to promote the assembly of local teams to assist courts with local outreach programs.

Recommendation 47
The AOC should collect, summarize, and evaluate public outreach resources currently available for judges and court administrators and should also collect, summarize, and evaluate educational materials for K–12 teachers and for judges and court administrators making classroom visits. These efforts should include the following:

- Creating a repository of all public outreach resources;
- Assigning AOC staff to coordinate outreach, education, and voter education efforts at the state and local level;
- Cultivating leaders who would make use of the repository in local courts;
- Creating a standing advisory group on public outreach that would help the judicial branch maintain a focus on outreach efforts;
- Maintaining a menu of public outreach options for local courts;
- Establishing benchmarks of good practice and promoting the assembly of local teams to assist courts with local outreach programs; and
- Encouraging bench-bar coalitions to reach out to key stakeholders and interest groups, including political parties, in order to increase awareness and understanding of the judicial branch.

Recommendation 48
The AOC should maintain a menu of public outreach options for local courts that will:

- Reflect the diversity of the state's demographic and geographic differences and include descriptions of the programs, the targeted audiences, and where they can be used; and
- Explore ethnic media outlets to reach more audiences and investigate multimedia outreach opportunities, such as the California Courts Web site, local court Web sites, radio, podcasts, public service announcements (PSAs), public video hosting sites, instant messaging, and the California Channel.

Recommendation 49
The judicial branch should more fully embrace community outreach activities.

Discussion: Rule 10.603 of the California Rules of Court requires the presiding judge to support and encourage judges to actively engage in community outreach to increase public understanding of and involvement with the justice system and to obtain appropriate community input regarding the administration of justice. In addition, standard 10.5 of the Standards of Judicial Administration provides that judicial participation in community outreach program activities should be considered an official judicial function in order to promote public understanding of and confidence in the administration of justice.

Recommendation 50
The standing advisory group mentioned in recommendation 46 should partner with local courts, bar associations, the CJA, the NCSC, the State Bar, and others to offer outreach and public information programs and media guidelines to courts or regional areas.

Discussion: The AOC currently has a vehicle to facilitate outreach practices. The Connecting with Constituencies Program was designed to help trial courts engage their constituency groups in a meaningful dialogue to improve courts and do strategic planning. The program stems from the Judicial Council's short-term strategy to revive community-focused court planning in response to the 2005 Public Trust and Confidence Survey in the California Courts. The program is currently being used to help courts with their Web sites.

Recommendation 51
Web sites should be enhanced to include the role of the judicial branch and explain how judges are elected, and information concerning how judges are elected should be placed prominently on the California Courts Web site.

Discussion: Because Web sites serve as the public face of the trial courts, current AOC plans include developing resources to help interested trial courts redesign their Web sites. Information about how judges are elected should be placed prominently on the California Courts Web site.

Recommendation 52
A compelling video on the role of the judicial branch should be created for use in various venues.

Discussion: The steering committee agreed that funds should be identified to retain a documentary filmmaker to create a brief and compelling video that illustrates the critical role an impartial judiciary plays in a democracy. The film would be general in focus in order to address various audiences, including the general public, community groups, jurors, and high school seniors. Incorporating video clips of judges in various courts, including drug court and peer court, is suggested. Reference to support materials for teachers (e.g., curriculum, creative ideas for usage, online tools) is also recommended to help teachers use the video. The steering committee feels that the video and support materials should be internet-based.

Recommendation 53
A model for responding to unfair criticism should be adopted, as should tips for judges to use when responding to press inquiries. (See Appendix I, Rapid Response Plan: A Model Guideline for Responding to Unfair Criticism of the Judicial Branch, and Appendix J, Responding to Press Inquiries: A Tip Sheet for Judges.)

Recommendation 54
A leadership group should be created to provide ongoing direction and oversight of the response plan recommended in recommendation 53 and to ensure that the services it proposes are provided in an enduring manner. The proposed group should also consider creating a model plan that can serve both as a plan for responding to unfair criticism and as a campaign oversight plan.

Discussion of recommendations 53 and 54: The steering committee has adopted guidelines developed by the Task Force on Public Information and Education for responding immediately to unfair criticism of or unusual media attention toward the judicial branch or a judge when the criticism or attention threatens to undermine fair and impartial courts. The Rapid Response Plan: A Model Guideline for Responding to Unfair Criticism of the Judicial Branch (see Appendix I) is intended to be used by existing local and statewide associations. Through the adoption of a rapid response plan, accurate, consistent, and timely information can be provided while maintaining the public's trust and confidence in the justice system.

In coordination with this plan, the task force also developed Responding to Press Inquiries: A Tip Sheet for Judges as guidelines for judges concerning ethical constraints when speaking to the public about cases. These guidelines, which the steering committee has also adopted, are in Appendix J.

The steering committee also proposes that a leadership group provide ongoing direction and oversight of this plan and ensure that the services it proposes are provided in an enduring manner. The leadership group should consider creating a model plan that can serve both as a plan for responding to unfair criticism and as a campaign oversight plan.

Recommendation 55
Media training programs should be institutionalized and judges and court administrators should continue to be educated on how to interact with the media.

Discussion: The steering committee agrees that media training should be offered in programs such as New Judge Orientation, Judicial College programs, and judicial leadership programs, as well as through the Trial Court Presiding Judges, Court Executives, and Appellate Advisory Committees. Such programs currently exist throughout the nation. The *California Judicial Conduct Handbook*, published by the CJA, has a section on dealing with the media, and the AOC recently published the *Media Handbook for California Court Professionals.* The National Judicial College, working with the NCSC and the media, has three programs aimed at journalists, judges, and court staff. Referred to as "law school for reporters," these programs exist in various counties.

The steering committee believes that the recommended programs should be ongoing because of leadership and journalist turnover.

In addition to these efforts, the Bench-Bar-Media Committee, chaired by Associate Justice Carlos R. Moreno of the California Supreme Court, was appointed by the Chief Justice in March 2008. The purpose of this committee is to help foster improved understanding and working relationships between California judges, lawyers, and journalists. The committee will be considering a variety of issues, such as media access to public records and the use of cameras in the court, and will facilitate the creation of local bench-bar-media committees.

Recommendation 56
Training for the media in reporting on legal issues—including a possible journalist-in-residence fellowship at the AOC—should be supported and facilitated, and funding for that training should be sought.

Discussion: Current media education programs should be supported and leveraged to educate the media on legal affairs reporting. Following research and collaboration with the Bench-Bar-Media Committee, AOC staff should draft an effective practice curriculum for educating the media, including a journalist-in-residence program at the AOC.

Recommendation 57
Training should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily grasped by the media.

Discussion: In the steering committee's view, many judicial opinions are not written in a manner that is easily digestible by nonattorneys. Introductory remarks or paragraphs could summarize a case and the court's decision in a way that can enhance media accuracy.

Recommendation 58
Local and statewide elected officials should be educated on the importance of the judicial branch.

Discussion: Some attacks against the judicial branch come from politicians. Term limits may cause legislators to lack knowledge of the branch. The steering committee is of the view that such legislators would benefit from a basic introduction to the courts. Many programs already exist and should be reinforced for local use with local representatives. The following examples are all run by the AOC's Office of Governmental Affairs:

- A Legislative-Executive-Judicial Forum follows the Chief Justice's annual State of the Judiciary address to a joint session of the Legislature;
- The Bench-Bar Coalition meets with legislators at the state capital during Day in Sacramento activities;
- A Day-on-the-Bench is a statewide program in which legislators spend a day visiting a court; and
- The New Legislator Orientation Program affords an opportunity to meet and interact with new members and provide education about the branch.

Recommendation 59
Leaders should be encouraged to inspire others to engage in outreach efforts.

Discussion: The judicial branch should encourage local champions in each court who will inspire other judges or local bar members to engage in outreach efforts. Some suggestions include:

- Matching sister counties to partner on outreach programs;
- Posting a court's total outreach hours on a Web site;
- Awarding continuing education credits for involvement in education efforts; and
- Encouraging retired judges to engage in outreach efforts.

Recommendation 60
Groups in public settings should be educated about the importance of the judiciary.

Discussion: The education recommended by the steering committee could be done through videos, brief talks, newsletters, or questionnaires. In considering appropriate public settings for such education, the steering committee considered, for example, jury assembly rooms. Potential jurors could be educated via juror questionnaires or videos in the assembly rooms, by listening to a judge reviewing the process after a trial or dismissal, or by receiving a thank-you postcard. Other opportunities to reach audiences include outreach to attorneys renewing State Bar dues, law students requesting bar applications, law enforcement training programs, business schools, the Department of Motor Vehicles, and other licensing agencies.

Recommendation 61
A video on the function and importance of the courts should be created for local court Web sites.

Discussion: The steering committee suggests that the recommended video include an explanation of how judges are appointed or elected.

Recommendation 62
The feasibility of a channel for the judicial branch on one or more public video hosting sites[54] should be studied.

Discussion: The steering committee recommends that the AOC investigate the possibility of establishing a judicial branch channel on one or more public video hosting sites such as YouTube.[55] One model for possible consideration is the California State YouTube channel that was launched in 2008 by the executive branch. The steering committee envisions that the judicial branch channel would be dedicated to improving public outreach and education and would feature programming from the AOC, the Judicial Council, the Supreme Court, and the trial courts.

Recommendation 63
Courts should be identified to pilot programs dealing with community outreach and education.

Education

A fair and impartial court system is vital for maintaining a healthy democracy, protecting individual rights, and upholding the Constitution. The strength of the judiciary requires that each new generation of citizens understand and embrace our constitutional ideals, institutions, and processes. While a focus on K–12 education is a broad and ambitious aspect of the CIC's overall charge, the steering committee agrees that the judicial branch should take a leadership role to ensure that every child in California receives quality civics education and to encourage and support judges, courts, and teachers in the education of students about the judiciary and its function in a democratic society.

One concern driving the steering committee's recommendations in this area is the impression that students may lack the knowledge and skills to participate effectively in government because of a lack of K–12 civics education. State education testing is focused on math and English and will soon include science. It appears, however, that social studies are not considered an education priority in school districts, given the lack of testing in that area.

To imprint a subject, children need multiple experiences, not just one, yet there are no long-term civics educational programs spanning multiple years of a student's education. Cultural differences due to immigration coupled with a multiplicity of languages increase the complexity of reaching children. The steering committee believes that the judicial branch's attention should be focused on framework and standards committees that

[54] One example of such a site is YouTube.
[55] The steering committee notes that as of the date of this report, the AOC is currently investigating how YouTube works and whether there are any problems or issues with posting state videos to that site.

establish what is taught in schools. Programs need to be institutionalized within each county and spearheaded by the branch as a whole, rather than left only to the initiative of individual judges. An additional challenge is the requirement for evidence-based evaluation criteria for such programs.

Connecting with ethnic groups is also important, and the steering committee believes that the best way to reach immigrant populations is by reaching school-age children, who often help their families become familiar with local culture. The steering committee is concerned, however, that students at high-impact schools may have less opportunity for learning social studies and related topics because of those schools' focus on math, reading, and science. A recent study found that nonwhite students from low-income families attending high schools in lower socioeconomic areas receive significantly fewer high-quality civic learning opportunities than other students.[56]

The Constitutional Rights Foundation (CRF) provides a number of programs for children in grades 3–12. CRF is a nonprofit educational organization offering programs, publications, videos, and training on many fronts. All programs are in compliance with state educational standards. Unfortunately, not all schools have the opportunity to take advantage of these programs.

As an example, the Mock Trial Program helps to develop critical thinking skills as students role-play in a hypothetical criminal case. To date more, than 8,000 students in 36 counties have participated. Students compete in state finals. As another example, the Youth Internship Program has served more than 1,100 primarily low-income and first-generation college-bound high school students. The seven-week program is a unique combination of paid employment in professional office environments and participation in educational seminars. These programs not only influence the children, they also educate their parents. Other CRF programs available are the Appellate Court Experience, Courtroom to Classroom (for middle schools and senior high schools), and the Summer Law Institute. Thirty thousand copies of the Bill of Rights are mailed out to the schools annually. Lesson plans are offered online for Constitution Day and History Day. CRF assistance is provided to any county bar, school system, or court interested in planning a program of this type or other programs offered.

The Bar Association of San Francisco sponsors the Law Academy and School to College programs, successful instructional and mentoring programs for students at low-income high schools, as vehicles to teach about impartial courts.

[56] Joseph Kahne and Ellen Middaugh, *Democracy for Some: The Civic Opportunity Gap in High School,* CIRCLE Working Paper, # 59, Washington, D.C., The Center for Information & Research on Civic Learning and Engagement, 2008.

There is a wide array of other California superior court K–12, law-related and civics education programs, including the California Supreme Court's special outreach sessions for high school students; the Appellate Court Experience program; the upcoming Courts in the Classroom Web site; various youth and peer courts throughout the state; Peer Courts DUI Prevention Strategies Program; and other programs through the AOC's Center for Families, Children & the Courts. These are effective programs that some educators simply do not know exist. The steering committee seeks to combine resources and help make these programs accessible.

Recommendation 64
Strategies for meaningful changes to civics education in California should be supported.

Recommendation 65
A strategic plan for judicial branch support for civics education should be developed. (See Appendix L, Proposed Strategic Plan to Improve Civics Education.)

Discussion of recommendations 64 and 65: The steering committee believes that the Judicial Council should continue to participate in strategies to elevate the importance of civics education, which should begin in kindergarten. Such education should include broad concepts about democratic and republican forms of government and should not be limited to the importance of courts and their impartiality. Academic standards for civics education already exist, and the Judicial Council should lobby support for having the schools honor those standards and strengthen the quality of their instruction.

To that end, the steering committee notes that a meeting was held with Mr. Jack O'Connell (State Superintendent of Public Instruction), Justice Ming W. Chin, CIC member Bruce Darling, Justice Judith D. McConnell, and CIC project director Christine Patton. The meeting was requested to discuss the appointment of the commission and the lack of in-depth civics education in the K–12 curriculum framework. As a result of this conversation, two letters were prepared and sent to Superintendent O'Connell. One covered the current history/social science framework and its lack of consistent coverage concerning the role of the judicial branch. The second recommended a teacher for appointment to the History-Social Science Curriculum Framework and Evaluation Criteria Committee. Superintendent O'Connell also recommended meeting with the Educational Testing Standards (ETS) Board.

Additional actions that could be taken in support of these recommendations include:

- Seeking judges to comment at the Board of Education open meetings on curriculum standards;
- Encouraging the courts and bar associations to participate in Law Day, Constitution Day, and Bill of Rights Day; and

- Researching collaborative efforts between the National Archives, California museums, California schools, and the Judicial Council whereby schoolchildren would travel to museums to view seminal documents on American history.

In an effort to strengthen civics education in our schools, the Task Force on Public Information and Education developed components to be included in a strategic plan referred to as Proposed Strategic Plan to Improve Civics Education (see Appendix L). Because a leadership body has yet to be appointed, however, the full development of a strategic plan would have been premature.

Recommendation 66
Political support should be sought from leaders in the Legislature, State Bar, law enforcement community, and other interested entities to improve civics education.

Discussion: The steering committee agrees that one way to improve civics education is for the Judicial Council to partner with influential groups such as the Governor's Office, the Legislature, the Department of Education, and the Constitutional Rights Foundation's California Campaign for the Civic Mission of Schools to improve civics education. The steering committee notes that California economists were successful in revising curriculum standards to include an economic component, and in connection with this recommendation, suggests that the model used by those economists be researched and possibly duplicated with respect to civics education.

Recommendation 67
Teacher training programs, curriculum development, and education programs on civics should all be expanded to include the courts.

Discussion: The steering committee notes that numerous training programs already exist in this state. For example, more than 100 K–12 teachers from around the state have participated in California on My Honor: Civics Institute for Teachers, with 60 expected to participate in 2009. The AOC and the State Bar provide teacher stipends for the four-day training. The program has been conducted for three years and therefore has reached more than 15,000 students. In addition, the AOC developed Courts in the Classroom, a Web tutorial for 8th–12th graders focusing on the judicial system. That tutorial includes a teacher's resource manual. Participants of the Civics Institute for Teachers and a few trial courts have reviewed the tutorial and are supportive of its use in the classroom. Thus, numerous programs are available to any interested school or bar association from the CRF.

Programs offered in other states were also reviewed and discussed. Justice R. Fred Lewis of the Florida Supreme Court gave a presentation to the Task Force on Public Information and Education on Justice Teaching, a program developed for the Florida

courts in 2006. The program calls on judges and lawyers to serve as resources for teachers and students in 3,000 K–12 schools. Justice Teaching has been successful because Justice Lewis, the Chief Justice at the time of the program's inception, spearheaded the effort, met with all presiding judges in the state, developed a governance structure, and established partnerships with the county superintendents of schools and each school's principal. The Florida Law Related Education Association provided funding and staff support to the program. The volunteer judges and lawyers are required to attend the Justice Teaching Institute to receive training on the lesson plans and Continuing Legal Education (CLE) credits.

The steering committee considered the elements of the Florida program essential to the success of providing education on the judicial system in K–12 schools. The components include enlisting a high-profile champion, appointing an oversight committee to provide support to a sustainable program, developing a strategic plan, developing a governance structure, identifying allies, and establishing partnerships.

The Educating for Democracy, California Campaign for the Civic Mission of the Schools, working with the Assembly Education Committee, introduced Assembly Bill 2544 (Mullin), a model civics education staff development program. At the request of the Task Force on Public Information and Education, the Judicial Council voted to support the measure, as did the League of Women Voters. The measure did not pass, and the steering committee recommends continued support of the measure by the Judicial Council.

Currently, the state Department of Education and the state Board of Education are reviewing the history and social science K–12 curriculum framework and evaluation criteria in 2009 and will move to adopt a new curriculum framework in 2011. The steering committee urges the Judicial Council and the AOC to take all steps necessary to ensure effective participation in the review of the curriculum framework and evaluation criteria.

Recommendation 68
Presiding judges should be encouraged to grant CLE credits to judicial officers and court executive officers conducting K–12 civics and law-related education.

Discussion: The Standards of Judicial Administration currently state that judicial participation in community outreach programs should be considered an official judicial function. The system is already in place for judges and court administrators to receive credit for teaching in K–12 classrooms. At the discretion of the presiding judge, a judge or administrator conducting classroom teaching may receive up to seven credits every three years under the category of self-directed study/learning. They are required to earn a total of 30 hours of education every three years. (Cal. Rules of Court, rules 10.451–

10.481.) The steering committee agreed that most who participate are committed to teaching with or without credits but noted that it would do no harm to create the opportunity for credits.

Recommendation 69
The State Bar Board of Governors should be asked to grant Minimum Continuing Legal Education (MCLE) credits to attorneys conducting K–12 civics and law-related education programs.

Discussion: Continuing education for attorneys is governed by rule 9.31 of the California Rules of Court and by 2.72 MCLE Rules and Regulations. The requirements are 25 hours every three years; self-directed study is limited to 12.5 hours every three years. Unfortunately, education activities on legal topics presented to nonlawyers are not considered activities for which MCLE credits can be obtained.

Recommendation 70
The AOC should be directed to help pilot extensive civics-related outreach in three jurisdictions.

Discussion: The steering committee recommends that the AOC pilot extensive outreach in three jurisdictions—to be determined—following collecting and evaluating outreach programs and making them available in a single repository.

Recommendation 71
Recognition programs that bring attention to teachers, judges, and court administrators who advance civics education should be promoted.

Discussion: In the steering committee's view, recognizing individuals will reinforce outreach practices and encourage others to participate.

Voter Education

An engaged and educated electorate is essential to maintaining public trust and confidence in a fair and impartial court system. Voters are entitled to abundant, full, and fair information that empowers them to make informed choices about candidates for judicial office. The steering committee agrees that the judicial branch needs to play an active role in encouraging a more informed and aware voting public, including affirming for courts and judges the value of providing neutral information to voters, creating resources for coordination of voter education and outreach efforts by the courts, and advocating for legislative and rule changes that would provide greater and more useful information for voters.

National efforts support that there is a need for enhanced voter education about judicial elections. In 2002, the nonpartisan Justice at Stake Campaign was created by a national partnership of 45 judicial, legal, and citizen groups to educate the public about the importance of fair and impartial courts. That same year, Justice at Stake hired a research and communications firm to conduct focus groups on judicial elections. The focus groups indicated that although voters would like to know how judges would decide particular issues, they are generally satisfied by candidate statements and general information regarding legal and professional experience, work, history, and education. There is a lack of consistency in this state on judicial candidate information provided to voters. Some bar associations conduct and publish judicial candidate evaluations, but the current candidate information in voter pamphlets was not designed for judicial candidates.

Recommendation 72
Judicial branch leaders should encourage judicial candidates to participate in candidate forums and respond to appropriate questionnaires.

Discussion: One possibility that the steering committee considered in connection with this recommendation is approaching the Chief Justice about communicating the importance of judicial participation in candidate forums, perhaps in a letter to the state's judges.

Recommendation 73
Information about how judges are elected should be incorporated into outreach efforts and communications with the media.

Discussion: This recommendation includes placement of this information in a prominent location on the California Courts Web site, as is currently provided on the Web sites of the Courts of Appeal.

Recommendation 74
Web traffic to existing nonpartisan sources of information should be increased by partnering with other groups, such as bar associations.

Discussion: The steering committee believes that citizens should have numerous avenues and opportunities for obtaining information on judicial elections. Currently, there is no statewide coordinated effort on voter education. The Judicial Council and the AOC should help courts set up communication networks and coordinate and share voter education practices. The creation of a video on the importance of the courts and an explanation of how judges are appointed or elected for local court Web sites would inform voters logging on to the sites. Voter education would benefit from pilot projects and recognition programs.

Recommendation 75
Collaboration should be established between the Judicial Council, the League of Women Voters, the California Channel, and other groups to inform voters.

