Note regarding CJA Ethics Opinions No. 45 and No. 48: Superseded in part by CCP sec 170.1(a)(9). California Judges Association Opinions No. 45, "Disclosure Requirements Imposed by Canon 3E Pertaining to Judicial Disqualification" and No. 48, "Disclosure of Judicial Campaign Contributions," do not presently reflect current law in light of the recent amendment to CCP 170.1 which added CCP 170.1(a)(9) concerning campaign contributions.

California Judges Association
OPINION NO. 48

(Issued: October 1999)

DISCLOSURE OF JUDICIAL CAMPAIGN CONTRIBUTIONS

I. Scope of Opinion and Introduction

The ethical issues that arise in the context of contested trial court judicial campaigns are numerous and complex. This opinion focuses on a discrete issue pertaining to campaign funding which has perhaps generated more inquiries to this committee from CJA members than almost any other facet of judicial elections[1]—disclosure concerning contributors and contributions to candidates in contested judicial elections.[2]

II. Fundraising in Trial Court Judicial Elections

"[¶] In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions." (Advisory Committee Commentary to Canon 5A).

The above comment is the most direct reference in the California Code of Judicial Ethics to fundraising in judicial elections. This general statement recognizes the dilemma of maintaining the appearance of judicial propriety and dignity while requiring judges to submit themselves to periodic contested elections. (Cal Const. Art. VI, Section §16). One expert in judicial ethics has commented: "Stringent limits on a judge's fundraising could make judges easy electoral targets."[3]

The fundraising activities judges may ethically engage in during and after the course of a judicial election include:

---

1 The leading issue appears to relate to the permissible scope of public comment by candidates. See, Formal Opinion 35.

2 Although we do not specifically address the question, the Committee sees no reason that the same ethical principles discussed in this opinion would not apply with equal weight to campaigns seeking the recall of a judge. See also, Opinion 45 for a discussion of disclosure and disqualification in other contexts.

3 Rothman, section 250.110, California Judicial Conduct Handbook (CJA 1990). Indeed, the cost of running a successful judicial campaign has reached prodigious levels. Between 1976 and 1992, the median cost for campaigns in Los Angeles Superior Court races rose from $3,000 to $76,000. Winners for open seats on the superior court in that county averaged expenditures of $82,000 for the years 1976-1994. The most spent on a single judicial race in Los Angeles thus far is reported to be $378,000. The California Commission on Campaign Financing found that forty-five percent of all outside contributions in the above-referenced races came from attorneys. "Price of Justice," California Commission on Campaign Financing (1995)

--The acceptance of donations to the judge's campaign committee[4] from attorneys who regularly appear before the judge. (1998 Update, III E)

4 Judges should not personally accept such contributions.

--The acceptance of contributions following an election to retire campaign debt, including holding a post-election event for this purpose. (1998 Update, III B)

Among those fundraising activities judges should avoid include:

--Solicitation of contributions from court commissioners under circumstances which suggest undue influence (1997 Update, III A)[5]

--Raising funds in the courthouse, or using court property or personnel for fundraising. (Rothman, 250.300)

--Offering or implying that a contributor or the contributor's cause may receive some favored consideration from the judge in return for making a contribution.[6]

III. Disqualification

The primary rule of judicial ethics governing disqualification is Canon 3E which provides: "[¶] A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law. In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties and their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."

Disqualifications required by law are codified in Code of Civil Procedure section 170.1. The only potential basis for a claim that receipt of campaign funds from parties or counsel who may appear before the judge mandates disqualification is 170.1(a)(6) which states: "(a) A judge shall be disqualified if any one or more of the following is true: . . . (6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification."

However, no authority exists to date suggesting that ethically allowable campaign fundraising may result in disqualification. Were this so, the ability to raise funds might be seriously impaired, and could perhaps interfere with the right of a judge to defend himself or herself from an election challenge.[7] Furthermore, some have expressed the view that limiting the ability of candidates for judicial office to raise funds will diminish the pool of candidates who do not have the personal means to finance a campaign. At a minimum it would disadvantage them in a campaign against wealthy candidates who could personally absorb the cost of the election. Requiring disqualification would also arguably conflict with Canon 3B(1), derived from the Code of Civil Procedure, and which imposes a duty on judges not to engage in conduct that would render the judge unable to perform his or her judicial duties.

For these reasons, the exigencies dictated by the need to run periodically for elective office against active challengers makes invocation of the rule of disqualification, unrealistic and unreasonable. This Committee is of the opinion that a judge who engages in permissible forms of campaign fundraising will not be seen by a reasonable person to be biased or lacking in impartiality, and normally[8] should not

---

5 Contributions should not be solicited from senior staff.

6 In the Committee's view, the mere listing of the identity of contributors or endorsers in campaign literature does not imply the candidate will be disposed to giving those listed favored treatment or consideration.

7 While attorney candidates for judicial office are required by the California Rules of Professional Conduct (Rule 1-700) to comply with Canon 5 of the Code of Judicial Ethics, that canon does not encompass fundraising, disqualifications, or disclosures.

8 Acceptance of disproportionately large contributions could give rise to such a presumption. Judges should consider contributions in the context of the size of the electorate and the total cost of a campaign. For example, a $1,000.00 contribution in a community where the total cost of a campaign is proportionately high would not be likely to raise a question of the judge's ability to be unbiased should that contributor later appear before the judge.

be compelled to be disqualified from hearing matters involving campaign contributors. Therefore, striking a balance between a judge's need to participate fairly in the electoral process with the judge's obligation to maintain the appearance of impartiality has, and continues to be, best achieved through disclosure.

IV. Disclosure

The relevant recent history pertaining to disclosure of the identity of campaign contributors begins with the 1993 Ethics Update in which this committee stated that "[d]uring a contested judicial election a judge is required to disclose to litigants and attorneys appearing before the judge whether one or more of the attorneys or litigants have announced support of the judge or have contributed to the judge's campaign. This places the burden on a judge running for re-election to disclose and to remain informed of contributors and announced supporters of the campaign." (1993 Update, V A.)

The following year, the 1994 Ethics Update commented further on the disclosure issue by