Discussion: The recommended collaboration could take the form of outreach videos, voter guides, and Public Service Announcements. By way of example, a video could be created containing interviews with judicial candidates.

Recommendation 76
AOC staff should be directed to coordinate voter education and to assist the courts in setting up frameworks for coordinating and sharing practices.

Recommendation 77
Politically neutral toolkits for judicial candidates regarding voter information and best practices on public outreach should be developed.

Discussion: It is important that the recommended toolkit be neutral, not election specific, and that it be accessible by both judges and candidates. The model toolkit could be developed following focus group input and legal research. For example, it could include:

- Campaign conduct guidelines;
- Guidance on completing candidate questionnaires; and
- Inclusion or links to candidate biographical information.

Recommendation 78
Voter focus groups should be conducted within California to determine what to provide in educational materials.

Discussion: In addition to other benefits, the use of voter focus groups in this state would establish credibility in the development of educational materials. The LegiSchool Project is an 8-minute video on the voting process. Justice at Stake hired a research and communications firm to conduct focus groups on judicial elections. The results indicated that although voters would like to know how judges would decide particular issues, they are generally satisfied by candidate statements and general information regarding legal and professional experience, work history, and education.

Recommendation 79
A consultant should be engaged to review the most effective uses of multimedia tools to promote voter education.

Discussion: Examples of such multimedia tools include the California Courts Web site and possible links to other sites. Review by an outside consultant could explore one-way content delivery systems such as podcasts, YouTube-like platforms, and instant messaging.

Recommendation 80
Statements that educate voters about judicial candidates and the state's court system should be placed in sample ballot statements or other voter education guides. (See Appendix K, Judicial Elections: Proposed Language for Voter Pamphlets.)

Discussion: Such statements in voter education guides would educate voters about the judicial candidates and their state's court system. The steering committee noted that the California judicial branch does not provide this type of information in voter guides and that it is important to do so. General descriptions concerning the responsibilities of judges should emphasize that judicial officers must be insulated from public pressure and remain free to decide each case fairly and impartially. Placing the responsibility for including these statements on individual judicial candidates is not ideal, as California has the highest candidate statement fees in the country, thus raising issues of fairness, accessibility, and consistency. Sample text from Kentucky and Utah were reviewed and provided guidance to the Task Force on Public Information and Education, which developed the proposed language in Appendix K, Judicial Elections: Proposed Language for Voter Pamphlets.

The steering committee also suggests that an opinion be sought from the AOC's Office of the General Counsel on whether it is legally permissible for the California Courts Web site or local court Web sites to include links for election information.

Education of Potential Applicants for Judgeships

Recommendation 81
The State Bar should be asked to offer an educational course to potential judgeship applicants in conjunction with the National Judicial College at the joint Judicial Council/CJA/State Bar conference in 2009.

Discussion: The steering committee considered a proposal regarding education for people considering applying for a judicial position that has been proposed by the Ohio State Bar Association and ABA Standing Committee on Judicial Independence. A copy of the proposal is attached to this report as Appendix M.[57] The steering committee recommends

[57] This proposal was originally made at the last ABA annual meeting in 2008 but was withdrawn for reintroduction at the midyear meeting in February 2009 in Boston. The revised version of the proposal is the one attached.

that the State Bar be asked to offer such a course as a trial program in conjunction with the National Judicial College at the joint Judicial Council/CJA/State Bar conference in 2009, most likely as part of an expansion of the "So You Want to Be a Judge" program. Based on the trial program experience, the course may become part of the regular biennial conference and may also be modified and offered elsewhere.

Accountability

The judicial branch must work to enhance trust and confidence in the courts through access, procedural fairness in court proceedings, and judicial accountability. Assuring the public that the judiciary is accountable means that courts and judges exhibit high standards of impartiality, lack bias, exercise courtesy and professionalism, and promote efficiency and timeliness.

The judicial branch has recognized the importance of these values. The second goal of the judicial branch's long-term strategic plan is "independence and accountability." Consultant Bert Brandenburg related that independence and accountability are equal in the eyes of the public and that the road to independence is through accountability. The most significant issue regarding accountability is the public's lack of awareness about current accountability measures for courts. However, with or without a system of evaluation, there will still be attacks on judges.

After considering judicial performance evaluations, the steering committee noted many potential problems, but it nonetheless recommends that some further study be undertaken.

Recommendation 82
Study should be undertaken and recommendations made regarding confidential self-improvement evaluations (optional or otherwise) for judges.

Discussion: The steering committee considered the use of judicial performance evaluations but did not agree about the benefit of studying them further. However, there was general consensus that some sort of confidential evaluation measures may be appropriate for the purposes of judicial self-improvement, so further study in that regard has been recommended.

Recommendation 83
The public should be informed that systems are in place to deal with judicial performance issues in fair and effective ways, including elections, appellate review, judicial education, media coverage, the Commission on Judicial Performance, the State Bar's Commission on Judicial Nominees Evaluation, and local bar association surveys.

Discussion: The steering committee believes that the most significant issue regarding accountability is the public's lack of awareness about current accountability measures for courts. These include elections, appellate review, judicial education, media coverage, the CJP, the State Bar's Commission on Judicial Nominees Evaluation (JNE), and local bar association surveys. Public outreach and voter education efforts should inform the public that systems are already in place to deal with judicial performance issues in fair and effective ways.

Recommendation 84
More widespread participation by the courts and the AOC should be encouraged in CourTools or similar court performance measures and in the development of toolkits and mentoring programs for courts that wish to participate in such projects.

Discussion: Court measurement tools, such as the NCSC's current CourTools pilot project now under way in California, are potentially very useful. Designed by the NCSC to help courts evaluate and improve their performance, the measurements may improve court processes and make court systems more accountable. Eleven trial courts in California have implemented CourTools.

One court that has implemented 10 measures of CourTools plans to post the results of its largely positive assessment on its Web site. That court is also using the findings from CourTools to update its strategic plan. And while CourTools requires more staffing time to implement, the steering committee agrees that CourTools provides transparency and accountability and can be modified to reduce staffing time.

Judicial Selection and Retention

Merit Selection and Judicial Selection Under the JNE Process

Recommendation 85
The JNE process, a unique form of a merit-based screening and selection system that has served California well, should be retained in lieu of adopting another form of merit selection such as the "Missouri Plan" and expanded to apply to all contested judicial elections.

Discussion: The fundamental goal of all merit selection systems is to produce the best-qualified nominees for appointment to the bench. The JNE system in California serves this goal by providing for a thorough, nonpolitical evaluation of the professional qualifications and fitness to serve of all candidates for judicial appointment submitted by the Governor to JNE. Further, the statutory requirement that all potential appointees must undergo JNE review prior to appointment discourages unqualified applicants from seeking appointment to the bench and constrains governors from nominating unqualified people for judicial vacancies.

The selection process that has come to be known as "merit selection" first appeared in 1940 with the adoption of the "Missouri Plan." The American Judicature Society's model merit selection plan calls for a judicial nominating commission to recommend nominees to the appointing authority, executive appointment, and retention elections after brief initial terms of office. Some states have a fourth component—confirmation of executive appointments. California's selection process shares many of the same features as the traditional merit selection process, except that the JNE Commission evaluates only those candidates whose names are submitted by the Governor.

The pros and cons of merit selection have been debated extensively. Advocates of merit selection, including the American Judicature Society, argue that such systems strike the appropriate balance between judicial independence and accountability to the public, place the focus on professional qualifications in the initial selection of judges, and reduce or eliminate electoral campaigning, interest group influence, and fundraising from judicial selection. Critics of merit selection plans maintain that the politics of the organized bar replace the politics of contested elections and that merit-selected judges as a whole are not demonstrably more qualified or competent than their elected counterparts.[58]

In 33 states and the District of Columbia, a merit selection system is used to select some or all judges at different points in the initial selection process. No two states use precisely

[58] See Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges* (1987) 70 Judicature 228. Differences in educational and professional backgrounds were attributable to region rather than selection method.

the same merit selection system. Fourteen states use merit selection for all judges at all times, while nine states use it only for appellate judges and in some instances for trial court judges in some jurisdictions. In addition, nine states use such systems only to fill midterm vacancies on some or all levels of court. There are significant variations among states in nominating commission rules and procedures, the number of nominees sent to the appointing authority, and the binding nature of the commission's nominations on the appointing authority, among other features.[59]

Recommendation 86
The background and diversity of the JNE members should be given more publicity, including by placing photographs of the members on the JNE Web site and making that site more accessible on the State Bar's home page.

Discussion: Public trust and confidence in the findings of JNE will increase if the diverse membership of JNE itself is known to the public. The State Bar provides background information about the JNE membership on its Web site. Under statute, the Web site notes: "The commission is to be broadly representative of the ethnic, gender, and racial diversity of the population of California."[60]

Recommendation 87
Legislation should be sponsored to require that a JNE rating of "not qualified" (and thus, by the absence of announcement, a rating of at least "qualified" or better) for a trial court judge be made public automatically at the time of appointment of a person with that rating.

Recommendation 88
Legislation should be sponsored to make the current practice of releasing the JNE rating for an appellate justice mandatory and permanent.[61]

Discussion of recommendations 87 and 88: Currently the JNE rating of an appellate justice is released at the time of the Commission on Judicial Appointments hearing. While Government Code section 12011.5(h) permits either the Commission on Judicial Appointments or the Board of Governors discretionary authority to request or release any rating, the practice is that this information is always released. Nonetheless, there is no requirement that this be done, and the Board of Governors has full discretionary

[59] For detailed information on all facets of these systems, see American Judicature Society, *Judicial Merit Selection: Current Status* (2008).
[60] See *http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10111&id=1056*.
[61] A number of the recommendations in this report propose language amending a current legal authority. All such proposed amendments are in Appendix N to this report. For the proposed language relevant to recommendations 87 and 88, see Appendix N at p. 6, lines 8–29.

authority, after providing notice to the candidate,[62] to release or not to release "not qualified" ratings for trial court judge appointees.

The steering committee believes that disclosure of all "not qualified" ratings, particularly if done automatically, would increase the public's confidence in the process. While it is possible that release of all JNE ratings could have a chilling effect on some potential applicants, if the change in procedures were to be well publicized, all potential appointees would have fair notice that evaluation results are public.

Because the distinctions between the various forms of qualified ratings are more subtle and the candidate is qualified in all cases, the disclosure of ratings of "exceptionally well qualified" (EWQ), "well qualified" (WQ), or "qualified" (Q) is not as important and may be undesirable for trial court judges who are subject to contestable elections. The same issue (i.e., release of the specific level of a qualified rating) does not apply to appellate justices who are subject to uncontested retention elections.

In the steering committee's opinion, making the recommended changes via a statute rather than a rule will ensure greater permanency of the requirement.

Recommendation 89
The judicial branch's California Courts Web site should explain the judicial appointment process and link to both the State Bar's JNE Web site and the Governor's Judicial Application Web site with appropriate information about JNE procedures and the rating system.

Recommendation 90
The JNE's and the Governor's Web sites should be more accessible and should contain videos explaining the judicial appointment process.

Recommendation 91
Law schools should be encouraged to provide information about the judicial appointment process to law students by, for example, encouraging qualified JNE members, both past and present, to give presentations at law schools.

Recommendation 92
JNE should be encouraged to provide greater publicity by having its members capitalize on opportunities to speak to local and specialty bar associations, service organizations, and other civic groups.

[62] JNE Rules and Procedures, rule III, § 2(b)(4).

Discussion of recommendations 89–92: The JNE system is California's form of merit-based screening and selection. JNE evaluation is a statutorily mandated function, and there do not appear to be any downsides to publicizing the procedures that it uses.

The State Bar has submitted the following description of the procedure used by JNE in making its evaluation:[63]

> The volunteer commission thoroughly investigates California judicial candidates while maintaining a code of strict confidentiality. JNE has 90 days to complete its evaluation, but it cannot appoint judges or mandate the appointment of judges.
>
> Two commissioners, at least one of whom is an attorney, are assigned to investigate each candidate for a trial court appointment. At least three commissioners, one of whom is a public member, investigate each candidate under consideration for an appellate or Supreme Court appointment.
>
> JNE commissioners investigate all information in the candidate's judicial application and send out confidential comment forms to hundreds of lawyers, judges, and others who know the candidate.
>
> The commission must receive at least 50 knowing responses from the mailings. The investigating commissioners also interview the candidate. If the commissioners find any criticisms of the candidate to be substantial and credible, they are required to notify the candidate not less than four days before the interview. At the interview, the candidate is given an opportunity to respond to and present information to rebut all reported criticisms.
>
> The JNE Commission considers many factors when determining the viability of a candidate for judicial office. The commission considers the candidate's industry, temperament, honesty, objectivity, respect within the community, integrity, work-related health, and legal experience. JNE construes legal experience broadly. For example, it will evaluate litigation and nonlitigation experience. It will examine legal work performed in a business or nonprofit entity, in any of the three branches of government, and in the arena of dispute resolution. JNE will also consider experience gained as a law professor as well as experience earned in other academic positions.

[63] E-mail dated October 21, 2008, from Starr Babcock, California State Bar, and member of the task force.

JNE concludes its work by rating the candidate as exceptionally well qualified, well qualified, qualified, or not qualified. Ratings and information gathered during the investigation are not public. If a candidate is found not qualified by the commission, and the Governor appoints that candidate to a trial court, the State Bar may publicly disclose that fact. When the Governor nominates a person for the Court of Appeal or the Supreme Court, the commission makes a report at the public hearing of the Commission on Judicial Appointments for each candidate regardless of the commission's rating.

A candidate rated not qualified may request rescission of that rating within 60 days of being notified. A three-member review committee, composed of one member of the Board of Governors and two former JNE commissioners, will review the request for rescission. Should the review committee find that the JNE rules have been violated, the candidate may request a new evaluation by the commission. In 2007, approximately 13 percent of candidates were found not qualified.

Recommendation 93
The State Bar should amend the JNE rules to require that any member of the State Bar Board of Governors who attends a JNE meeting comply with the JNE conflict of interest rules.[64]

Discussion: JNE rules presently provide that all commissioners complete a statement under oath that they have read and understand rule IV, which addresses conflicts of interests, and that they agree to comply with its provisions. Members of the Board of Governors who attend a JNE meeting should complete the same statement that JNE commissioners sign.

The JNE rules currently provide that a member of the Board of Governors is subject to the same confidentiality rules as JNE commissioners. It is appropriate to extend this to the conflict of interest rules as well.

Oversight and rules for the JNE system
Currently JNE functions as a voluntary activity by the State Bar, although the requirement for JNE evaluation before appointment is statutory.[65] Originally this requirement was inserted to preclude the Lieutenant Governor from making judicial appointments when the Governor was temporarily absent from the state. More recently, the issues regarding JNE have resulted from the debate concerning the diversity or lack of diversity in the Governor's judicial appointments. In the view of the steering committee,

[64] See Appendix N at p. 7, lines 23–31.
[65] Gov. Code, § 12011.5.

the current JNE system works well, and there is no reason to change its oversight and rules.

Funding for the JNE system

No direct money is given to the State Bar to run the JNE system, although the Legislature indirectly provides a source to fund much bar activity through the passage of the dues bill. JNE funding is a small part of the overall State Bar budget and likely accounts for less than 1 percent of the total expenses and less than 0.5 percent of the chargeable expenses.

JNE does not restrict the number of candidates that can be referred to it for evaluation. JNE must report its evaluation to the Governor within 90 days after submission. (Gov. Code, § 12011.5(c).) Thus, there could be a potential funding and personnel issue if there were to be a substantial increase in the number of candidates JNE evaluates or that the Governor sends to JNE at one time for evaluation.

The overall annual cost for the JNE program is approximately $1 million. While this is an important State Bar function, it is not considered part of the core discipline function. The nonfixed, per candidate costs for JNE are approximately $3,000 per evaluation.

If JNE were funded as a line item as part of a dues bill, individual dissatisfaction with particular appointments could surface and the system would be much more susceptible to legislative influence. Accordingly the steering committee believes that the present funding system should be retained.

JNE membership

The present membership of JNE is set by the Board of Governors, which is also the appointing authority for the commission. Public trust and confidence in the system is at least partially based on the public perception of the membership.

Currently there is a maximum of 38 members, although the actual number of members at a given time may be fewer depending on vacancies. Members are appointed for one-year terms and for not more than three consecutive terms. Membership on JNE is a demanding position and also can require significant individual expense for mailing evaluation forms.

For the past three years, the bar has reported the following in terms of JNE commissioner workload, including orientation and other professional training:

Year	Commissioners	Meeting Days	Evaluations	Total Assignments	Assignments Per Commissioner
2005	34	20	316	728	21
2006	37	14	225	476	13
2007	36	15	261	561	16

When seeking volunteers for JNE, the bar notes the following in terms of workload and time commitment:

- Two-day orientation meeting
- 35–40 hours per month (or approximately 55 working days per year)
- 10 hours of preparation per evaluation
- Preparing and mailing 400–600 forms for each evaluation
- Interview participation, often outside commissioners' geographic areas

Members serve up to three consecutive one-year terms. They may not endorse any judicial candidate's campaign for office or contribute to a candidate's campaign while a commissioner. They may not apply for or accept a state judicial appointment or have their name submitted for evaluation as a candidate until two to three years after completion of service. Expenses are reimbursed by the State Bar.

The present system functions well, and there does not appear to be any reason to change it, although the use of JNE in contested and open elections might require a change for those uses (discussed below).

JNE Evaluations for Contested Trial Court Elections

Recommendation 94
All candidates in contested and open elections should be required to participate in a JNE form of evaluation, and the results of that evaluation should be published in the ballot materials together with a description of the JNE process, including the identity of those making the rating and what the ratings mean.[66]

Discussion: Currently JNE evaluates only persons being considered for judicial appointment who are referred by the Governor's staff. There is no process for evaluation of candidates for judicial office who are seeking a judgeship by either opposing a sitting

[66] The steering committee recognizes that a mandatory participation program might require a constitutional amendment. The steering committee also believes, however, that initially a *voluntary* program would serve as a useful test of this program and would have the advantage of being easier to implement because it could be done by statute.

judge in an election or seeking election to an open position.[67] It would be theoretically possible to require nonincumbent candidates to submit to the JNE process, although arguably this might require a constitutional amendment.[68]

In the steering committee's view, extending the JNE rating system to all candidates in contested judicial elections would provide the electorate, which makes the selection decision in contested election situations, with the same information that is given to the Governor, who makes the selection decision in appointment situations. Indeed, this information is likely to be far more useful to the electorate, which often knows little if anything about candidates appearing on the ballot for judge. By contrast, the Governor usually has either personal knowledge or the advice and comments of respected individuals about any potential judicial appointee.

Many bar associations across the country perform evaluations of both sitting judges running for reelection and attorney challengers, and while it could be difficult to compare a sitting judge and an attorney challenger, it would not be impossible.[69] If there is to be a JNE-type evaluation of candidates in a contested election, the sitting judge's actual judicial performance would most certainly need to be evaluated. Currently, no state has established an official evaluation program to inform voters in contested elections.[70]

The work of JNE is not fully scalable, so merely adding additional members for election periods would not be a solution. Instead it is desirable to set up election-year JNE-type panels consisting of former members. The steering committee understands that the State Bar has stated that there are sufficient former members and that they would be able to

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[67] A review of data supplied by the CJA indicates that on average there are 28 contested or open superior court elections on the ballot in each general election cycle. This ranges from a high of 47 elections (2002) to a low of 15 (2004), with a median number of 31. Some of the data may be incomplete, however, and the 1992 election year is excluded because of lack of data on open elections.

[68] Requiring a judicial candidate to submit to a JNE-style evaluation as a condition of office could possibly be unconstitutional, absent its placement in the Constitution, because the Legislature lacks authority to add qualifications or requirements for judges beyond what is set forth in the state Constitution. (*People v. Chessman* (1959) 52 Cal.2d 467, 500.) The current provision concerning appointments does not run afoul of the same provision because the requirement that the candidate's name be submitted to JNE is placed on the Governor. (Gov. Code, § 12011.5.) Arguably a similar requirement could require that the registrar of voters in each county submit the names to JNE. Still, without the candidate's cooperation, it is questionable whether a valid JNE-style evaluation could be obtained. The requirement that the candidate submit his or her name to evaluation and cooperate with the evaluating entity, enshrined in the Constitution, would both ensure more valuable reports and be an indication of the value California places on qualified candidates.

[69] One approach that has been suggested is "prospective performance evaluation." (See Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Contested Judicial Elections* (2007) 29 U. Ark. Little Rock L. Rev. 725.)

[70] The only state in which a state-sponsored entity evaluates potential judicial candidates is New York, which established independent judicial election qualifications commissions in early 2007. These statewide screening panels, which consist of both lawyers and nonlawyers, are charged with reviewing the qualifications of candidates within their districts and making public a list of candidates found qualified to seek judicial office. Participation in these evaluations is voluntary for candidates. It is too soon to assess the effectiveness of these commissions.

accommodate the number of evaluations expected to result from such a requirement. The imposition of this requirement would require an increase in the time between the notice of intent to seek judicial office and the filing date.

The steering committee also acknowledges that several county bar associations provide evaluations of candidates, including incumbents, in contested judicial elections. These evaluations often provide valuable information for electors. The ratings by JNE are meant to be in addition to any such evaluations, not as a substitute for them.

Recommendation 95
All JNE ratings in contested elections—i.e., ratings of exceptionally well qualified, well qualified, qualified, and not qualified—should be reported as part of the voter information proposed as part of recommendation 94.

Discussion: The steering committee's reasons for recommending the reporting of all four JNE ratings include the following:

- While a sitting judge might be damaged by a lower rating than an opponent, the purpose of the system is to inform the public, not protect a judge.
- The public should have the same information the Governor has in making an appointment.
- More information (i.e., all levels of ratings) would be helpful against the hyperbole of an election campaign.
- The JNE level of rating might be a helpful method of looking at the entire record of a judge, not just one controversial decision.
- More information is better than less information.

There is some concern that releasing all four levels of a rating could appear to make the JNE viewed as the decisive factor in the election. This could result in an attack on the process itself. The use of four levels of rating might also cause some to view the JNE system as a disguised public performance evaluation. While the steering committee recognizes these arguments, it ultimately believes that providing more information to those members of the electorate desiring it will enhance the decisionmaking process.

JNE Ratings

Four levels of JNE ratings
The four levels provide a helpful tool to the Governor in differentiating between various candidates for a judicial position. While the differences between "qualified" and "well qualified" may be somewhat more subjective, the differences between an "exceptionally well qualified" and a "well qualified" rating at the top and a "qualified" and "not qualified" rating at the bottom are fairly clear.

The following is the interpretation of the four ratings used by JNE in evaluating potential trial court judges and appellate justices:

Trial Judges – Definition of Ratings:

- **Exceptionally Well Qualified**: Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without doubt, the person is fit to perform the judicial function with distinction.
- **Well Qualified**: Possessing qualities and attributes considered to be worthy of special note, indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.
- **Qualified**: Possessing qualities and attributes considered to equip a person to perform the judicial function adequately and satisfactorily.
- **Not Qualified**: Possessing less than the minimum qualities and attributes considered necessary to perform the judicial function adequately and satisfactorily.

Appellate Judges – Definition of Ratings:

- **Exceptionally Well Qualified**: Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without doubt, the person is suited to perform the judicial function with distinction.
- **Well Qualified**: Possessing qualities and attributes considered to be worthy of special note, indicative of a superior fitness to perform the judicial function with a high degree of skill, effectiveness, and distinction.
- **Qualified**: Possessing qualities and attributes considered indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.
- **Not Qualified**: Possessing less than the qualities and attributes considered indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.

Factors involved in arriving at a JNE rating
Rule II, section 6 of the JNE rules lists qualities/factors for consideration in evaluating judicial candidates as follows:

> The commission seeks to find the following qualities in judicial candidates. However, the absence of any one factor on the lists below is not intended automatically to disqualify a candidate.

> Qualities for all judicial candidates: impartiality, freedom from bias, industry, integrity, honesty, legal experience, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, job-related health.
>
> In addition, for:
>
> Trial court candidates: decisiveness, oral communication skills, patience.
>
> Appellate court candidates: collegiality, writing ability, scholarship.
>
> Supreme Court candidates: collegiality, writing ability, scholarship, distinction in the profession, breadth and depth of experience.

Other criteria are listed in Government Code section 12011.5(d):

> In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience. The State Bar shall consider legal experience broadly, including, but not limited to, litigation and nonlitigation experience, legal work for a business or nonprofit entity, experience as a law professor or other academic position, legal work in any of the three branches of government, and legal work in dispute resolution.

The criteria used by JNE in evaluating a candidate for judicial office are similar to those used in other states. They are also consistent with the evaluative criteria recommended by the American Judicature Society in its training materials for members of judicial nominating commissions.[71]

Recommendation 96
The release of a rating by JNE should not be accompanied by a statement of reasons.

Discussion: The investigation and evaluation process by JNE is confidential, which enhances the accuracy and completeness of the information received. The release of reasons would compromise this confidentiality and ultimately the value and validity of the rating system. The release of reasons might also have a chilling effect on the

[71] These criteria include impartiality, integrity, judicial temperament, industry, professional skills, community contacts, social awareness, collegiality, writing and speaking ability, decisiveness, suitable age, and good health. (See Kathleen M. Sampson, *Handbook for Judicial Nominating Commissioners* (American Judicature Society, 2d ed. 2004).)

gathering of information for the rating process if the commenter knew that his or her comment, even in a disguised or anonymous form, were going to be public.

"Not qualified" rating

The steering committee considered whether to recommend changing the lowest rating given by JNE—which is currently "not qualified," implying that the candidate being evaluated should not be a judge—to "not recommended." Such a change might suggest that the candidate could still be qualified to be a judge at a later time even though JNE does not currently recommend the appointment of the person. It also implies that the person should not be appointed at this time without commenting on the person's overall qualifications.

The problem with making this change, however, is that it also implies that JNE is a "recommending" body rather than a "rating" body. The steering committee believes that this would be seen by some as compromising the impartiality of JNE. Finally, the "not qualified" rating in its current form strongly discourages the Governor from still making such an appointment.

Releasing JNE voting numbers

The steering committee also considered whether the release of a JNE rating should be accompanied by information about the number of commissioners who voted for that rating but ultimately decided against such a recommendation. The value of JNE's rating system is the high regard in which its ratings are held. Instituting vote counts and minority views is not part of the information currently made public, and such information is likely to weaken the public perception of the validity of the rating without providing any public benefit.

Expanding JNE evaluations to all applicants for gubernatorial appointment

One alternative to how JNE determines whom to evaluate would require an evaluation of every person who submits an application to the Governor, as opposed to the current system, under which only those candidates whose names are submitted to JNE by the Governor are evaluated. This raises a question, however, as to who should narrow down the initial group of candidates.

The current system of having the Governor narrow down the list seems more effective and efficient because the Governor has a variety of considerations to account for, some of which are not factors evaluated by JNE. The reduction of the pool of applicants by the Governor before JNE evaluation will still ensure that those who are eventually appointed have been evaluated by JNE without burdening JNE with evaluating candidates that would be unacceptable to the Governor.

Diversity of the Judiciary

The steering committee agrees that an important component of judicial selection in California is examining how to increase diversity among the judiciary. Other states are in accord, and some have placed aspirational language about judicial diversity into their state constitutions. For example, article 6, section 37(C), of the Arizona Constitution reads:

> A vacancy in the office of a justice or a judge of such courts of record shall be filled by appointment by the governor without regard to political affiliation from one of the nominees whose names shall be submitted to him as hereinabove provided. In making the appointment, the governor shall consider the diversity of the state's population for an appellate court appointment and the diversity of the county's population for a trial court appointment, however the primary consideration shall be merit.

The steering committee concluded that efforts to place such aspirational language in the California Constitution should not be pursued. In the steering committee's view, there would be little to be gained by pursuing such language in lieu of taking other action that may actually help gain a more diverse bench.

Recommendation 97

The courts should be directed to consider, when making appointments of subordinate judicial officers, both the diverse aspects of the appointees and the appointees' exposure to and experience with diverse populations and their related issues.[72]

Discussion: One of the sources of judicial appointments is from the subordinate judicial officers (SJOs) who serve the courts.[73] Thus, to the extent that the diverse nature of that group—either in terms of its own diversity or its experience with diverse populations—can be increased, the likelihood of more diverse judicial appointments also will increase. This is one area where the judicial branch has control and can help make a more diverse bench. Any rule of court adopted on this issue should make clear that these qualities are not required but desired. Experience with diverse populations may well be the more important quality.

Recommendation 98

One of the factors the JNE should consider is the candidate's exposure to and experience with diverse populations and issues related to those populations.

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[72] See Appendix N at p. 7, lines 14–21.

[73] Of the 1,482 trial court judges in California as of October 2008, 105 judges (7.1% of the total) were former SJOs. Of the 1,263 judges who first obtained office by appointment, 93 (or 7.4% of the total) were former SJOs.

Discussion: All members of the steering committee support a judiciary that is diverse and mirrors the population of California. Likewise, the steering committee agreed that judicial candidates should have exposure to and experience with diverse populations. The experience of a candidate working with diverse populations is an important consideration and a strong factor in increasing the trust and confidence of a diverse public with the bench; this includes the positive aspects of cultural awareness and working with diverse populations as well as negative attitudes or actions toward people from diverse backgrounds. For example, while someone might think that a person who keeps his or her eyes focused on the ground is being disrespectful, in that person's culture such behavior may actually be one of respect.

When evaluating any particular candidate, JNE is not responsible for and cannot appropriately assess how the racial, religious, economic, or practice background of that candidate might affect the overall makeup of the bench. The steering committee is not recommending that a candidate's race, ethnicity, gender, religion, disability, sexual orientation, or other diversity characteristics be considered as an evaluative factor. However, this recommendation does not preclude JNE from considering all aspects of a candidate's life and professional experiences.

The steering committee engaged in intense discussion about the appropriate language to be used to describe the weight and emphasis to be given to a particular candidate's exposure to and experience with diverse populations as it may be reflected by the candidate's life and professional experiences. The recommendation that the steering committee has made is similar to the present JNE practice in some regards. Rule II, section 6(a) of the JNE rules has "freedom from bias" and "commitment to equal justice" as two of the factors identified for all evaluations. To add this new factor to the Government Code would require other modifications and amendments to the statute and would probably result in divisive action and unproductive legislative activity. Accordingly, the steering committee strongly suggests that its recommendation be implemented by amending JNE Rules and Procedures, rule II, section 6 to read as follows:

> **Qualities for all judicial candidates:** Impartiality, freedom from bias, industry, integrity, honesty, legal experience, professional skills, intellectual capacity, judgment, community respect, <u>exposure to and experience with diverse populations and issues related to those populations,</u> commitment to equal justice, judicial temperament, communication skills, job-related health.

Recommendation 99
The Governor should consider an appointee's exposure to and experience with diverse populations and issues related to those populations.

Discussion: The steering committee recognizes that the Constitution gives the Governor the unqualified duty to fill vacancies in judicial offices.[74] Because most trial court judges and all appellate court justices originally take office by virtue of gubernatorial appointment, the exposure to and experience with diversity of the appointees of a Governor dramatically affect those qualities of the bench.

The previous recommendations talked about reasons for a court, in making subordinate judicial position appointments, and JNE, in making recommendations to the Governor, to consider whether a person has experience working with diverse populations. In the steering committee's view, these reasons apply at least as much to the judicial appointments of the Governor. While the steering committee recognizes that the Governor has unfettered discretion under the Constitution in making judicial appointments (except for the constitutional requirements for the office), it feels that it is appropriate to recommend that issues of diversity be considered in the course of the Governor exercising that discretion. Of course, the weight given to this factor in any particular case would be solely within the Governor's discretion.

Recommendation 100
The judicial branch's public outreach and publicity programs should include one that encourages all members of the bar to consider applying for judicial office.

Discussion: Part of any effort to increase diversity in the bench is increasing the diversity of those who apply for judicial positions. As discussed above, increasing the diversity of SJOs is one partial solution. Increasing the diversity of the applicant pool generally is another solution, and the judicial branch's public outreach efforts, which are discussed in great detail above, should address this issue.

Citizenship as a qualification to become a judge
The steering committee considered whether to recommend sponsoring a constitutional amendment to require that a person be a United States citizen in order to become a judge in California. There is currently no such explicit requirement in California,[75] and there is

[74] "[T]he Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins." (Cal. Const., art. VI, §16(c) for superior court judges); "The Governor shall fill vacancies in those courts by appointment." (Cal. Const., art. VI, § 16(d)(2) for appellate court justices).
[75] The requirements in the Constitution do not state that a judge must be a citizen. (See Cal. Const., art. VI, § 15 [imposing only experience requisites including bar membership].) Case law holds that the Legislature lacks authority to add qualifications or requirements for judges beyond what is set forth in the state Constitution. (*People v. Chessman* (1959) 52 Cal.2d 467, 500.) The requirements for bar admission are similarly silent on the issue of citizenship. Of the eight specified requirements for admission, none speaks

likely no implicit requirement. Currently only 20 states have an explicit constitutional or statutory requirement that judges be U.S. citizens. However, it is an implicit requirement in states where judges must be licensed attorneys or state bar members and licensure or bar membership is limited to U.S. citizens.

The steering committee feels that it is unlikely that a noncitizen would be appointed or elected a judge. Thus, the steering committee has not recommended sponsoring a constitutional amendment; doing so would, in the steering committee's opinion, be appropriate only within the context of recommending other constitutional amendments.

California's Electoral Process at Both the Trial and Appellate Court Levels

In addressing judicial selection and retention, the steering committee evaluated California's current trial and appellate electoral processes, with an eye toward considering whether any aspects of those processes warrant recommended changes.

Increasing the length of trial court judges' terms of office

The steering committee believes that the present term of six years for a trial court judge should be retained. Judicial officers currently have the longest term of office of any elected officials in California. The current term length for trial court judges appears to strike an appropriate balance between public accountability and judicial impartiality. Indeed, most judges up for reelection do not face contests. Although a term of eight years might provide marginally greater protection of judicial impartiality,[76] a judge would still stand for election three times during a typical two-decade judicial career.

Reelection by contestable election versus retention election at the trial court level

The present system of contestable elections following initial appointment or election is preferred to retention elections, triggered retention elections, or hybrid systems. Under the current system, a judge appears on the ballot only if an opponent files to run against the judge. If there is no opponent, the judge's name does not appear on the ballot and the judge is automatically reelected. Most trial court judges retain their offices unopposed. A discussion of each of the alternatives considered by the steering committee follows.

Regular retention elections

The California Constitution provides, "The Legislature may provide that an unopposed incumbent's name not appear on the ballot."[77] The Legislature has so provided.[78] A retention election system would require that every judge's name appear on the ballot, contrary to this policy. In addition, the phenomenon of ballot roll-off, in which voters

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to residency or citizenship of the candidate. (Compare Cal. Const., art. IV, § 2(c) [requiring citizenship for members of the Legislature] and art. V, § 2 [requiring citizenship of the Governor].)

[76] Some studies indicate that judges tend to be less concerned about public political response to a decision when an election is less imminent.

[77] Cal. Const., art. VI, § 16(b).

[78] Elec. Code, § 8203.

cast votes for major offices but do not vote for other offices, e.g., judicial offices, could result in the removal of a judge from office for no reason other than the length of the ballot. This problem would be exacerbated in large counties with many judicial positions.

Triggered retention elections

The alternative of a triggered retention election has several disadvantages, depending on the type of trigger. Initially, any triggered system may imply that a judge's name appears on the retention ballot only if the judge's performance has resulted in some opposition to his or her retention. Thus, such judges may attract a base of negative votes simply by being on the ballot, and a number of individuals may vote against any judge in a triggered retention election. A judge facing retention under a triggered system, therefore, may start with a significant negative base without regard to his or her actual performance or qualifications. No state currently has a triggered retention election system.

If the trigger is a petition of the voters, then interest groups, disgruntled litigants, political parties, or others with an axe to grind against a particular judge or in opposition to a single decision by a judge might be encouraged to launch campaigns to force judges to appear on the retention ballot. This could inject interest group politics into judicial elections in direct contravention to what the CIC is trying to accomplish. In addition, some might see a system with a petition as the only triggering system as equivalent to a lifetime appointment subject only to recall.

The only other theoretically possible trigger would be an unacceptable performance evaluation score of a judge. California does not have any formal, mandatory judicial performance evaluation process designed for this purpose, nor does any other state. A similar proposal was made in Illinois in the late 1990s but was not adopted. The steering committee believes that its recommendations regarding evaluation of judicial candidates in contested elections are far superior.

Hybrid elections

The steering committee also chose not to recommend a hybrid system in which there is an appointment followed by an initial contestable election followed by retention elections. This system is used in part in Illinois and Pennsylvania, neither of which is generally viewed as a positive model for judicial selection (although that reputation is primarily due to the partisan influence on judicial elections). New Mexico uses a similar system, with a nominating commission appointment followed by a contestable partisan election followed by retention elections. The opposition to this system is based on the same reasons as opposition to standard and triggered retention elections.

Open elections versus all initial selections by appointment at the trial court level
The present system, which permits open elections—that is, an election in which there is no incumbent judge on the ballot—should be retained. This is important to provide greater opportunities for judicial service.

While some concerns have been expressed that open elections can lead to partisan battles, contestable elections appear equally subject to that risk. In addition, open elections provide a useful safety valve for good candidates who might not otherwise be appointed. A prohibition on open elections could also potentially lead to a less diverse bench in the event that governors consistently fail to nominate and appoint a heterogeneous pool of judges. The steering committee notes, however, that most studies of judicial selection methods and diversity have found little correlation between the two. In some states, women and people of color appear at a disadvantage in statewide contested election systems, while other elective states have produced significant gains in judicial diversity. The diversity of the eligible pool of potential judges; the political dynamics, history, and culture of a given state or jurisdiction; and other factors unrelated to the formal selection method appear to have a greater influence on the overall diversity of the bench.

Recommendation 101
An amendment should be sponsored to change the constitutional provision for the recall of a judge—which currently requires a petition with signatures of 20 percent of those voting for a judge in the most recent election—to require a petition with signatures of 20 percent of those voting for district attorney, the only county official elected in every county.[79]

Discussion: Because races for judicial office are likely to draw a low number of voters, using the number of voters who voted for that office in the most recent election as a base makes it too easy to mount a recall petition against a judge. The steering committee instead recommends using the number of voters for the office of district attorney as a base, as district attorney is the only county official that is elected in every county.

Recommendation 102
A constitutional amendment should be sponsored to provide that a trial judge shall serve at least two years before his or her first election.[80]

Discussion: Judges should have an opportunity to build a record on which they can run. The current system, which measures the time to the first election based on the occurrence of the vacancy rather than the appointment of the judge, may unfairly penalize a judge

[79] See Appendix N at p. 1, lines 1–17.
[80] *Id*. at p. 4, lines 33–35.

based on how promptly the vacant office is filled.[81] A strong argument can be made that two years is a minimum acceptable time for a judge to make a record of service. Some highly qualified attorneys may be discouraged from abandoning a rewarding or lucrative practice to seek judicial appointment if they face the very real possibility of encountering a strong electoral challenge shortly after assuming the bench.

Recommendation 103
Legislation should be sponsored to change the number of signatures needed for placing an unopposed judicial election on the ballot for a potential write-in contest from the current level of 100 signatures to 1 percent of the voters for district attorney in the last county election but not fewer than 100 signatures.

Recommendation 104
Legislation should be sponsored to amend current law, which provides that an unopposed judge may be challenged by write-ins at either or both the primary election and the general election, to permit only one challenge, which should be at the first (i.e., primary) election.

Discussion of recommendations 103 and 104: Current law provides that a petition with only 100 signatures (no matter what the size of the county) forces an unopposed judge's name onto the ballot because of a potential write-in campaign.[82] This extremely low threshold can result in a judge being "targeted" for improper reasons. Increasing the number of threshold signatures needed to 1 percent of the voters for district attorney in the last county election (or 5 percent of the level for recall of a judge), but not fewer than 100, seems an appropriate number of signatures to demonstrate an interest where a person truly is seeking to run a write-in campaign. The application of such an amendment would, for example, raise the number of signatures in Los Angeles County, based on the most recent election, to just over 7,000 out of a population of 9,878,554 in 2007, based on a U.S. Census Bureau estimate.

In addition, there does not appear to be any reason why an unopposed judge should be subject to a write-in challenge at both the primary and general elections when, if the judge were opposed at the primary election, he or she would not be subject to a write-in challenge at the general election.[83]

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[81] A chart showing this time limit nationwide is attached to this report as Appendix O.
[82] The number of signatures required to submit nomination papers for the purpose of challenging an incumbent is 20, and this recommendation is not intended to alter that number. (See Elec. Code, § 8062(a)(3).) Rather, this recommendation applies only to write-in situations, i.e., elections where only the incumbent has filed nomination papers, meaning that he or she would be unopposed but for a write-in campaign. The steering committee's goal is to reduce the ease of conducting last-minute, frivolous write-in campaigns.
[83] See Appendix N at p. 6, line 32 through p. 7, line 11.

Recommendation 105
An amendment should be sponsored to article VI, section 16 of the California Constitution to reorder the subsections therein and make minor wording changes for the sake of clarity.

Discussion: The subdivisions within section 16 of article VI of the California Constitution are in a somewhat confusing order. Subdivisions (a) and (d) deal with appellate offices, while subdivisions (b) and (c) deal with superior court offices. The task force recommends a complete reordering of the language of the section to make it clearer. Subdivision (a) would cover terms, elections, and filling of vacancies for Supreme Court and Court of Appeal justices, and subdivision (b) would cover superior court judges.

The recommended reordering of the provisions is not intended to fundamentally alter the pattern of superior court contested elections and appellate court retention elections. The proposed amendments to section 16 are presented in two forms. Each change is shown as it would be made to the current organization of section 16,[84] and then the entire reorganized section is shown as a repeal and reenactment of the existing language.[85]

The current constitutional provisions are confusing concerning which officers are voted on at which elections. The term "general election" as used in the Constitution has two meanings, referring both to the direct primary election (currently held in June of even-numbered years) and the runoff or general election (held in November of even-numbered years). For superior court positions, it is possible (and it occurs with some regularity) that no candidate will receive a majority of votes at the first election and a runoff will be necessary. The normal process is to hold the initial election at the direct primary, with a runoff, if needed, in November. The proposed language makes explicit these two election dates.[86]

The proposed language also makes clear that when the office that a judge held was subject to the electoral process in that year, and at least one candidate has qualified for the election for that office before the incumbent leaves office, the election goes forward for a full term beginning the following year.[87]

Term of office of appellate justices
Judicial officers currently have the longest term of office of any elected officials in California. While this is appropriate, the steering committee concluded that there has been no demonstrated need for increasing the length of a judge's term. The current term length for appellate court justices appears to strike an appropriate balance between public

[84] *Id.* at p. 4, line 7 through p. 6, line 6.
[85] *Id.* at p. 1, line 28 through p. 4, line 5.
[86] This language appears in various provisions of the revision on section 16, e.g., Appendix N at p. 4, lines 13–14, and 22; and p. 5, lines 15, 26, and 35–40.
[87] This is the holding in *Stanton v. Panish* (1980) 28 Cal.3d 107. See Appendix N at p. 6, lines 2–6.

accountability and judicial impartiality. Indeed, nearly all justices up for retention are confirmed.

While an argument could be made for lifetime appointments, especially of appellate court justices who grapple with more politically sensitive cases,[88] a counter-argument could be made for contestable elections. Outside of the federal system, most states do not have lifetime appointments for their judiciary. The current system of 12-year terms with retention elections seems an appropriate compromise between lifetime appointments and 6-year terms subject to contestable elections.

Recommendation 106
A constitutional amendment should be sponsored to provide that retention elections for appellate justices be held every two years (during both the gubernatorial and the presidential elections) rather than the present system of every four years (during the gubernatorial elections).[89]

Discussion: With elections every two years, there would be 50 percent fewer retention elections on a ballot and a concomitant reduction in ballot fatigue. Based on historical trends, elections in presidential years also would have somewhat greater turnout than elections in gubernatorial years. With elections every two years instead of every four, the length of time a person would serve before facing the initial retention election could be reduced by up to two years.

Recommendation 107
A constitutional amendment should be sponsored to provide that following an appellate justice's initial retention election, that justice serves a full 12-year term, rather than the current system of a 4-, 8-, or 12-year term, depending on the length of term remaining for the previous justice holding that seat.[90]

Discussion: Under the current system, at the first retention election, a justice is elected to the remaining term (or a full term if there is no remaining term) of his or her predecessor. This means that the term is 4, 8, or 12 years. Under the steering committee's recommendation, a justice would be retained for a full 12-year term at each retention election.

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[88] "The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. . . . [I]t is a[n] . . . excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." (*The Federalist No. 78* (Alexander Hamilton).)
[89] See Appendix N at p. 4, lines 13–44.
[90] *Id.* at p. 4, lines 16–77.

An exception would be made, however, where a 12-year term for a new judge would result in more than three justices from the Supreme Court or more than two justices from the same division of a Court of Appeal being up for retention at the same time. This exception would spread out the retention elections in a manner similar to the "one-third every four years" originally envisioned by the Constitution.

Recommendation 108
A constitutional amendment should be sponsored to provide that an appellate justice serve at least two years before the first retention election, paralleling recommendation 102 above concerning trial court judges.[91]

Discussion: Under the current system, a justice may face an initial retention election within a short time, i.e., less than a year, following his or her appointment. The discussion presented with recommendation 102 above for allowing more time before an election for trial judges is equally relevant here.

Recommendation 109
Further study should be made of ways to help ensure that judicial vacancies are filled promptly.

Discussion: Vacant judicial positions contribute to a backlog in the courts, delay justice, and potentially reduce the quality of justice. The steering committee recommends that further consideration be given to methods to ensure more prompt action on judicial vacancies.[92]

[91] See Appendix N at p. 5, lines 13–17.
[92] See, e.g., Pub. Resources Code, § 25206. Under that provision, which the steering committee does not necessarily recommend for judicial vacancies, the Governor is required to fill vacancies in the State Energy Resources Conservation and Development Commission within 30 days of the date a vacancy occurs or the right to make the appointment falls to the Senate Rules Committee.

Consolidated List of Recommendations

Judicial Candidate Campaign Conduct

1. The Code of Judicial Ethics should be amended to include the American Bar Association Model Code of Judicial Conduct definition of "impartiality."

2. The commentary to canon 4B of the Code of Judicial Ethics should be amended to encourage judges to take an active role in educating the public on the importance of an impartial judiciary.

3. The commentary to canon 5B of the Code of Judicial Ethics should be amended to encourage judicial candidates to discuss matters such as their qualifications for office and the importance of an impartial judiciary.

4. Canon 5 of the Code of Judicial Ethics should be reexamined for consistency in its use of the terms "judge" and "candidate."

5. The Code of Judicial Ethics should be amended by adding new canon 3E(2), providing that a judge is disqualified if he or she, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that a reasonable person would believe commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

6. A definition of "commitment" that includes "pledges" and "promises" should be added to the Code of Judicial Ethics.

7. An unofficial statewide fair judicial elections committee should be established 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.

8. The formation of unofficial local committees should be encouraged, and resources should be provided to aid in their development.

9. A model campaign conduct code for use by the state and local oversight committees should be developed.

10. Consideration should be given to merging the recommended unofficial statewide campaign conduct committee with the rapid response team recommended below in recommendations 53 and 54.

11. The Code of Judicial Ethics should be amended to require all judicial candidates, including incumbent judges, to complete a mandatory training program on ethical campaign conduct.

12. Judicial questionnaires should be included as a component of candidate training.

13. Candidate Web sites should be included as a component of candidate training.

14. Both the California Judges Association's Judicial Ethics Hotline and the new Supreme Court Committee on Judicial Ethics Opinions should be publicized as resources that sitting judges and attorney candidates can use to obtain advice on ethical campaign conduct.

15. Collaboration among the Administrative Office of the Courts, the State Bar, the California Judges Association, and the National Center for State Courts should be recommended to develop brochures to educate judicial candidates.

16. The sentence "This canon does not prohibit a judge from responding to allegations concerning the judge's conduct in a proceeding that is not pending or impending in any court" should be added to the commentary following canon 3B(9) of the Code of Judicial Ethics, but the prohibition against public comment on pending cases should not be extended to attorney candidates for judicial office.

17. The commentary to canon 3B(9) of the Code of Judicial Ethics should be amended to provide guidance to judges on acceptable conduct in responding to attacks on rulings in pending cases.

18. Courts should work with local county bar associations to create independent standing committees that will respond to inaccurate or unfounded attacks on judges, judicial decisions, and the judicial system.

19. The California Judges Association's Response to Criticism Team and its network of contacts should be publicized.

20. A model letter and a model questionnaire that candidates can use in lieu of responding to an interest group questionnaire should be developed.

21. Commentary to the Code of Judicial Ethics should be amended to provide guidance to judicial candidates on handling questionnaires.

22. The advisory memorandum on responding to questionnaires by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight should be used as part of a comprehensive approach to addressing judicial questionnaires.

23. Candidates should be encouraged to give reasoned explanations for not responding to improper questionnaires rather than simply citing advisory opinions.

24. The statutory slate mailer disclaimer should be strengthened by requiring mailers to cite canon 5 of the Code of Judicial Ethics and, when a candidate is placed on a mailer without his or her consent, to prominently disclose that fact.

25. An amendment to Government Code section 84305.5 should be sponsored to apply to organizations that support or oppose candidates.

26. Judicial campaign instructional material setting forth best practices regarding the use of slate mailers should be developed.

27. Judicial candidates should be advised to obtain written permission before using an endorsement and to clarify which election the endorsement is for, to honor any request by an endorser to withdraw an endorsement, and to request written confirmation of any oral request to withdraw an endorsement.

28. Judicial candidates should be prohibited from seeking or using endorsements from political organizations.

29. The Code of Judicial Ethics should be amended to explain why partisan activity by candidates is disfavored.

30. Instructional material about the importance of truth in advertising should be developed.

31. Canon 5 of the Code of Judicial Ethics or its commentary should be amended to require candidates to take reasonable measures to control the actions of campaign operatives and the content of campaign statements.

32. The Code of Judicial Ethics should be amended to add a list of prohibited campaign conduct.

33. A letter—to be sent by the courts to county registrars before each election cycle—should be developed addressing permitted use of the title "temporary judge" by candidates.

34. Canon 6 of the Code of Judicial Ethics should be amended to clarify how the title "temporary judge" may be properly used.

35. The State Bar should be encouraged to discipline attorney candidates who engage in campaign misconduct.

Judicial Campaign Finance

36. A system should be adopted under which each trial court judge is required to disclose, to litigants, counsel, and other interested persons appearing in the judge's courtroom, all contributions of $100 or more made to the judge's campaign, directly or indirectly. Specifically:

    - The commentary to the disclosure provision in canon 3E(2) of the Code of Judicial Ethics should be amended to require a trial judge to maintain an updated list of campaign contributions of $100 or more and to orally disclose on the record to litigants appearing in court that the list is available for viewing in the courthouse and online;
    - The commentary to canon 3E(2) should be amended to state that the obligation to disclose campaign contributions continues for a minimum of one year after the judge assumes office; and
    - The commentary to canon 5B should be amended to cross-reference the proposed new commentary to canon 3E(2).

37. Each trial court judge should be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the judge's campaign, directly or indirectly, subject to the following:

    - The contribution level at which disqualification shall be mandatory shall be the same as the level, set forth in Code of Civil Procedure section 170.5(b), at which a judge is considered to have a "financial interest" in a party requiring disqualification;
    - Notwithstanding the above mandatory disqualification amount, trial court judges shall continue to disqualify themselves based on contributions of lesser amounts where doing so would be required by Code of Civil Procedure section 170.1(a)(6)(A);
    - The Judicial Council should recommend that the amount set forth in Code of Civil Procedure section 170.5(b)—which, as of the date of this tentative recommendation, is $1,500—be periodically reviewed and adjusted as appropriate;
    - The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
    - The obligation to disqualify shall begin immediately upon receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

38. Appellate courts should be required to send to the parties—with both the first notice from the court and with the notice of oral argument—information on how they may learn of campaign contributions if there is an upcoming retention election or there was a recent election.

39. Appellate justices' disclosures should be maintained electronically and should be accessible via the Web and possibly through a link to the California Secretary of State's Web site.

40. Each appellate justice should be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of a certain amount to the justice's campaign, directly or indirectly, subject to the following:

    - For justices of the Courts of Appeal, the contribution level at which disqualification shall be mandatory shall be the same as the level, set forth in canon 3E(5)(d) of the Code of Judicial Ethics, at which a justice is considered to have a "financial interest" in a party requiring disqualification;
    - For justices of the Supreme Court, the contribution level at which disqualification shall be mandatory shall be the same as the contribution limit, set forth in Government Code section 85301(c) and Administrative Code title 2, section 18545, in effect for candidates for governor;
    - Notwithstanding the above mandatory disqualification amounts, appellate justices shall continue to disqualify themselves based on contributions of lesser amounts where doing so would be required by canon 3E(4) of the Code of Judicial Ethics;
    - The mandatory disqualification described above shall be waivable by those parties to the matter who were not involved in making the contribution in question; and
    - The obligation to disqualify shall begin immediately upon receipt of the contribution in question and shall run for two years from the date that the candidate assumes office or from the date the contribution was received, whichever is later.

41. Legislation should be sponsored prohibiting corporations and unions from using treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with campaigns for judicial office.

42. Legislation should be sponsored to require that all candidates for judicial office—regardless of their total dollar amount of contributions received or expenditures made—be required to file, in some electronic format with the California Secretary of State's Office, all campaign disclosure documents that they would also be required to file in paper form.

43. Amendments should be sponsored to appropriate California statutes and regulations so that California's definition of an independent expenditure—subject to, e.g., disclosure laws—is as broad as possible under current case law, including *McConnell, United States Senator, et al. v. Federal Election Commission* (2003) 540 U.S. 93, and *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007) 127 S. Ct. 2652 ("*WRTL II*").

44. Amendments to appropriate California statutes and/or regulations should be sponsored to require that disclosures pertaining to advertising in connection with judicial elections—whether funded independently or by a candidate—be made at the time that any person or entity makes a contract for that advertising.

45. Spending in connection with judicial elections should be closely observed for developing trends that would indicate a need to reconsider whether to sponsor legislation to create a system of public financing at the trial court or appellate court level, but such legislation should not be sponsored at this time.

Public Information and Education

46. A leadership advisory group should be appointed to oversee, identify, and coordinate public outreach programs and opportunities; to establish benchmarks of good practice; and to promote the assembly of local teams to assist courts with local outreach programs.

47. The AOC should collect, summarize, and evaluate public outreach resources currently available for judges and court administrators and should also collect, summarize, and evaluate educational materials for K–12 teachers and for judges and court administrators making classroom visits. These efforts should include the following:

    - Creating a repository of all public outreach resources;
    - Assigning AOC staff to coordinate outreach, education, and voter education efforts at the state and local level;
    - Cultivating leaders who would make use of the repository in local courts;
    - Creating a standing advisory group on public outreach that would help the judicial branch maintain a focus on outreach efforts;
    - Maintaining a menu of public outreach options for local courts;
    - Establishing benchmarks of good practice and promoting the assembly of local teams to assist courts with local outreach programs; and
    - Encouraging bench-bar coalitions to reach out to key stakeholders and interest groups, including political parties, in order to increase awareness and understanding of the judicial branch.

48. The AOC should maintain a menu of public outreach options for local courts that will:

    - Reflect the diversity of the state's demographic and geographic differences and include descriptions of the programs, the targeted audiences, and where they can be used; and
    - Explore ethnic media outlets to reach more audiences and investigate multimedia outreach opportunities, such as the California Courts Web site, local court Web sites, radio, podcasts, public service announcements (PSAs), public video hosting sites, instant messaging, and the California Channel.

49. The judicial branch should more fully embrace community outreach activities.

50. The standing advisory group mentioned above in recommendation 46 should partner with local courts, bar associations, the CJA, the NCSC, the State Bar, and others to offer outreach and public information programs and media guidelines to courts or regional areas.

51. Web sites should be enhanced to include the role of the judicial branch and explain how judges are elected, and information concerning how judges are elected should be placed prominently on the California Courts Web site.

52. A compelling video on the role of the judicial branch should be created for use in various venues.

53. A model for responding to unfair criticism should be adopted, as should tips for judges to use when responding to press inquiries. (See Appendix I, Rapid Response Plan: A Model Guideline for Responding to Unfair Criticism of the Judicial Branch, and Appendix J, Responding to Press Inquiries: A Tip Sheet for Judges.)

54. A leadership group should be created to provide ongoing direction and oversight of the response plan recommended in recommendation 53 and to ensure that the services it proposes are provided in an enduring manner. The proposed group should also consider creating a model plan that can serve both as a plan to respond to unfair criticism and as a campaign oversight plan.

55. Media training programs should be institutionalized and judges and court administrators should continue to be educated on how to interact with the media.

56. Training for the media in reporting on legal issues—including a possible journalist-in-residence fellowship at the AOC—should be supported and facilitated, and funding for that training should be sought.

57. Training should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily grasped by the media.

58. Local and statewide elected officials should be educated on the importance of the judicial branch.

59. Leaders should be encouraged to inspire others to engage in outreach efforts.

60. Groups in public settings should be educated about the importance of the judiciary.

61. A video on the function and importance of the courts should be created for local court Web sites.

62. The feasibility of a channel for the judicial branch on one or more public video hosting sites should be studied.

63. Courts should be identified to pilot programs dealing with community outreach and education.

64. Strategies for meaningful changes to civics education in California should be supported.

65. A strategic plan for judicial branch support for civics education should be developed. (See Appendix L, Proposed Strategic Plan to Improve Civics Education.)

66. Political support should be sought from leaders in the Legislature, State Bar, law enforcement community, and other interested entities to improve civics education.

67. Teacher training programs, curriculum development, and education programs on civics should all be expanded to include the courts.

68. Presiding judges should be encouraged to grant CLE credits to judicial officers and court executive officers conducting K–12 civics and law-related education.

69. The State Bar Board of Governors should be asked to grant Minimum Continuing Legal Education (MCLE) credits to attorneys conducting K–12 civics and law-related education programs.

70. The AOC should be directed to help pilot extensive civics-related outreach in three jurisdictions.

71. Recognition programs that bring attention to teachers, judges, and court administrators who advance civics education should be promoted.

72. Judicial branch leaders should encourage judicial candidates to participate in candidate forums and respond to appropriate questionnaires.

73. Information about how judges are elected should be incorporated into outreach efforts and communications with the media.

74. Web traffic to existing nonpartisan sources of information should be increased by partnering with other groups, such as bar associations.

75. Collaboration should be established between the Judicial Council, the League of Women Voters, the California Channel, and other groups to inform voters.

76. AOC staff should be directed to coordinate voter education and to assist the courts in setting up frameworks for coordinating and sharing practices.

77. Politically neutral toolkits for judicial candidates regarding voter information and best practices on public outreach should be developed.

78. Voter focus groups should be conducted within California to determine what to provide in education materials.

79. A consultant should be engaged to review the most effective uses of multimedia tools to promote voter education.

80. Statements that educate voters about judicial candidates and the state's court system should be placed in sample ballot statements or other voter education guides. (See Appendix K, Judicial Elections: Proposed Language for Voter Pamphlets.)

81. The State Bar should be asked to offer an educational course to potential judgeship applicants in conjunction with the National Judicial College at the joint Judicial Council/CJA/State Bar conference in 2009.

82. A study should be undertaken and recommendations made regarding confidential self-improvement evaluations (optional or otherwise) for judges.

83. The public should be informed that systems are in place to deal with judicial performance issues in fair and effective ways, including elections, appellate review, judicial education, media coverage, the Commission on Judicial Performance, the State Bar's Commission on Judicial Nominees Evaluation, and local bar association surveys.

84. More widespread participation by the courts and the AOC should be encouraged in CourTools or similar court performance measures and in the development of toolkits and mentoring programs for courts that wish to participate in such projects.

Judicial Selection and Retention

85. The JNE process, a unique form of a merit-based screening and selection system that has served California well, should be retained in lieu of adopting another form of merit selection such as the Missouri Plan and expanded to apply to all contested judicial elections.

86. The background and diversity of the JNE members should be given more publicity, including by placing photographs of the members on the JNE Web site and making that site more accessible on the State Bar's home page.

87. Legislation should be sponsored to require that a JNE rating of "not qualified" (and thus, by the absence of announcement, a rating of at least "qualified" or better) for a trial court judge be made public automatically at the time of appointment of a person with that rating.

88. Legislation should be sponsored to make the current practice of releasing the JNE rating for an appellate justice mandatory and permanent.

89. The judicial branch's California Courts Web site should explain the judicial appointment process and link to both the State Bar's JNE Web site and the Governor's Judicial Application Web site with appropriate information about JNE procedures and the rating system.

90. The JNE's and the Governor's Web sites should be more accessible and should contain videos explaining the judicial appointment process.

91. Law schools should be encouraged to provide information about the judicial appointment process to law students by, for example, encouraging qualified JNE members, both past and present, to give presentations at law schools.

92. JNE should be encouraged to provide greater publicity by having its members capitalize on opportunities to speak to local and specialty bar associations, service organizations, and other civic groups.

93. The State Bar should amend the JNE rules to require that any member of the State Bar Board of Governors who attends a JNE meeting comply with the JNE conflict of interest rules.

94. All candidates in contested and open elections should be required to participate in a JNE form of evaluation, and the results of that evaluation should be published in the ballot materials together with a description of the JNE process, including the identity of those making the rating and what the ratings mean.

95. All JNE ratings in contested elections—i.e., ratings of exceptionally well qualified, well qualified, qualified, and not qualified—should be reported as part of the voter information proposed as part of recommendation 94.

96. The release of a rating by JNE should not be accompanied by a statement of reasons.

97. The courts should be directed to consider, when making appointments of subordinate judicial officers, both the diverse aspects of the appointees and the appointees' exposure to and experience with diverse populations and their related issues.

98. One of the factors the JNE should consider is the candidate's exposure to and experience with diverse populations and issues related to those populations.

99. The Governor should consider an appointee's exposure to and experience with diverse populations and issues related to those populations.

100. The judicial branch's public outreach and publicity programs should include one that encourages all members of the bar to consider applying for judicial office.

101. An amendment should be sponsored to change the constitutional provision for the recall of a judge—which currently requires a petition with signatures of 20 percent of those voting for a judge in the most recent election—to require a petition with signatures of 20 percent of those voting for district attorney, the only county official elected in every county.

102. A constitutional amendment should be sponsored to provide that a trial judge shall have served at least two years before his or her first election.

103. Legislation should be sponsored to change the number of signatures needed for placing an unopposed judicial election on the ballot for a potential write-in contest from the current level of 100 signatures to 1 percent of the voters for district attorney in the last county election but not fewer than 100 signatures.

104. Legislation should be sponsored to amend current law, which provides that an unopposed judge may be challenged by write-ins at either or both the primary election and the general election, to permit only one challenge, which should be at the first (i.e., primary) election.

105. An amendment should be sponsored to article VI, section 16 of the California Constitution to reorder the subsections therein and make minor wording changes for the sake of clarity.

106. A constitutional amendment should be sponsored to provide that retention elections for appellate justices be held every two years (during both the gubernatorial and the presidential elections) rather than the present system of every four years (during the gubernatorial elections).

107. A constitutional amendment should be sponsored to provide that following an appellate justice's initial retention election, that justice serves a full 12-year term, rather than the current system of a 4-, 8-, or 12-year term, depending on the length of term remaining for the previous justice holding that seat.

108. A constitutional amendment should be sponsored to provide that an appellate justice serve at least two years before the first retention election, paralleling recommendation 102 above concerning trial court judges.

109. Further study should be made of ways to help ensure that judicial vacancies are filled promptly.

Appendixes

Appendix A

Commission for Impartial Courts
Steering Committee Roster

As of January 16, 2009
(Expires November 30, 2009)

Hon. Ming W. Chin, Chair
Associate Justice of the
California Supreme Court

Mr. Joseph W. Cotchett, Jr.
Attorney at Law
Cotchett, Pitre & McCarthy
Burlingame

Mr. Bruce B. Darling
Executive Vice-President, University Affairs
University of California

Hon. Peter Paul Espinoza
Assistant Supervising Judge of the
Superior Court of California,
County of Los Angeles

Mr. Thomas V. Girardi
Attorney at Law
Girardi & Keese
Los Angeles

Mr. John Hancock
President
California Channel
Sacramento

Hon. Brad R. Hill
Associate Justice of the Court of Appeal,
Fifth Appellate District

Ms. Janis R. Hirohama
President
League of Women Voters of California
Manhattan Beach

Hon. William A. MacLaughlin
Judge of the Superior Court of California,
County of Los Angeles

Hon. Judith D. McConnell
Administrative Presiding Justice of the
Court of Appeal, Fourth Appellate District

Hon. Barbara J. Miller
Judge of the Superior Court of California,
County of Alameda

Hon. Douglas P. Miller
Associate Justice of the Court of Appeal,
Fourth Appellate District, Division Two

Hon. Dennis E. Murray
Presiding Judge of the
Superior Court of California,
County of Tehama

Hon. William J. Murray, Jr.
Presiding Judge of the
Superior Court of California,
County of San Joaquin

Hon. Ronald B. Robie
Associate Justice of the Court of Appeal,
Third Appellate District

Hon. Karen L. Robinson
Judge of the Superior Court of California,
County of Orange

Mr. Michael M. Roddy
Executive Officer
Superior Court of California,
County of San Diego

Mr. John H. Sullivan
President
Civil Justice Association of California
Sacramento

Ms. Patricia P. White
Member, State Bar of California
Board of Governors

JUDICIAL COUNCIL LIAISONS

Hon. Peter Paul Espinoza
Assistant Supervising Judge of the
Superior Court of California,
County of Los Angeles

Hon. Dennis E. Murray
Presiding Judge of the
Superior Court of California,
County of Tehama

CJER GOVERNING COMMITTEE LIAISON

Hon. Gail A. Andler
Judge of the Superior Court of California,
County of Orange

AOC ADVISOR TO THE COMMITTEE
Hon. Roger K. Warren (Ret.)
Scholar-in-Residence
Administrative Office of the Courts

AOC PROJECT DIRECTOR

Ms. Christine Patton
Regional Administrative Director
Bay Area/Northern Coastal Regional Office
Administrative Office of the Courts

AOC STAFF TO THE STEERING COMMITTEE

Ms. Althea Lowe-Thomas
Assistant Division Director
Bay Area/Northern Coastal Regional Office
Administrative Office of the Courts

Ms. Susan Reeves
Court Services Analyst
Bay Area/Northern Coastal Regional Office
Administrative Office of the Courts

Ms. Barbara Whiteoak
Executive Secretary
Bay Area/Northern Coastal Regional Office
Administrative Office of the Courts

Appendix B

Task Force on Public Information and Education Roster

As of January 16, 2009
(Expires November 30, 2009)

Hon. Judith D. McConnell, Chair
Administrative Presiding Justice of the
Court of Appeal, Fourth Appellate District

Mr. Stephen Anthony Bouch
Executive Officer
Superior Court of California,
County of Napa

Dr. Frances Chadwick
Assistant Professor of Education
California State University at San Marcos

Ms. Nanci L. Clarence
President, Bar Association of San Francisco
Partner, Clarence & Dyer, LLP

Mr. Marshall Croddy
Director of Programs
Constitutional Rights Foundation
Los Angeles

Hon. Lynn Duryee
Judge of the Superior Court of California,
County of Marin

Hon. Martha M. Escutia
Partner
Manatt, Phelps & Phillips, LLP
Los Angeles

Mr. John Fitton
Executive Officer
Superior Court of California,
County of San Mateo

Hon. Edward Forstenzer
Presiding Judge of the
Superior Court of California,
County of Mono

Mr. José Octavio Guillén
Executive Officer
Superior Court of California,
County of Imperial

Hon. Steven E. Jahr
Judge of the Superior Court of California,
County of Shasta

Hon. Linda L. Lofthus
Judge of the Superior Court of California,
County of San Joaquin

Hon. Franz E. Miller
Judge of the Superior Court of California,
County of Orange

Dean Elizabeth Rindskopf Parker
Dean, University of the Pacific,
McGeorge School of Law

Hon. David Sargent Richmond
Assistant Presiding Judge of the
Superior Court of California,
County of Amador

Mr. Jonathan Shapiro
Writer/Producer
Beverly Hills

Ms. Therese Stewart
Chief Deputy City Attorney
Office of the City Attorney,
City and County of San Francisco

ADVISORY MEMBER

Dr. Timothy A. Hodson
Executive Director
Center for California Studies
California State University at Sacramento

TASK FORCE CONSULTANT

Mr. Bert Brandenburg
Executive Director
Justice at Stake Campaign
Washington, D.C.

AOC LEAD COMMITTEE STAFF

Mr. Peter Allen, Program Director
Manager
Office of Communications
Executive Office Programs Division
Administrative Office of the Courts

AOC STAFF TO THE TASK FORCE

Ms. Lynne Mayo
Administrative Secretary
Executive Office Programs Division
Administrative Office of the Courts

Ms. Linda Theuriet
Special Consultant
Executive Office Programs Division
Administrative Office of the Courts

Appendix C

Task Force on Judicial Candidate Campaign Conduct Roster

As of January 16, 2009
(Expires November 30, 2009)

Hon. Douglas P. Miller, Chair
Associate Justice of the Court of Appeal,
Fourth Appellate District, Division Two

Ms. Christine Burdick
Executive Director and General Counsel
Santa Clara County Bar Association

Mr. Thomas R. Burke
Partner
Davis, Wright and Tremaine, LLP
Society of Professional Journalists

Hon. Joseph Dunn
Chief Executive Officer
California Medical Association
Sacramento

Hon. Richard D. Fybel
Associate Justice of the Court of Appeal,
Fourth Appellate District, Division Three

Hon. Michael T. Garcia
Judge of the Superior Court of California,
County of Sacramento

Mr. Dennis J. Herrera
City Attorney
Office of the City Attorney,
City and County of San Francisco

Ms. Beth Jay
Principal Attorney to the Chief Justice
California Supreme Court

Hon. Ronni B. MacLaren
Judge of the Superior Court of California,
County of Alameda

Hon. Rodney S. Melville (Ret.)
Judge of the Superior Court of California,
County of Santa Barbara

Mr. G. Sean Metroka
Executive Officer
Superior Court of California,
County of Nevada

Hon. James M. Mize
Presiding Judge of the
Superior Court of California,
County of Sacramento

Professor Mary-Beth Moylan
Professor of Law
Assistant Director Appellate Advocacy
University of the Pacific,
McGeorge School of Law

Mr. James N. Penrod
Member
State Bar of California Board of Governors
Morgan, Lewis & Bockius
San Francisco

Hon. Maria P. Rivera
Associate Justice of the Court of Appeal,
First Appellate District, Division Four

Hon. Byron D. Sher
Former Member of the California Senate
Placerville

Mr. Alan Slater
Chief Executive Officer
Superior Court of California,
County of Orange

Hon. Nancy Wieben Stock
Presiding Judge of the
Superior Court of California,
County of Orange

Professor Kathleen M. Sullivan
Stanley Morrison Professor of Law
Stanford Law School

TASK FORCE CONSULTANT

Professor Charles Gardner Geyh
John F. Kimberling Professor of Law
Indiana University School of Law

AOC LEAD COMMITTEE STAFF

Mr. Mark Jacobson, Committee Counsel
Senior Attorney
Office of the General Counsel
Administrative Office of the Courts

AOC STAFF TO THE TASK FORCE

Mr. Jay Harrell
Administrative Coordinator
Office of the General Counsel
Administrative Office of the Courts

Mr. Sei Shimoguchi
Attorney
Office of the General Counsel
Administrative Office of the Courts

Appendix D

Task Force on Judicial Campaign Finance Roster

As of January 16, 2009
(Expires November 30, 2009)

Hon. William A. MacLaughlin, Chair
Judge of the Superior Court of California,
County of Los Angeles

Hon. Gail A. Andler
Judge of the Superior Court of California,
County of Orange

Ms. Rozenia D. Cummings
President
California Association of Black Lawyers
Mill Valley

Hon. Alden E. Danner
Judge of the Superior Court of California,
County of Santa Clara

Ms. Denise Gordon
Executive Officer
Superior Court of California,
County of Sonoma

Mr. Charles Wesley Kim, Jr.
Counsel
Yelman & Associates
San Diego

Hon. Bruce McPherson
Former Member of the California Senate
Santa Cruz

Hon. Heather D. Morse
Judge of the Superior Court of California,
County of Santa Cruz

Ms. Angela Padilla
Member
The Bar Association of San Francisco
Orrick, Herrington & Sutcliffe
San Francisco

Mr. Michael D. Planet
Executive Officer
Superior Court of California,
County of Ventura

Hon. Mark B. Simons
Associate Justice of the Court of Appeal,
First Appellate District, Division Five

Mr. Gerald F. Uelmen
Executive Director
California Commission on the
Fair Administration of Justice
Santa Clara

Hon. Michael P. Vicencia
Judge of the Superior Court of California,
County of Los Angeles

Mr. Thomas Joseph Warwick, Jr.
Attorney at Law
Grimes & Warwick
San Diego

ADVISORY MEMBER

Mr. Robert Leidigh
Commissioner
California Fair Political Practices Commission

TASK FORCE CONSULTANT

Ms. Deborah Goldberg
Managing Attorney
Earthjustice
New York

AOC LEAD COMMITTEE STAFF

Mr. Chad Finke, Committee Counsel
Managing Attorney
Office of the General Counsel
Administrative Office of the Courts

AOC STAFF TO THE TASK FORCE

Ms. Cristina Foti
Administrative Coordinator
Office of the General Counsel
Administrative Office of the Courts

Appendix E

Task Force on Judicial Selection and Retention Roster

As of January 16, 2009
(Expires November 30, 2009)

Hon. Ronald B. Robie, Chair
Associate Justice of the Court of Appeal,
Third Appellate District

Mr. Ralph Alldredge
Secretary/Treasurer of California
Newspaper Publishers Association
Publisher, Calaveras Enterprise
San Andreas

Mr. Chris Arriola
Deputy District Attorney
Office of the District Attorney,
County of Santa Clara

Mr. Joseph Starr Babcock
Special Assistant to the Executive
Director
The State Bar of California
San Francisco

Hon. H. Walter Croskey
Associate Justice of the Court of Appeal,
Second Appellate District, Division
Three

Hon. Marguerite D. Downing
Judge of the Superior Court of
California, County of Los Angeles

Hon. Bonnie M. Dumanis
District Attorney
County of San Diego

Hon. Kim Garlin Dunning
Assistant Presiding Judge of the
Superior Court of California,
County of Orange

Mr. William I. Edlund
Attorney at Law
Bartko, Zankel, Tarrant & Miller
San Francisco

Hon. Terry B. Friedman
Judge of the Superior Court of
California, County of Los Angeles

Ms. Victoria B. Henley
Director and Chief Counsel
Commission on Judicial Performance
San Francisco

Hon. Scott L. Kays
Judge of the Superior Court of
California, County of Solano

Mr. J. Clark Kelso
Professor of Law and Director,
Governmental Affairs Program and the
Capital Center for Government Law
and Policy
University of the Pacific,
McGeorge School of Law
Sacramento

Mr. Jack London
Partner
Morrison and Foerster, LLP
San Francisco

Mr. John Mendes
Executive Officer
Superior Court of California,
County of Placer

Hon. William J. Murray, Jr.
Presiding Judge of the
Superior Court of California,
County of San Joaquin

Hon. Chuck Poochigian
Former Member of the California Senate
Fresno

Hon. Edward Sarkisian, Jr.
Judge of the Superior Court of
California, County of Fresno

Mr. Roman M. Silberfeld
Managing Partner
Robins, Kaplan, Miller & Ciresi, LLP
Los Angeles

Ms. Sharol Strickland
Executive Officer
Superior Court of California,
County of Butte

Hon. Sharon J. Waters
Judge of the Superior Court of
California, County of Riverside

Hon. David S. Wesley
Judge of the Superior Court of
California, County of Los Angeles

Mr. Michael R. Yamaki
Attorney at Law
Pacific Palisades

TASK FORCE CONSULTANT

Mr. Seth S. Andersen
Executive Vice-president
American Judicature Society
The Opperman Center at Drake
University

AOC LEAD COMMITTEE STAFF

Mr. Michael A. Fischer
Committee Counsel
Senior Attorney
Office of the General Counsel
Administrative Office of the Courts

AOC STAFF TO THE TASK FORCE

Ms. Benita Downs
Administrative Coordinator
Office of the General Counsel
Administrative Office of the Courts

Appendix F: Steering Committee and Task Force Charges

Commission for Impartial Courts Steering Committee

The Commission for Impartial Courts Steering Committee is charged with overseeing and coordinating the work of the four task forces, receiving the periodic task force reports and recommendations, and presenting its overall recommendations to the Judicial Council.

Task Force on Judicial Selection and Retention

The Task Force on Judicial Selection and Retention is charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to improve the methods and procedures of selecting and retaining judges and regarding the terms of judicial office and timing of judicial elections.

Task Force on Judicial Candidate Campaign Conduct

The Task Force on Judicial Candidate Campaign Conduct is charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to promote ethical and professional conduct by candidates for judicial office, including through statutory change, promulgation, or modification of canons of judicial ethics; improving mechanisms for the enforcement of the canons; and promotion of mechanisms encouraging voluntary compliance with ethics provisions by candidates for judicial office.

Task Force on Judicial Campaign Finance

The Task Force on Judicial Campaign Finance is charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to better regulate contributions to, financing of, or spending by candidates or campaigns for judicial office, and to improve or better regulate judicial campaign advertising, including through enhanced disclosure requirements.

Task Force on Public Information and Education

The Task Force on Public Information and Education is charged with evaluating and making periodic reports and final recommendations to the steering committee regarding any proposals to improve public information and education concerning the judiciary, both during judicial election campaigns and otherwise. Proposals may include methods to improve voter access to accurate and unbiased information about the qualifications of judicial candidates and to improve public understanding of the role and decisionmaking processes of the judiciary.

As the task force develops public information and education strategies, it should focus on ways to prevent or respond to unfair criticism, personal attacks on judges, institutional attacks on the judiciary, inappropriate judicial campaign conduct, and other challenges to judicial impartiality arising from unpopular judicial decisions. In forming strategies, the task force should consider all available avenues to develop and strengthen partnerships with other organizations, such as state and local bar associations, educational institutions, and the California Judges Association, which has a program for responding to criticism of judges.

Appendix G: Background Analysis of *Republican Party of Minnesota v. White* and Its Aftermath

The steering committee has made a number of recommendations relating to the post-*White* landscape. To provide context for those recommendations, the Task Force on Judicial Candidate Campaign Conduct prepared this appendix, which analyzes *White* and how case law concerning judicial elections has developed in its aftermath. The analysis also addresses amendments to the American Bar Association's Model Code of Judicial Conduct ("model code") and the California Code of Judicial Ethics ("code") as a result of *White*.

Introduction

In *White*, the U.S. Supreme Court held that a provision in Minnesota's Code of Judicial Conduct prohibiting a judicial candidate from "announcing his or her views on disputed legal or political issues" violated the First Amendment. The decision raised concerns about the validity of any provision regulating judicial campaign speech and whether judicial elections should be treated differently from elections for political office. Some lower federal courts have since relied on the decision to invalidate restrictions on judicial candidate speech that were not expressly addressed by the *White* court. The purpose of this analysis is to provide background on the *White* decision and a framework for considering possible amendments to California's rules governing judicial campaign conduct. This analysis addresses (1) the *White* majority opinion, (2) the dissenting opinions, (3) issues that were not discussed in the opinion, (4) lower federal court rulings interpreting *White*, (5) post-*White* revisions to the California Code of Judicial Ethics, and (6) post-*White* revisions to the model code.

The Majority Opinion

In *White*, Gregory Wersal, a lawyer running for the state supreme court, sought an advisory opinion from Minnesota's Lawyers Professional Responsibility Board, the state agency responsible for investigating and prosecuting ethical violations by lawyer candidates for judicial office, on whether it planned to enforce the canon in Minnesota's Code of Judicial Conduct. The canon provides that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues."[93] This prohibition, which was based on canon 7B of the 1972 ABA Model Code of Judicial Conduct, is known as the "announce clause."[94] The Lawyers Board responded that it had significant doubts about the constitutionality of this provision but could not answer Wersal's question because he had not provided examples of the announcements he wished to make.[95] Wersal then filed a lawsuit in federal district court

[93] *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 769.
[94] *Id.* at p. 768.
[95] *Id.* at p. 769.

seeking a declaration that the announce clause violated the First Amendment.[96] The Minnesota Republican Party joined the lawsuit as a plaintiff, alleging that the clause prevented it from learning Wersal's views and determining whether to support or oppose his candidacy.[97] The district court ruled that Minnesota's announce clause did not violate the First Amendment and the Eighth Circuit Court of Appeals affirmed.[98]

The U.S. Supreme Court, in a 5–4 decision authored by Justice Scalia, reversed the appellate court's ruling and held that the announce clause violated the First Amendment. The court found that Minnesota's announce clause was a content-based restriction on judicial campaign speech and was therefore subject to the strict scrutiny standard, which required Minnesota to show that the clause was narrowly tailored to serve a compelling state interest.[99] Minnesota had asserted that two compelling state interests justified its announce clause: preserving the impartiality of the judiciary and preserving the appearance of the impartiality of the judiciary.[100]

The holding in *White* turned on three different definitions of impartiality. First, Justice Scalia wrote for the majority that the announce clause failed to preserve impartiality defined in the "traditional sense" as "lack of bias for or against either *party* to the proceeding" [emphasis in original] because the clause only proscribed candidate speech on *issues*, not *parties*.[101] Second, Justice Scalia wrote that it was "perhaps possible" that impartiality could mean a "lack of preconception in favor of or against a particular *legal view*," [emphasis in original] but such an interest was not a compelling one because no judge comes to the bench without preconceptions about the law, nor would such inexperience be desirable.[102] Finally, he wrote that a third "possible meaning" of impartiality was "openmindedness," in the sense that a judge would "be willing to consider views that oppose his preconceptions, and remain open to persuasion" while on the bench.[103] The announce clause, however, was too underinclusive to preserve impartiality in this sense of the term because it regulated only statements made on the campaign trail, which are an "infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake."[104]

Concerning the assertion that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will be reluctant to contradict them, Justice Scalia noted that this "might be plausible" with regard to campaign *promises*, but Minnesota had a separate prohibition on campaign "pledges or

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[96] *Id.* at pp. 769–770.
[97] *Ibid*.
[98] *Ibid.*
[99] *White, supra,* 536 U.S. at pp. 774–775.
[100] *Ibid.*
[101] *White, supra*, 536 U.S. at pp. 775–776.
[102] *Id.* at pp. 777–778.
[103] *Id.* at p. 778.
[104] *Id.* at p. 779.

promises" that was not challenged.[105] Justice Scalia wrote that it was "not self-evidently true" that judges would feel, or appear to feel, significantly greater compulsion to maintain consistency with nonpromissory statements made during a campaign than with such statements made at other times.[106]

Justice Scalia disagreed with the assertion that it would violate due process for a judge to sit in a case involving an issue on which he or she had previously announced his or her view because the judge would have a "direct, personal, substantial, and pecuniary interest" in ruling consistently with that previously announced view. Justice Scalia wrote that elected judges "*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench" regardless of whether they had announced any views beforehand [emphasis in original].[107]

Justice Scalia also wrote that the majority does not make the argument that judicial campaigns must "sound the same as those for legislative office," but noted that the notion of a judiciary completely separate from the enterprise of "representative government" was "not a true picture of the American system," because judges possess the power to "make" common law and to shape state constitutions.[108]

The Dissenting Opinions

Justices Ginsburg and Stevens filed dissents in *White*. Both dissents stressed that the fundamental difference between campaigns for judicial office and those for the political branches of government allowed for differences in election regulations. Justice Ginsburg wrote in her dissent: "Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies."[109] On the other hand, she suggested, "[j]udges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency."[110] Justice Ginsburg thus would have concluded that "[s]tates may limit judicial campaign speech by measures impermissible in elections for political office."[111]

Justice Ginsburg also noted that the announce clause was part of Minnesota's "integrated system of judicial campaign regulation" designed to preserve the impartiality guaranteed to litigants through the due process clause of the Fourteenth Amendment.[112] She pointed out that Minnesota's announce clause was coupled with a provision—the "pledges and promises clause"—that prohibits candidates from making "pledges or promises of

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[105] *White*, *supra*, 536 U.S. at p. 780.
[106] *Ibid.*
[107] *White*, *supra*, 536 U.S. at p. 782.
[108] *White*, *supra*, 536 U.S. at pp. 783–784.
[109] *White*, *supra*, 536 U.S. at p. 805.
[110] *Id.* at p. 806.
[111] *Id.* at p. 807.
[112] *White*, *supra*, 536 U.S. at p. 812.

conduct in office other than the faithful and impartial performance of the duties of the office," which the parties agreed was constitutional.[113] Pledges and promises of conduct in office are inconsistent with a judge's obligation to decide cases on the basis of the facts and law before them; therefore, the prohibition against such statements serves vital due process interests.[114] Justice Ginsburg warned, however, that without the announce clause, the pledges and promises clause was "an arid form" that could be "easily circumvented" by making promises that were phrased as announcements.[115] Justice Ginsburg suggested, for example, that a prohibited promise—"'If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages'"—could be rephrased as a permissible announcement—"'I think it is constitutional for the legislature to prohibit same-sex marriages.'"[116]

Justice Stevens wrote that opinions expressed by a lawyer before becoming a judge or judicial candidate do not disqualify anyone from judicial service.[117] But when a judicial candidate announces his views in the context of a campaign, he "is effectively telling the electorate: 'Vote for me because I believe X, and I will judge cases accordingly.'"[118] Even if the candidate, once elected, decides to disregard his campaign statements, it does not change the fact that the judge announced his views on issues "*as a reason to vote for him*."[119] [Emphasis in original.] Justice Stevens wrote that candidates who seek to enhance their candidacy by making statements beyond general observations about the law demonstrate "either a lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary."[120]

Judicial Campaign Issues Not Decided By *White*

The scope of the *White* decision has been the subject of much debate in the legal community. Some commentators have taken the view that the decision effectively prohibits any attempt to restrict candidate speech in judicial election campaigns, while disciplinary and ethics bodies have argued that the decision should be interpreted narrowly in order not to prohibit judicial candidate speech restrictions that were not expressly addressed by the *White* court.[121] Thus, it is important to note the First Amendment issues in judicial campaigns that were not decided by *White*.

First, *White* left intact state rules barring judicial candidates from making "pledges or promises" to voters during judicial campaigns. In the opinion, Justice Scalia expressly

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[113] *Id.* at p. 813.
[114] *Ibid*.
[115] *Id.* at p. 819.
[116] *Id.* at p. 820.
[117] *White*, *supra*, 536 U.S. at p. 798.
[118] *Id.* at p. 800.
[119] *Ibid.*
[120] *Ibid.*
[121] See ABA Report and Recommendations of the Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility (2003), p. 3.

stated that Minnesota's pledges and promises clause was "a prohibition that is not challenged here and on which we express no view."[122]

Second, *White* addressed the right of a challenger seeking to obtain judicial office; it did not discuss or reach the constitutionality of limitations that might be placed on an incumbent judge running for retention or reelection. As noted by Justice Kennedy in his concurring opinion, the petitioner in *White* "was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights."[123]

Third, *White* addressed only a direct restriction on speech by judicial candidates; it did not address restrictions on their supporters or contributors, nor did it address judges' election-related conduct as opposed to their speech.

Fourth, the opinion did not discuss restrictions on the solicitation of judicial campaign contributions.

Finally, the opinion did not suggest any First Amendment limits on provisions that call for disqualification to prevent the appearance of a lack of impartiality when a judge, while a candidate for judicial office, has made a statement that commits or appears to commit the judge to ruling a particular way in a matter before him or her.

Lower Federal Court Rulings Interpreting *White*[124]

The *White* decision raised concerns for many in the legal community because by invalidating the announce clause, it appeared to move judicial elections a step closer to elections for political office. Those concerns have increased because some lower federal courts have interpreted *White* broadly to invalidate, on First Amendment grounds, rules other than the announce clause that regulate judicial elections. For example, in 2005 the Eighth Circuit Court of Appeals held that clauses in Minnesota's Code of Judicial Conduct prohibiting (1) personal solicitation of contributions by judicial candidates, and (2) partisan political activities violated the First Amendment.[125] It is noteworthy,

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[122] *White, supra*, 536 U.S. at p. 770.
[123] *White, supra*, 536 U.S. at p. 796.
[124] For ongoing information on cases interpreting *White*, consult the Brennan Center for Justice Web site, *www.brennancenter.org*, or the American Judicature Society Web site, *www.ajs.org*.
[125] *Republican Party of Minnesota v. White* (8th Cir. 2005) (en banc) 416 F.3d 738, cert. den. *sub nom. Dimick v. Republican Party of Minnesota* (2006) 546 U.S. 1157. See also *Carey v. Wolnitzek* (E.D.Ky., Oct. 15, 2008, No. 3:06-36-KKC) 2008 U.S. Dist. Lexis 82336 [granting summary judgment in favor of plaintiff's First Amendment challenges to Kentucky's canons prohibiting partisan political activity and personal solicitation of campaign funds]; *Siefert v. Alexander* (W.D.Wis. Feb. 17, 2009, No. 08-CV-126-BBC) 2009 U.S. Dist. Lexis 11999) [permanently enjoining enforcement of canons prohibiting judges from (1) personally soliciting campaign funds, (2) endorsing a partisan candidate, and (3) joining a political party].

however, that some state courts have found similar provisions prohibiting personal solicitation and partisan political activity to be constitutional.[126]

In 2002, the Eleventh Circuit Court of Appeals held unconstitutional provisions in Georgia's Code of Judicial Conduct that prohibited a judicial candidate from (1) making negligent false statements and misleading or deceptive true statements, and (2) personally soliciting campaign contributions. In the opinion, the Eleventh Circuit asserted that "the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."[127]

In addition, four federal district courts have extended *White* to prohibit enforcement of canons that forbid candidates from pledging or promising to rule in a particular manner or from committing themselves in advance on legal issues,[128] even though the *White* court expressly declined to determine the constitutionality of such pledges and promises or commit rules.[129] By contrast, one federal district court and two state courts have upheld the constitutionality of these clauses.[130]

One federal district court has also enjoined enforcement of a canon that required judges to recuse themselves if, while a judge or a candidate for judicial office, they previously had made statements that "appear[ed] to commit" the judge with respect to an issue in a proceeding.[131] There are, however, a number of federal cases that have rejected First

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[126] See *Simes v. Judicial Discipline and Disability Commission* (Ark., 2007) 247 S.W.3d 876, 883–884 [Arkansas's prohibition on judicial candidates personally soliciting campaign contributions not unconstitutional]; *Inquiry Concerning Vincent* (N.M., 2007) 172 P.3d 605, 610 [New Mexico's prohibition on endorsement of a political candidate by judge not unconstitutional]; *In the Matter of Raab* (N.Y., 2003) 793 N.E.2d 1287, 1290–1293 [New York's prohibition on partisan political activity by a judicial candidate not unconstitutional].

[127] *Weaver v. Bonner* (11th Cir. 2002) 309 F.3d 1312, 1321.

[128] See *Bauer v. Shepard* (N.D.Ind., May 6, 2008, No. 3:08-CV-196-TLS) 2008 U.S. Dist. Lexis 37315; *Kansas Judicial Watch v. Stout* (D.Kan., 2006) 440 F.Supp.2d 1209, 1232–1234; *North Dakota Family Alliance, Inc. v. Bader* (D.N.D., 2005) 361 F.Supp.2d 1021, 1038–1039; *Family Trust Foundation of Kentucky v. Wolnitzek* (E.D.Ky., 2004) 345 F.Supp.2d 672, 703–704.

[129] *White, supra,* 536 U.S. at pp. 770, 773.

[130] See *Pennsylvania Family Institute v. Celluci* (E.D.Pa., 2007) 521 F.Supp.2d 351, 376–380 [pledges and promises clause and commit clause in Pennsylvania's canons could reasonably be construed narrowly and as such are not unconstitutional]; *In the Matter of Watson* (N.Y., 2003) 794 N.E.2d 1, 5–8 [New York's pledges and promises clause bans only statements inconsistent with the faithful and impartial performance of judicial duties and is not unconstitutional]; *Inquiry Concerning Kinsey* (Fla. 2003) 842 So.2d 77, 86–87 [Florida's pledges and promises and commit clauses serve compelling state interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary and are narrowly tailored to protect those interests].

[131] *Duwe v. Alexande*r (W.D.Wis., 2007) 490 F.Supp.2d 968. But see *Florida Family Policy Council v. Freeman* (N.D.Fla., Sept. 11, 2007, No. 4:06-cv-00-395-RH-WCS) order of dismissal [Florida canon requiring recusal if judicial candidate makes statement that commits or appears to commit the candidate with respect to parties, issues, or controversies does not violate First Amendment]. *Florida Family Policy Council* is currently on appeal to the 11th Circuit.

Amendment challenges to more general disqualification rules providing that a judge is disqualified if his or her "impartiality might reasonably be questioned."[132]

Post-*White* revisions to the California Code of Judicial Ethics

In 1995, a constitutional amendment[133] gave the California Supreme Court authority to promulgate the California Code of Judicial Ethics, which sets forth binding rules governing the conduct of California state judicial officers and of judicial candidates in the conduct of their campaigns. In 1996, the court formally adopted the California Code of Judicial Ethics.

At the time of the decision in *White*, the California Code of Judicial Ethics did not contain either an announce clause or a pledges and promises clause. Instead, canon 5B, which places limitations on judicial candidate speech, contained a "commit clause" prohibiting a judicial candidate from making certain statements that "commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the court." Canon 5B stated in full:

> A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent.

In 2003, following the decision in *White*, the California Supreme Court deleted the "appear to commit" language from canon 5B(1) because it may have been overinclusive. The commentary to the canon explains the deletion of this language as follows:

> This Code does not contain the "announce clause" that was the subject of the United States Supreme Court's decision in *Republican Party of Minnesota v. White* (2002) 536 U.S. 765. That opinion did not address the "commit clause," which is contained in Canon 5B(1). The phrase "appear to commit" has been deleted because, although judicial candidates cannot promise to take a particular position on cases, controversies, or issues prior to taking the bench and presiding over individual cases, the phrase may have been overinclusive.

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[132] See *Indiana Right to Life, Inc. v. Shepard* (N.D.Ind., 2006) 463 F.Supp.2d 879, 886–887; *Kansas Judicial Watch*, *supra*, 440 F.Supp.2d at pp. 1234–1235; *Alaska Right to Life Political Action Comm. v. Feldman* (D. Alaska, 2005) 380 F.Supp.2d 1080, 1083–1084; *North Dakota Family Alliance, Inc.*, *supra*, 361 F.Supp.2d at pp. 1043–1044; *Family Trust Foundation of Kentucky, Inc.*, *supra*, 345 F.Supp.2d at pp. 705–711.

[133] Cal. Const., art. VI, § 18(m).

Also in 2003, the California Supreme Court amended canon 5B(2) to state that a candidate for judicial office shall not

> 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.

In addition, the commentary to canon 5B(2) was amended to add the following language:

> Canon 5B(2) prohibits making knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.

At the time of the 2003 amendment to canon 5B(2), the 11th Circuit Court of Appeals had held unconstitutional a provision in Georgia's Code of Judicial Conduct that prohibited a candidate from making negligent false statements and misleading or deceptive true statements.[134] And in August 2002, the California Commission on Judicial Performance cited *White* as a basis for dismissing formal disciplinary proceedings against a former judge, Patricia Gray, who was charged with making misleading statements about her election opponent in campaign mailers.

The California Code of Judicial Ethics did not incorporate the 2003 revisions to the model code, discussed below, that were made in response to *White*. In particular, unlike the model code, the Code of Judicial Ethics does not contain a definition of "impartiality," and the commit clause has not been extended beyond the judicial campaign context to apply to sitting judges in the performance of their regular adjudicative duties. In addition, there are no provisions in either the Code of Judicial Ethics or the Code of Civil Procedure—which contains the disqualification rules for trial court judges—that mandate disqualification if a judge or judicial candidate makes a public statement that commits or appears to commit the judge to rule a particular way in a proceeding or controversy. Under the current California rules, however, a judge or judicial candidate who has made such a statement may nevertheless be disqualified under the general rules requiring disqualification when a reasonable person aware of the facts would doubt the judge's ability to be impartial.[135]

[134] *Weaver v. Bonner*, *supra*, 309 F.3d at p. 1321.
[135] See Cal. Code Jud. Ethics, canon 3E(4)(c); Code Civ. Proc., § 170.1(a)(6)(A)(iii).

The ABA Model Code of Judicial Conduct and Post-*White* Revisions

In 1924, the ABA adopted the Canons of Judicial Ethics with the intention of providing a "guide and reminder to the judiciary."[136] In 1972, the ABA adopted the Model Code of Judicial Conduct, which was designed to be enforceable and intended to preserve the integrity and independence of the judiciary.[137] California, however, has not adopted the model code, and its provisions are therefore not binding on California state judicial officers or judicial candidates.

The model code adopted in 1972 contained both an announce clause and a pledges and promises clause. Canon 7B(1)(c) stated that a candidate for judicial office should not:

> make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

In 1990, the ABA amended the model code. The rules regulating the conduct of judicial candidates were moved to canon 5 and the announce clause was replaced with a commit clause. Canon 5A(3)(d) of the 1990 code stated that a candidate shall not:

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or
>
> (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent; . . .

In 2003, in light of *White*, the ABA adopted a number of amendments to the model code. First, canon 5A(3)(d) was amended to combine the "pledges and promises" and "commit" language and to eliminate the prohibition against statements that "appear to commit" the candidate. The 2003 revision to canon 5A(3)(d) provides that a candidate shall not:

> (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or

[136] See preface to the 1972 Model Code of Judicial Conduct.
[137] *Ibid.*

(ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

The purpose of combining the pledges and promises and commit clauses was to create a single provision that clearly identified restricted campaign speech (statements concerning "cases, controversies, or issues that are likely to come before the court") and that clearly identified what was being protected ("inconsistent with the impartial performance of the adjudicative duties of the office").[138] The "appear to commit" language was deleted because it was considered too vague to withstand strict scrutiny analysis.[139]

Second, the model code was amended by the addition of canon 3E(1)(f), which added a disqualification provision that is directly related to judicial candidate speech. Canon 3E(1)(f) requires a judge to disqualify himself or herself if:

> the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceedings; or (ii) the controversy in the proceeding.

This new disqualification canon was designed to make explicit the disqualification ramifications of a prohibited speech violation and to reflect the goals of canon 5A(3)(d).[140] Although it is unclear why the "appears to commit" language was deleted from the campaign speech prohibition but inserted into the disqualification provision, it is arguable that disqualification rules are not subject to the same First Amendment considerations as campaign speech.

Third, the model code was amended by the addition of canon 3B(10), which includes language that mirrors the speech restrictions imposed on judicial candidates by canon 5A(3)(d). Canon 3B(10) provides:

> A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

The purpose of adding canon 3B(10) was to preserve judicial independence, integrity, and impartiality by extending the speech restrictions on judicial candidates to all sitting judges in the performance of their regular adjudicative duties.[141]

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[138] See ABA Report, *supra*, at p. 7.
[139] *Ibid.*
[140] See ABA Report, *supra*, at p. 6.
[141] See ABA Report, *supra*, at p. 6.

Finally, the 2003 amendments added a definition of the meaning of "impartiality" to the terminology section that tracks the analysis of impartiality in the majority opinion of *White* by couching the definition in terms of an absence of bias or prejudice toward parties and maintaining an open mind on issues. It states:[142]

> "Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

In 2007, the model code was significantly reorganized and reformatted; however, the ABA maintained in substantially the same form the 2003 revisions discussed above that were implemented in response to *White*.[143] No significant *White*-related additions were made to the canons or rules in the 2007 model code. The comments[144] to rule 4.1, however, contain substantial new language that provides guidance and explanation concerning (1) the difference between the judicial role and that of a legislator or executive branch official; (2) participation in political activities; (3) campaign statements; and (4) the prohibition against making pledges, promises, and commitments.

[142] See ABA Report, *supra*, at p. 5.

[143] In the 2007 Model Code of Judicial Conduct, the prohibition on pledges, promises, or commitments by judicial candidates (formerly in canon 5A(3)(d)(i)) is now in rule 4.1(A)(13); the disqualification provision concerning statements that commit or appear to commit a judge (formerly in canon 3E(1)(f)) is now in rule 2.11(A)(5); and the provision extending speech restrictions on judicial candidates to all sitting judges (formerly in canon 3B(10)) is now in rule 2.10(B).

[144] The comments in the model code serve two functions: (1) they provide guidance on the purpose, meaning, and application of the rules; and (2) they identify aspirational goals for judges. A comment itself is not binding or enforceable. See Model Code of Judicial Conduct, Scope.

Appendix H

National Ad Hoc Advisory Committee on Judicial Campaign Oversight

300 Newport Avenue Williamsburg, VA 23185
(757) 253-2000 / FAX: (757) 220-0449

How Should Judicial Candidat es Respond to Questionnaires?

An Advisory Memorandum
July 24, 2008

The Current Scene:

"Questionnaires" from interest groups to candidates for election or reelection to the bench are proliferating and becoming more pointed. Also more loaded, like the following paragraph, here quoting from a 7/19/06 federal court decision in Kansas.

> [The Questionnaire's] 'Decline to Respond' option is accompanied by an asterisk, which reads:
>
> This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(I) and (ii), which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1), which requires a judge or judicial candidate to recuse him or herself when "the judge's impartiality might reasonably be questioned . . . ."[1]

An almost identical paragraph is used on every page of the Tennessee Family Action Council's June 2006 Questionnaire. A Georgia questionnaire (sent out in July) has a similar paragraph without the treatment of recusal.

NOTE that states in which candidates have declined to respond *because of* the Canons have been subject to lawsuits.

Of 64 Tennessee judges who received questionnaires, 25 sent letters declining to respond (some citing Chief Justice John Roberts, and almost all giving biographic information), 35 did not respond, and 3 gave limited responses (*e.g.*, that Reagan and Rehnquist best represent their political or judicial philosophy among the listed Presidents and Justices). The Tennesseans' letters Declining to respond may be helpful. An Addendum provides excerpts from three of them. Tennessee, a few weeks later, voted on average 75 percent *for* retention of their 27 appellate judges.

[1] From *Kansas Judicial Watch v. Stout*, Case 5:06-cv-04056-JAR-KGS (D.Ct. Kansas 7/19/06), at 5-6. Citations to other relevant cases are available upon request.

Recommendations:

There is no simple right answer on how to respond. This is true because of variations in local circumstances and candidates' own preferences. Judicial candidates should research the law in their jurisdiction, consult with local judicial campaign committees, and definitely confer with other candidates.

1. Do not be rushed in deciding how to handle the questionnaire. Questionnaires often arrive only a few days before what the questionnaire states is the "due" date for responding. The Chief Justice of Tennessee opened his recent letter (declining to respond) noting that he had received the questionnaire on June 13; the due date was June 16. You should know that the response by all but a *very* few judges and candidates, has been either not responding at all or sending a letter like those in the Addendum. While this characterization is valid in general, we do not know or mean to presume about your jurisdiction. Some judges who have responded later said they were unaware that their responses would be made public, not merely as part of a tabulation. Generally, a judicial candidate should assume that any response to a questionnaire becomes part of a permanent file where statements made by the candidate can be used for years to come.

2. Never use the pre-printed answers provided on the questionnaire. Candidates have greater First Amendment rights to discuss views post-*White*, but no case law, statute, rule or practice creates any obligation to discuss any issue. Even a well intentioned and well written response may be used in a way you do not agree with. Indeed, simplifying a legal or political issue to a "yes/no" answer is inconsistent with the judge's role—*e.g.*, how the issue comes before the judges; what facts are proven and what law is applicable; and protecting the parties' due process rights.

3. Consider responding with a letter. A letter is an opportunity to educate voters on the role of judges and judicial independence and impartiality—and about yourself! Candidates who reply with a letter are advised to request that the letter be distributed to members of the group sponsoring the questionnaire. You might release the letter, especially if the interest group attempts to portray you as non-responsive. Candidates' letters might express their concern that completing the questionnaire will mislead voters about the relevance of any judges' personal views and the relevance of the issues raised in the questionnaire to being a judge since so few cases concern such issues.

4. Never use a judicial Canon to justify a decision not to respond. Since *White*, interest groups have successfully litigated (in four states, with two more pending) to strike down Canons that are read as prohibiting responses to their questionnaire, with recovery of costs and fees from the states.

5. Distinguish general-interest, non-advocacy groups from special interest advocacy groups—and be consistent. There is a notable difference between, on the one hand, general-interest media and general interest non-advocacy groups that have a neutral claim on a response to their questionnaires. On the other hand, there are special interest advocacy groups that are likely to draft questionnaires so as to encourage a candidate to make a pledge, promise or commitment. Different general-interest, non-advocacy groups send out their own questionnaires, but in our experience they are as neutral and as aimed at obtaining sheer information as are the general news media questionnaires. Any questions from any source that encourage a candidate to make a pledge, promise or commitment should not be answered. Once you have decided on your general approach to questionnaires, apply it consistently so that you won't be accused of favoritism.

ADDENDUM

Excerpts from 2006 Letters by Judges Declining to Answer the Questionnaire:

1. **Judge John Everett Williams (Tennessee):**

. . . . I believe that Chief Justice John Roberts set the gold standard in ethical conduct during his confirmation hearing. As did Justice Roberts, I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge. I have pledged to maintain the highest degree of ethical conduct.

As a judge, my role is to interpret the law, not make it. My opinions reflect my strict adherence to the rule of law.

It is my hope and desire that by maintaining the highest degree of ethical conduct, I promote public trust and confidence in the independence of the judiciary.

2. **Judge Gary R. Wade (Tennessee):**

. . . .I am a great believer in the ethical canon of our profession which authorizes judges to engage in activities which promote respect for the administration of justice. On the theory that judges should make every effort to support worthy community causes as a part of that mission, I often lend support to a number of non-profit organizations with an educational, historic, or charitable purpose. For example, I am a founding member of the Friends of the Great Smoky Mountains National Park and have served as President of that organization since its inception in 1993. I am the immediate past President of both the Knoxville Zoo and the Walters State Community College Foundation. I support a number of other organizations, including the Sevier County Library Foundation, Boys and Girls Club of the Smoky Mountains, Safe Harbor Child Advocacy Center, and United Way of both Sevier and Knox Counties . . .

3. **Judge Peter D. Webster (Florida):**

Although I am aware of the Florida Supreme Court Judicial Ethics Advisory Committee's very recent Opinion Number 06-18, for the reasons that follow, I respectfully decline to answer the questionnaire.

I have been a judge for nearly 21 years, the first six on the circuit court in Jacksonville and Green Cove Springs and the last 15 on First District Court of Appeal in Tallahassee. In addition, I have been nominated twice for vacancies on the Florida Supreme Court and once for a vacancy on the United States District Court for the Northern District of Florida. As a result, I have spent a good portion of my life thinking about issues related to the judiciary. My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad—bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida.

To the extent you desire to learn more about my personal or professional background, you may find such information on line at either our court's (www.IDCA.org) or The Florida Bar's (www.floridabar.org) web site, or in print in *Who's Who in America*. The best gauge of my judicial philosophy may be found in the opinions I have authored, which number several hundred.

4. **Chief Justice Wallace B. Jefferson (Texas):**

I have completed answers to the 2006 Free Market Foundation Voters' Guide concerning judicial candidates. I have elected not to answer some of the questions. While I, of course, have opinions on many areas of substantive law, I have made it a practice to give litigants the opportunity to persuade me, based on the facts of their case and any developments in the law, that their position is meritorious. That "chance to persuade" is, in my view, a component of due process. Second, I would be subject to recusal were I to express an opinion on disputed legal issues before the case is actually decided by my Court. I have an obligation to minimize the areas in which recusal would be warranted so that I can be a participant, and not a spectator, in the administration of justice. With respect to particular questions, the answer to number 4 would depend on the circumstances. The areas about which you have inquired in questions 7, 8 and 9 (and to a degree, 5) involve decisions from the United States Supreme Court. It is irrelevant whether or not I believe them to have been "correctly decided." Under our constitutional form of government, those decisions (unless reversed or modified by the Supreme Court) control in both state and federal court regardless of any particular judge's view of their validity.

Thank you for your interest in the courts. I am always encouraged when members of the public take a genuine interest in the judicial branch.

Appendix I: Rapid Response Plan

A Model Guideline for Responding to Unfair Criticism of the Judicial Branch

A. Plan Proposal

The purpose of this document is to provide guidelines for establishing a Statewide Rapid Response Team to respond immediately and systematically to unfair criticism of judges or the judiciary, or to broad-based attacks on the judiciary stemming from the initiative process. The goal of the statewide team is to be available as a resource to individual courts and to the branch as a whole and to provide accurate, consistent, and timely information while maintaining the public's trust and confidence in the justice system. Additionally, a primary responsibility of the statewide team is to anticipate when a response will be needed, rather than merely reacting after an attack has already been made.

Courts and local bar associations are encouraged to develop regional rapid response teams to consolidate resources. The California Judges Association has created a response plan with a useful district structure, which can be used as a model for local or regional teams. The statewide team can help courts create local or regional teams.

An independent coalition or commission appointed by the Chief Justice should provide oversight to the plan. AOC staff with media experience should be assigned to the coalition to provide it with ongoing administrative services.

This plan was developed to respond to unwarranted attacks on the judicial branch. Specific complaints of judicial misconduct and judicial incapacity should continue to be communicated to the Commission on Judicial Performance. Complaints that do not rise to the level of judicial misconduct or judicial incapacity but are otherwise warranted should be redirected to the responsible authority or institution (e.g., the presiding judge, the court executive officer).

B. Membership of the Statewide Rapid Response Team

The Statewide Rapid Response Team should be made up of high-level members of the judicial branch and bar, as well as members of the public and any court executive, trial court presiding judge, or presiding justice directly affected by the unfair criticism or unusual media attention. Note: Judges should not make up a majority of the membership in order to avoid the perception that the team seeks to protect individuals rather than the judiciary as an institution. Additional suggested team members include:

- California Judges Association leaders
- Local and State Bar association leaders
- Academics

- Law school deans
- Retired politicians with high name recognition
- Local and state Bench-Bar-Media Committee members
- Local and state community leaders, including representatives from government, religious and civic organizations, and minority communities
- Retired judges and attorneys
- Business community leaders
- Representatives from each major political party
- Former or retired members of law enforcement
- Staff from the following offices of the AOC: Executive Office, applicable regional office, Office of Governmental Affairs, Office of the General Counsel, and Office of Communications

C. Components of the Statewide Rapid Response Team

The Statewide Rapid Response Team should have three components.

- Intake Team: This team, consisting of only a few members, should immediately determine the threat level and the necessity of a statewide response. The intake team should have a rotating membership and remain small to ensure rapid response (i.e., preferably within one hour, but not beyond the same business day). Staff from the AOC Office of Communications would participate in this group.
- Immediate Response Team: This team consists of members primarily responsible for communicating to the media and other involved groups. When identifying the members of this group, the rules and standards that prohibit all judges from commenting on any pending case must be taken into consideration.
- Communications Management Team: The members of this team are responsible for devising an overall strategy, advising on individual incidents, and assisting with the debriefing of the entire team after a response has been made. A detailed list of responsibilities follows in section H.

D. Triggers for Deployment of the Statewide Rapid Response Plan

- Unfair criticism: When a judge or the judiciary comes under unfair attack and the attack threatens to undermine the perception of the courts as fair and impartial; or
- Unusual media attention: When a judge or the judiciary is the subject of unusually intense, broad, or negative media interest that threatens to undermine the perception of the courts as fair and impartial.

E. Intake Procedure

Any member of the Statewide Rapid Response Team may initiate a request for a response. The request should be sent via e-mail to all members of the Intake Team and should describe the comment or criticism, the date and location of publication/broadcast, any recommended response strategy, and other pertinent facts.

Available members of the Intake Team should immediately determine whether the criticism is unfair or unwarranted. Each available member of the Intake Team should respond by e-mail immediately, indicating one of the following:

- Recusal;
- Support making a response;
- Oppose making a response; or
- No position.

If a majority of the Intake Team supports making a response, the Intake Team should suggest what the response should be, which members should deliver the response, and the appropriate audiences for the response. An ad hoc response team should be formed to create the response within one day.

F. Evaluation Factors

When considering whether a statewide response is required, the Intake Team should consider the following factors:

- Does the criticism demonstrate a serious misunderstanding about the courts, justice system, or a court decision that is sufficiently serious that it demands correction?
- Is the criticism a serious misrepresentation of the courts, justice system, or a court decision that is part of a disinformation campaign that could adversely affect the justice system?
- Is the criticism unwarranted or unjust?
- Will the response have the negative effect of prolonging or giving greater circulation to the criticism?
- Will a response serve a larger public purpose?
- Who are the best/most appropriate people to offer a credible response?

G. Communications Management

- Determine the facts.
- Decide what information can be shared.
- Decide what information remains confidential.
- Identify the specific audiences.
- Develop talking points and use as a reference the talking points regarding the core values of judicial fairness and impartiality.
- Identify the chief spokespersons.
- Determine appropriate communications channels, including news briefings and employee notification.
- Create a system to field multiple calls 24/7 from the press and public.
- Tell the truth; be accurate; don’t mislead.
- Deliver our own bad news; don’t wait for the media to deliver it.
- Acknowledge mistakes, apologize if appropriate.
- Find the positives in the situation.
- Describe lessons learned.

- Refer to “Crisis Communications” chapter in *Media Handbook for California Court Professionals.*

H. Debrief

- Review the facts and the responses made.
- Tie up loose ends.
- Evaluate the communications response.
- Develop a process for applying lessons learned.

I. Local Response

If the unfair criticism or media attention appears to be strictly local, a trial court presiding judge or court executive officer may seek immediate advice from the AOC’s regional administrative director, who can apply experience gained in helping other courts with communications issues and can recommend other AOC resources if necessary. If the director or assistant regional director is unavailable, the judge or executive can call Public Information Officer Lynn Holton at 415-865-7726, Communications Manager Peter Allen at 415-865-7451, Communications Specialist Leanne Kozak at 916-263-2838, or Communications Specialist Philip Carrizosa at 415-865-8044.

Appendix J: Responding to Press Inquiries

A Tip Sheet for Judges

- Canon 3B(9) prohibits a judge from commenting publicly about a pending or impending proceeding in any court. A judge is still permitted to talk to the media, however. This tip sheet contains some general guidelines.
- Consider responding to press calls via speakerphone, with a member of staff or court administration in the room to ensure accuracy. Alert the reporter at the beginning of the call that the other person is present to take notes and provide supplemental answers and information.
- CJA maintains a hotline at 415-263-4600.

1. **Explain your ruling on the record.** To the extent possible, judges involved in high-conflict litigation should try to anticipate and prepare for press inquiries in advance of hearings. The best time for you to explain the reasons for a controversial ruling is on the record in open court and in a detailed written ruling that begins with a summary paragraph that clearly presents the facts of the case, legal issues, and basis for the ruling. When the press inquiry is made, court staff can supply the reporter with a transcript and the ruling that contains the summary paragraph.
2. **Consult a trusted colleague.** If you are the subject of public criticism, consult a trusted colleague for objective guidance. Is the criticism warranted? Is there any action that you should take? Avoid isolating yourself or making a hasty or reactive public statement.
3. **Determine who is the most appropriate person to return the reporter's call.** Because it is generally considered good practice to return a press call, you should evaluate who should return the call. It might be more effective to have the presiding judge, court executive officer, court staff, or other knowledgeable person return it. In deciding who should return the call, you might consider:
    a. Are you embroiled? If you're feeling attacked, emotional, or defensive, you probably won't make the most effective statement.
    b. Is there a pending case? If so, have someone else in the court return the press inquiry, give the reporter a copy of canon 3B(9), and provide the reporter with any appropriate case information, such as court minutes, rulings, transcripts, pleadings, online information, and access to court files.
4. **Prepare your statement before returning any press inquiries.** You should be extremely careful about speaking to the press without first thinking through your remarks. If a reporter catches you off-guard, ask for a return number or an e-mail address so that you can speak at a more convenient time. Find out what the

reporter would like to discuss in advance so you can prepare yourself. Consider taking the following steps:

a. Obtain the court file.
b. Review the transcript with your court reporter.
c. Write out your statement in advance.
d. Keep in mind that e-mail and voicemail are very effective ways to respond to press inquiries and to ensure the accuracy of your message.
e. Make your quote a complete statement about the message you want to deliver. Say only what you want to say. Make your message brief, clear, and understandable.
f. Practice your message first so that it is professional and reasonable and doesn't sound emotional or reactive.
g. Avoid saying "No comment." Instead, circle back to your core message. (e.g., "I appreciate your interest. What I want to emphasize is . . .")
h. Stress your overriding concern that justice be administered fairly and that the courts operate effectively to serve the community and that you are committed to accountability.

5. **Call the CJA hotline at 415-263-4600.**

Appendix K: Judicial Elections

Proposed Language for Voter Pamphlets

A judge is a public servant holding an office of high public trust. The obligation of a judge is to resolve disputes impartially and to base decisions solely on the law and the facts of the case.

Citizens have the right to expect that judges will decide each case on its merits, even if that means going against popular opinion or interest groups. Judges must answer to a statewide disciplinary body as well as to higher courts that review their rulings.

The office of judge is unlike other elected offices. While voters can expect many elected officials to represent them, judges are elected to be fair and impartial. Judges are accountable to the law and to the Constitution, not to partisan or other interest groups.

The California Code of Judicial Ethics puts it this way:
“A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism.”

Appendix L: Proposed Strategic Plan to Improve Civics Education

The Task Force on Public Information and Education [or the Commission for Impartial Courts] finds that:

(1) The current level of civics education is inadequate to prepare California's diverse school-age population for assuming their responsibilities as citizens in a democracy; and
(2) Poorly prepared students become poorly informed citizens, which puts our democratic institutions at risk.

The task force [commission] recommends that the Supreme Court and the Judicial Council take a leadership role in advocating for better civics education in California by energetically supporting appropriate legislation and policies and by enlisting the support of other governmental entities, as well as school superintendents and teachers. As an immediate first step, the Judicial Council should develop a strategic plan to provide ongoing leadership to promote and implement quality civic education and education about the courts in public schools throughout California.

Proposed Components of the Strategic Plan

The strategic plan might include the following components:

Leadership

- Establish a standing committee or advisory group to develop and monitor the plan;
- Include Supreme Court or Court of Appeal judicial officers;
- Provide adequate staff to implement and coordinate the strategic plan statewide;
- Develop evaluative measures for both the overall plan and individual components;
- Analyze current program offerings based on educational research; provide a gap/opportunity analysis that considers target audiences, (i.e., grade levels, demographics), objectives, evidence of success;
- Create priorities based on needs, cost/benefit, and impact on learning; and
- Encourage judicial and State Bar leaders to take leadership roles in advocating for law-related civics education. This would include providing judges and lawyers with opportunities for sharing information and receiving training on public outreach and civics education.

Advocacy

- Enlist the support of other governmental branches and agencies,
- Support and endeavor to strengthen appropriate legislation or policies, including those of the State Department of Education;
- Raise public awareness about the need for civics education through the development of op/ed pieces, media appearances, and civics presentations;
- Encourage presiding judges and bench officers around the state to renew their commitment to public education and work with school officials and teachers in their area to promote civics education and education about the courts;
- Enlist the support of statewide parent-teacher associations;
- Include the subject of civics education in messages to the state Legislature; and
- Enlist the support of scholastic testing services.

Professional Development

- Expand statewide professional development programs for teachers;
- Develop a leadership base of teacher-leaders throughout the state in order to help expand professional development programs for teachers;
- Create assessment mechanisms to evaluate professional development programs. Include quality criteria: program articulation of desired outcomes based on state and national standards, evidence of results, and methodology for learning activities based on effective learning theory; and
- Provide training for judges and lawyers on public outreach and civics education.

Collaborations

- Establish and use criteria for collaborating with higher education, museums, and nonprofit civics education organizations to promote and cosponsor programs and events and inform teachers about state and nationwide resources;
- Establish methods and create opportunities to collaborate with school superintendents, administrators, and teachers;
- Cross-market and promote quality program offerings to schools across the state;
- Establish communication between educators and professionals in law-related fields at conferences, institutes, and other law-related events; and
- Encourage educators and judicial officers to present at the California Council for the Social Studies annual conference and other teacher conferences.

APPENDIX M

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
NATIONAL CONFERENCE OF STATE TRIAL JUDGES
APPELLATE JUDGES CONFERENCE
OHIO STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges state, local, territorial bar associations, and the highest court of each state to establish for those who have an interest in serving on the judiciary, a voluntary pre-selection/election program designed to provide individuals with a better appreciation of the role of the judiciary and to assist them in making a more informed decision regarding whether a judicial career is appropriate.

REPORT

The vast majority of people serving in the judiciary have no special training for the judicial role other than a law school education, bar passage, and some amount of experience in the practice of law. In recent years, suggestions have been made for a special curriculum (informational educational program) for individuals aspiring to judicial office. Under the aegis of the American Bar Association's Standing Committee on Judicial Independence ("SCJI" or the "Committee"),[1] a Study Group on Pre-Judicial Education[2] (the "Study Group")[3] was impaneled in 2001 and in 2003 issued a brief but interesting report.[4] The idea of IJE is that some form of voluntary pre-selection/election

[1] SCJI has taken a leadership role in promoting public trust and confidence in the judiciary as well as in the justice system more generally, including such recent efforts as the DVD video program *Protecting Our Rights, Protecting Our Courts*, the projudicial independence pamphlets *Countering the Critics*, *Countering the Critics II*, and *Rapid Response to Unjust and Unfair Criticism of Judges*, and (in cooperation with the ABA Judicial Division) the Least Understood Branch project. Other significant Committee projects have included influential reports on public financing of judicial campaigns and on judicial compensation, as well as sponsorship of revisions to the Model Code of Judicial Conduct.

[2] To avoid potentially unpleasant confusion between pre-judicial and prejudicial, a possibility identified by one of the white papers to the 2007 Symposium discussed below (see Fisher, *infra* note 24, at 3–4), the term used henceforth herein will be "Introductory Judicial Education" or its acronym "IJE."

[3] The Study Group comprised trial and appellate judges, lawyers, judicial and adult educators, bar association executives, and legal academics.

[4] See, e.g., Am. Bar Association, Standing Committee on Judicial Independence, Report of the Study Group on Pre-Judicial Education (Feb. 12, 2005) [hereinafter "Study Group Report"].

program designed to provide individuals with a better appreciation of the role of the judiciary and to assist them in making a more informed decision as to whether a judicial career is appropriate and would give aspirants a better understanding of the job they might someday seek.

As part of this effort, it was necessary for the Study Group to address the issue whether the effectiveness and perception of legitimacy of judicial selection might be enhanced through the establishment of a program of introductory judicial education. This involved consideration of the form this education might take, how the availability of this education might affect the pool of potential judges, how this education might assist those responsible for the selection of judges, and the potential impact of this education on the overall functioning of our system of justice.

As the Study Group observed:

> What we envision is not the displacement of existing selection mechanisms, but rather their enhancement by making available to potential judges educational programs designed to produce judicial candidates who are better prepared for the role and who can make a more informed decision regarding whether a judicial career is appropriate for them. The candidates themselves would benefit from attaining a better appreciation of the judicial role. Changes in the nature of law practice and the judicial role over the past several decades have rendered the gap between the two activities increasingly large. Lawyers are less able to appreciate all of what being a judge entails, and the skills learned in practice are less directly applicable to a judicial role that now includes a substantial managerial component.
>
> We also identify potential negative effects of [IJE], including its possible negative impacts on the pool of potential judges, which might vary depending on the format. To the extent that [IJE] involves significant costs, career interruption, or geographic relocation, some otherwise suitable candidates are likely to be discouraged from pursuing judgeships. In addition, there is some reason for concern regarding whether these effects would fall more heavily on women and those in public service or other less remunerative practice areas. These effects are, of course, speculative, but nonetheless deserve ongoing attention as the concept of [IJE] moves forward. [5]

[5] *Id.* at 4–5.

Questions Raised in the Aftermath of the Study Group's Report

The concept of Introductory Judicial Education is not only unobjectionable but, in the Committee's judgment, may well deserve enthusiastic support from the organized bar, which has an interest in maximizing the chances that the most highly qualified individuals will ascend to the bench. The devil is in the details, however, and, in the aftermath of the Study Group's Report, several details needed filling in. What, for example, would be the intended scope of IJE? Would it be a relatively short, seminar-like program, lasting a week or less? Would it be a formal, degree program requiring a year of full-time study in residence, much like a typical LL.M. curriculum? What sorts of subjects would comprise an IJE curriculum?

Apart from the Study Group Report, very little literature of substance existed on the subject of judicial education[6] generally and even less on IJE. Indeed, the latter consisted of only two offerings, one by a former Director of the ABA's Judicial Division[7] and the other by a judge of the Louisiana Court of Appeal, Third Circuit. [8] Recognizing that some might regard the promotion of IJE as advocating an approach to judicial selection akin to the civil law methodology of selecting judges, which presents the judiciary as a career path chosen early in a very different jurisprudential setting, [9] the Committee decided in favor of further deliberation. Rather than rush into the business of promoting the concepts underlying IJE, SCJI deferred developing a policy proposal for the ABA House of Delegates until such time, if any, as a broader consensus on the subject could be reached. Instead, the Committee organized a symposium to ascertain whether IJE as a concept might be appealing to those constituencies—including judges, lawyers, judicial educators, legal educators, judicial ethicists, judicial administrators, and bar associations—that would most likely be affected by implementation of an educational factor as part of the judicial selection process.

The Symposium

The Symposium was convened last year at the Ohio State University Moritz College of Law in Columbus, Ohio. Those represented at the Symposium included judicial conferences of the ABA Judicial Division, the ABA Center for Continuing Legal Education, the National Center for State Courts, the Association of American Law Schools, the American Judicature Society, the National Judicial College, the Conference of State Court Administrators, the Association of Judicial Disciplinary Counsel, the National Association of State Judicial Educators, the National Conference of Bar

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[6] *I.e.*, continuing education for those who have *already* ascended to the bench.

[7] Luke Bierman, *Beyond Merit Selection*, 29 Fordham Urb. L.J. 851 (2002).

[8] Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 52 J. Legal Educ. 130 (2002). This article is an adaptation of Judge Amy's thesis for the degree of LL.M. in Judicial Process at the University of Virginia School of Law.

[9] This issue was specifically addressed at the 2007 Symposium described below and in one of the white papers prepared therefor.

Presidents and the National Conference of Bar Executives. In addition, the Chief Justice of Ohio and state legislators from Ohio participated.

Two new white papers were prepared especially for the Symposium by Professor Keith R. Fisher[10] of the Michigan State University College of Law and Associate Dean Joseph R. Stulberg[11] of the Ohio State University Moritz College of Law. These papers, in conjunction Judge Amy's aforementioned article[12] and the Study Group report, [13] were intended to offer the participants some background in the concepts underlying IJE.

Professor Fisher's paper focused initially on whether there was a sufficiently strong case to be made for IJE. He found that it could be justified neither by the experience of civil law jurisdictions[14] nor by the social, cultural, political, economic and demographic changes—including purported changes in the role of the trial judge—put forth by some commentators as requiring wholesale changes to the administration of justice. He found ample justification for IJE, however, in the increasingly well-documented distrust and lack of faith on the part of the general public, and in particular among minority communities, in the fairness and impartiality of our courts—matters that strike at the heart of the judiciary as an institution of government.

Fisher identified several behavioral elements that judges should emphasize in order to promote positive public perception, and enhance the legitimacy, of the judiciary, such as "(i) judges treating those who come before them with dignity and respect; (ii) full and fair opportunities for litigants to present their cases; and (iii) neutral decision-making by fair, honest, and impartial judges—in short, both actual and perceived substantive and procedural fairness."[15] Taking these public integrity issues as a point of departure, Fisher concluded that "there is certainly a case to be made for educating judges to conduct the business of the courts in a manner that not only lives up in fact to the ideals that lend legitimacy to the judiciary and judicial decisions but also dispels any significant public perceptions (or misperceptions, as the case may be) of biased or unequal justice." [16]

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[10] Keith R. Fisher, *An Essay on Education for Aspiring Judges* (White Paper, Symposium on Pre-Judicial *Education,* Ohio State University Moritz College of Law, 2007). Professor Fisher is currently the liaison to the Committee from the ABA Business Law Section.

[11] Joseph B. Stulberg, *Education for Aspiring Trial Court Judges: The Craft of Judging* (White Paper, Symposium on Pre-Judicial *Education,* Ohio State University Moritz College of Law, 2007).

[12] Amy, *supra* note 22.

[13] Study Group Report, *supra* note 13.

[14] Professor Fisher's examination of this question took as a representative sampling of sophisticated legal and judicial systems three jurisdictions, Germany, France, and Japan. He concluded that nothing in their judicial cultures (including their modes of training prospective judges) exhibited any hint of superiority over the U.S. experience and hence that no argument could be made for supplanting the latter with a civil law approach. "To the extent that a specialized program of study is designed to create a cadre of judges – a specialized judicial class, if you will—it is anathema to our legal system. Add to that the youth and inexperience of those eligible for career judicial positions, and one finds foreign law programs to be poor role models for adoption of [IJE] in the United States." Fisher, *supra* note 24, at 14.

[15] *Id.* at 19–20 (citations omitted).

[16] *Id.* at 20.

Consistent with this conception, Professor Fisher suggested that an IJE curriculum that could contribute to the educational factor consistent with the purposes identified might include training in such topics as judicial demeanor (including the treatment of court staff, attorneys, litigants, and others); interpreting body language; listening skills; jury selection; efficient use of law clerks and staff attorneys; techniques of docket management; basic techniques of managing people with large personalities (including, but not limited to, lawyers) in the courtroom and in chambers conferences; balancing the needs of judicial office with pre-existing friendships in the bar, family obligations, and memberships in religious, professional, civic, and community organizations; judicial ethics; judicial independence versus judicial restraint; financial planning (*i.e.*, how to "afford" to be a judge); public perceptions and the importance of judicial decorum; dealing with threats to personal safety and security and that of court personnel and loved ones; determining when recusal is advisable, even where it is not mandatory; and balancing First Amendment rights against the needs of judicial discretion in public speaking, relations with news media, responding to public criticism of decisions, and election campaigning. [17] Under such an approach, Professor Fisher observed, IJE might "improve the overall quality of the pool of people seeking election or appointment to the bench." [18]

Associate Dean Stulberg's paper explored two aspects of judging. First, he focused on the administrative aspects of the judicial function in what has become known as "managerial judging" and concluded that there are many aspects to this portion of the judicial role that would benefit from IJE. For example, he suggested that a variety of curricula and pedagogies such as the psychology of judging, communications theory, family counseling, and team teaching would fulfill the aspects of managerial judging that far exceed the substantive law topics that are covered in law school. Offering these topics to judicial aspirants would be "a thoughtful response to the 'administrative perspective,' presuming consensus on the claim that there are theories, skills, insights, and practices distinctive to the judging role that are not necessarily effectively 'absorbed' or 'learned' in the conventional route to becoming a judge—*i.e.*[,] practicing law."

Second, Stulberg drew on a Carnegie Foundation study of the legal profession[19] to review the manner by which people become lawyers and are "transformed" in the process and develop a "framework . . . that is distinctive to, and constitutive of, thinking and acting as a lawyer." [20] This "'signature pedagogy'" provides "a primary means by which a student becomes acculturated to the enterprise." [21] Using this approach, he posed the question whether there is such a "signature pedagogy" for becoming a judge. Answering in the negative, Stulberg considered whether it is "important for there to be a shared culture among those who discharge the judicial role and, if so, need it be developed

[17] *Id.* at 24–25.

[18] *Id.* at 26.

[19] W. Sullivan, A. Colby, J. Wegner, L. Bond, & L. Schulman, *Educating Lawyers: Preparation for the Profession of Law* (2007).

[20] Stulberg, *supra* note 25, at 10.

[21] *Id.* at 11 (citation omitted).

before becoming a judge?" [22] In answering the latter questions affirmatively, he then reviewed the processes and practices of labor arbitrators and civil case mediators to conclude that shared visions of impartiality are essential to all these enterprises and serve to reinforce particular skills and promote confidence and integrity to the process. From these perspectives, he concluded that while "there is an intellectual and practical skill set distinctive to the trial judge's role[,] . . . there is nothing comparable for those who would like to explore or prepare for that role." In short, IJE can provide a professional perspective to the craft of judging that will promote confidence in the justice system.

The Symposium also considered possible curricular issues in addition to those suggested by Professors Fisher and Stulberg. Hon. William B. Dressel, President of the National Judicial College, indicated that educating judges, and potential judges, presented particular educational objectives ranging from ethics, professionalism, managerial judging, self[-]evaluation, job security, and public criticism, to name just a few and apart from the substantive requirements of judicial decision making. He agreed that judging was sufficiently different from lawyering that it should be considered a different profession with a different set of professional parameters, ranging from preparation to socialization to acculturation. Judge Dressel offered an overview of a curriculum designed to be used for judicial aspirants, covering a wide array of the topics that judges in the modern era would be called upon to use as a professional distinct from the practicing bar. The collaboration of many in the educational process, including *inter alia* law schools, bar associations, and judicial educators, he argued, would be essential to the development of an acceptable IJE program. He suggested that a voluntary program was preferable to a mandatory one, because the former would demonstrate motivation on the part of the aspirant, avoid concerns about competition with the civil law system of judicial selection, and ensure openness for the process.

The Symposium also heard about efforts in Ohio, where the Chief Justice had already offered a legislative proposal that would incorporate a mandatory system of IJE into the judicial selection process. [23] Legislators and others from Ohio indicated that the motivation for incorporating IJE into the selection process was to create an additional factor that would aid the selectors in assessing the qualifications and commitment of judicial aspirants while simultaneously providing additional training and preparation for those who might be interested in (though not yet necessarily committed to) serving on the bench. The Ohio presenters indicated that they definitely viewed judging as a distinct profession, the training for which would improve the pool of aspirants, enhance the legitimacy of the judiciary among the electorate, and provide an ability to connect the craft of judging with public perceptions of the judiciary. Those in attendance agreed that, as with public financing of judicial campaigns in North Carolina, [24] having Ohio (or any

[22] *Id.*

[23] By the time the Symposium was held, proposals similar to the one put forward by the Ohio Chief Justice had also been introduced in the Ohio legislature.

[24] *See* North Carolina General Assembly, Senate Bill 1054, *available at http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2001&BillID=S1054* (last visited May 12, 2008); Doug Bend, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 Geo. J. Legal Ethics 597 (2005). *See also* ABA Standing Comm. on Judicial

other state)[25] serve as a laboratory to assess the IJE concept in practice[26] would be very important, especially in the absence of the kind of empirical studies mentioned by the Study Group.

After the foregoing presentations at the Symposium, the participants, with the benefit of their broad collective experience from several perspectives on the judicial selection process, reached consensuses on several substantive points: (1) judging is a distinct discipline of the legal profession that required an appreciation of unique knowledge, skills and abilities; (2) it would be preferable that, before assuming a judicial position, judicial aspirants have by experience or training qualifications that exceed admission and practice requirements; (3) the concept of IJE offers valuable opportunities to bridge the debate over whether election or appointment is preferable as means to select judges; and (4) differences between the roles and responsibilities of trial and appellate judges make it very important that implementation of any IJE curriculum accommodate all levels of the judiciary.

While the committee, after conferring and receiving input from all potentially affected entities of the ABA, is unwilling at this time to recommend an extensive program that would include all of the consensus points reached at the Symposium, it believes that IJE represents an innovative approach to bridging some of the most intractable and controversial issues in the centuries-old debate over judicial selection. The Recommendation to the House of Delegates, to which this Report is attached, is submitted for consideration not as an alternative to traditional modes of judicial selection but as a potential means of educating individuals with a better appreciation of the role of the judiciary and to assist them in making an informed decision as to whether a judicial career may be appropriate. It comes down to a very simple question—shouldn't a person know something about the job they are seeking, especially one that impacts the lives of our citizens? The Committee further believes that in developing and implementing IJE programs, consideration should be given to accessibility and affordability of programs so as not to exclude women, minorities or others who might feel excluded from participating. The Committee also wants to emphasize that participation on IJE programs should not be considered as giving rise to credentialing and/or certification of participants.

Independence, Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns (2002), *available at http://www.abanet.org/judind/pdf/commissionreport4-03.pdf* (last visited May 12, 2008).

[25] As of this writing (May 2008), no IJE legislation has yet been enacted in Ohio.

[26] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting with approval states serving as laboratories for trying "novel social and economic experiments without risk to the rest of the country").

In sum, the Committee believes that the additional knowledge to be gained from an appropriate program of Introductory Judicial Education can burnish the stature of the judiciary and elevate the level of public trust and confidence that our judicial system rightfully deserves.

William K. Weisenberg
Chair
Standing Committee on Judicial Independence
November 2008

EXECUTIVE SUMMARY

(a) The Recommendations urge state, local and territorial bar associations to adopt programs of introductory legal education to assist lawyers with potential career aspirations of service in the judiciary; and that adopting such a program would assist in elevating public trust and confidence in the judiciary.

(b) The proposed policy, if adopted by state, local and territorial bar associations, will enhance the knowledge of lawyers aspiring to judicial service and thus raise the stature of the judiciary in the public eye and insure they are fully aware of the ethical and career demands of a judicial position.

(c) At this point in time, no organized opposition is known.

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Judicial Independence

Submitted By: William K. Weisenberg, Chair

1. Summary of Recommendation

That the American Bar Association urges adoption of programs of judicial education to assist lawyers who aspire to judicial service.

2. Approval by the Submitting Entity

The ABA Standing Committee on Judicial Independence approved the recommendation on October 18, 2008.

3. Has this or a similar recommendation been submitted to the House or the Board previously?

No

4. What existing Association policies are relevant to this recommendation and how Would they be affected by their adoption?

The ABA has a number of policies pertaining to judicial selection including merit selection for judges, public financing of judicial elections and qualification commissions to assist in the selection process. Introductory judicial education is consistent with preexisting ABA policy.

5. What urgency exists that requires action at this meeting of the House?

The adoption of these recommendations will prompt state and territorial bar associations and state and territorial legislative bodies to begin consideration of their adoption.

6. Status of Legislation

N/A

7. Cost to the Association (Both direct and indirect costs)

N/A

8. Disclosure of Interest (If applicable)

N/A

9. Referrals

ABA Judicial Division
ABA Section on Legal Education
ABA Section on Criminal Justice
ABA Section on Litigation
National Center for State Courts

10. Contact Person (Prior to the meeting)

William K. Weisenberg
Assistant Executive Director
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
(614) 487-4414
(614) 487-5782 - FAX
wweisenberg@ohiobar.org

Judicial Division
Contact Information for Rep

11. Contact Person (Who will present the report to the House)

William K. Weisenberg, SCJI Chair
Assistant Executive Director
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
(614) 487-4414
(614) 487-5782 - FAX
wweisenberg@ohiobar.org

Professor Keith R. Fisher
Northeastern University School of Law
25 Cargill Hall
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 373-7071
k.fisher@neu.edu

Appendix N: Drafts of Proposed Implementing Provisions Regarding Judicial Selection and Retention

Section 14 of Article II of the California Constitution would be amended to read:

(a) Recall of a state officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable. Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the Assembly, members of the Board of Equalization, and judges of courts of appeal ~~and trial courts~~ must equal in number 20 percent of the last vote for the office. Signatures to recall a judge of a superior court must equal in number 20 percent of the last vote for the office of District Attorney in that county

(c) The Secretary of State shall maintain a continuous count of the signatures certified to that office.

Article VI, section 15 of the California Constitution would be amended to read:

A person is ineligible to be a judge of a court of record unless for 10 years immediately preceding selection, the person has been a member of the State Bar or served as a judge of a court of record in this State, and at the time of taking the oath of office is a citizen of the United States.

Section 16 of Article VI of the California Constitution would be repealed and reenacted to read:
~~(a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.~~
~~(b) Judges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law. In the latter case the Legislature, by two-thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed in subdivision (d), or by any other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.~~
~~(c) Terms of judges of superior courts are six years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general~~

~~election after the second January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.~~

~~(d) (1) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.~~

~~(2) The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.~~

~~(3) Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of superior courts.~~

(a)(1) Justices of the Supreme Court shall be elected at large. Justices of the Courts of Appeal shall be elected in their districts. Elections shall be held at the November general election in even-numbered years. The terms of Supreme Court and Court of Appeal justices are 12 years, beginning the Monday after the January 1 following the election, except that the Legislature, in creating a new Court of Appeal district or division, shall provide that the initial terms of the new justices are 4, 8, and 12 years.

(2) Within 30 days before the August 16 preceding the expiration of the justice’s term, a justice of the Supreme Court or a Court of Appeal may file a declaration of candidacy to succeed to the office presently held by the justice. If the declaration is not filed, the Governor shall nominate a candidate before September 16. At the next November general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question of whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate who is not elected may not be appointed to that court but later may be nominated and elected.

(3) The Governor shall fill vacancies in the Supreme Court and Courts of Appeal by appointment. An appointee shall appear on the ballot for a full 12-year term at the first November general election after the justice has served 2 years in office unless application of this rule would cause more than three justices in the Supreme Court or more than two justices in a division of a Court of Appeal to appear on the same ballot, in which case the most recent appointee or appointees shall appear on the ballot for a full 12-year term at the following November general election.

(4) A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.

(b)(1) Judges of superior courts shall be elected in their counties except as otherwise necessary to meet the requirements of federal law. In the latter instance the Legislature, by two-thirds vote of

the members of each house, with the advice of the judges within the affected court, may provide for their election by the system prescribed in subdivision (6) or by any other system.

(2) Elections for superior court judges shall be held in even-numbered years at the primary election at which candidates for the November general election are selected. If a candidate receives a majority of the votes cast, the candidate is elected. If no candidate receives a majority of the votes cast, the two candidates receiving the most votes shall be candidates at the November general election. A term of a superior court judge is 6 years beginning the Monday after January 1 following the election.

(3) The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

(4) A vacancy occurs when a judge leaves office before the end of his or her term at a time at which the election process has not begun for the next term of that office. The election process shall be deemed to have begun if at least one person, other than the judge, has qualified for election for the next term of that office.

(5) The Governor may fill vacancies in the superior court by appointment. An election for a 6-year term shall be held at the next general election following the occurrence of the vacancy, except the election shall not be held until after the judge has served at least 2 years in office.

(6) Electors of a county, by a majority of those voting and in a manner the Legislature shall provide, may make the following procedure applicable to the election of judges of the superior court in that county. Within 30 days before the August 16 preceding the expiration of the judge's term, a judge may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor shall nominate a candidate before September 16. At the next November general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question of whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected. If the judge does not file a declaration of candidacy and the Governor does not nominate a candidate, a vacancy shall occur in the office upon the expiration of the judge's current term.

Proposed Modification of Section 16 Without Reorganization

(Note: Underlines and ~~strikeouts~~ show changes made to existing Article VI, section 16 without reorganization. **[Boldfaced material between brackets]** show rearrangement of existing provision in proposed new provision.)

[Now paragraph (a)(1)] (a) ~~Judges~~ Justices of the Supreme Court shall be elected at large. ~~and judges~~ Justices of Courts of Appeal shall be elected in their districts ~~at general elections at the same time and places as the Governor~~. Elections shall be held at the November general election in even-numbered years. The~~ir~~ terms of Supreme Court and Court of Appeal justices are 12 years, beginning the Monday after January 1 following the~~ir~~ election, ~~except that a judge elected to an unexpired term serves the remainder of the term. In~~ The Legislature, in creating a new Court of Appeal district or division, ~~the Legislature~~ shall provide that the ~~first elective~~ initial terms are 4, 8, and 12 years.

[Now paragraphs (b)(1)] (b) Judges of superior courts shall be elected in their counties ~~at general elections~~ except as otherwise necessary to meet the requirements of federal law. In the

latter ~~case~~ instance the Legislature, by two-thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed in subdivision (~~d~~)(6), or by any other ~~arrangement~~ system. **[Now paragraph (b)(3)]** The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

[Now the last sentence of paragraph (b)(2)(c) A term~~s~~ of a judge~~s~~ of a superior court ~~are~~ is six years beginning the Monday after January 1 following the election. **[Now the second sentence of paragraph (b)(5)]** ~~A vacancy shall be filled by~~ An election ~~to~~ for a ~~full~~ 6-year term shall be held at the next general election following the occurrence of the vacancy, except the election shall not be held until after the judge has served at least 2 years in office. ~~after the second January 1 following the vacancy,~~ **[Now the first sentence of paragraph (b)(5)** ~~but t~~The Governor ~~shall appoint a person to~~ may fill ~~the~~ vacanc~~y~~ies in the superior court by appointment ~~temporarily until the elected judge's term begins~~.

[Now paragraph (a)(2)](d) (1) Within 30 days before August 16 preceding the expiration of the ~~judge's~~ justice's term, a ~~judge~~ justice of the Supreme Court or a Court of Appeal may file a declaration of candidacy to succeed to the office presently held by the ~~judge~~ justice. If the declaration is not filed, the Governor ~~before September 16~~ shall nominate a candidate before September 16. At the next November general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate who is not elected may not be appointed to that court but later may be nominated and elected.

[Now paragraph (a)(3)](2) The Governor shall fill vacancies in ~~those courts~~ the Supreme Court and Courts of Appeal by appointment. An appointee ~~holds office until the Monday after January 1 following~~ shall appear on the ballot for a full 12-year term at the first November general election after the justice has served 2 years in office unless application of this rule would cause more than three justices in the Supreme Court or more than two justices in a division of a Court of Appeal to appear on the same ballot, in which case the most recent appointee or appointees shall appear on the ballot for a full 12-year term at the following November general election . ~~at which the appointee had the right to become a candidate or until an elected judge qualifies~~. **[Now paragraph (a)(4)]** A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.

[Now paragraph (b)(6)](3) Electors of a county, by a majority of those voting and in a manner the Legislature shall provide, may make ~~this system of selection~~ the following procedure applicable to the election of judges of the superior court~~s~~ in that county. Within 30 days before the August 16 preceding the expiration of the judge's term, a judge may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor shall nominate a candidate before September 16. At the next November general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question of whether the candidate shall be elected. The candidate shall be elected

upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected. If the judge does not file a declaration of candidacy and the Governor does not nominate a candidate, a vacancy shall occur in the office upon the expiration of the judge's current term.

[New language placed in paragraph (b)(2)] Elections for superior court judges shall be held in even-numbered years at the primary election at which candidates for the November general election are selected. If a candidate receives a majority of the votes cast, the candidate is elected. If no candidate receives a majority of the votes cast, the two candidates receiving the most votes shall be candidates at the November general election. A term of a superior court judge is 6 years beginning the Monday after January 1 following the election.

[New language placed in paragraph (b)(4)] A vacancy occurs when a judge leaves office before the end of his or her term at a time at which the election process has not begun for the next term of that office. The election process shall be deemed to have begun if at least one person, other than the judge, has qualified for election for the next term of that office.

Government Code section 12011.5 would be amended to read:

(a) – (f) * * *

(g) ~~If~~ When the Governor has appointed a person to a trial court ~~who has been found not qualified by the designated agency~~, the State Bar ~~may~~ shall make public whether the person was found to be either (i) not qualified or (ii) qualified or better by the designated agency. ~~this fact after due notice to the appointee of its intention to do so, but that~~ That ~~notice or~~ disclosure shall not constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the appointee.

(h) If the Governor has nominated or appointed a person to the Supreme Court or Court of Appeal in accordance with subdivision (d) of Section 16 of Article VI of the California Constitution, the Commission on Judicial Appointments ~~may~~ shall invite, ~~or~~ and the State Bar's governing board or its designated agency ~~may~~ shall submit to the commission its recommendation, and the reasons therefor, but that disclosure shall not constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the nominee or appointee.

(i) – (o) * * *

Section 8203 of the Elections Code would be amended to read:

In any county in which only the incumbent has filed nomination papers for the office of superior court judge, his or her name shall not appear on the ballot unless there is filed with the elections official, within 10 days after the final date for filing nomination papers for the office, a petition indicating that a write-in campaign will be conducted for the office and signed by ~~100~~ registered voters qualified to vote with respect to the office equal in number to at least 1 percent of the last

vote for the office of District Attorney in that county, or 100 registered voters, whichever is greater.

~~If a petition indicating that a write-in campaign will be conducted for the office at the general election, signed by 100 registered voters qualified to vote with respect to the office, is filed with the elections official not less than 83 days before the general election, the name of the incumbent shall be placed on the general election ballot if it has not appeared on the direct primary election ballot.~~

If, in conformity with this section, the name of the incumbent does not appear ~~either~~ on the primary ballot ~~or general election ballot~~, the elections official, on the day of the ~~general~~ primary election, shall declare the incumbent reelected. Certificates of election specified in Section 15401 or 15504 shall not be issued to a person reelected pursuant to this section before the day of the ~~general~~ primary election.

Rule 10.704 would be added to the California Rules of Court to read:

Rule 10.704. Appointment of subordinate judicial officers

In making a selection for a person to be a subordinate judicial officer, the trial court shall consider, in addition to other relevant criteria, both the diverse aspects of each candidate and that candidate's exposure to and experience with diverse populations and issues related to those populations.

Section 7 is added to Rule IV (Conflict of Interest) of the JNE rules to read:

Section 7. Conflict of Interest Requirement Extend to State Bar Board of Governors, Employees

Members of the Board of Governors, designees of the Board of Governors and employees and agents of the State Bar are subject to the same standards as procedures regarding conflict of interest in the same manner as provided in this rule for commissioners.

Appendix O: Length of Interim Appointment

	Initial term lengths for interim appointees
AL	> 1 yr
AZ	until next election
AR	> 4 mos after vacancy occurred
CA	> 1 yr after vacancy occurred
FL	> 1 yr
GA	> 6 mos
ID	remainder of unexpired term
IL	> 60 days
IN	until next election
KS	> 6 mos
KY	> 3 mos
LA	ineligible for election
MD	> 1 yr
MI	> 90 days after vacancy occurred
MN	> 1 yr
MS	> 9 mos after vacancy occurred
MO	until next election
MT	remainder of unexpired term
NV	next election
NM	next election
NY	> 3 mos after vacancy occurred
NC	> 60 days after vacancy occurred
ND	> 2 yrs
OH	> 40 days after vacancy occurred
OK	remainder of unexpired term
OR	> 60 days
PA	> 10 mos after vacancy occurred
SD	remainder of unexpired term
TN	> 30 days after vacancy occurred
TX	until next election
WA	until next election
WV	remainder of unexpired term if < 2 years
WI	> 5 mos after vacancy occurs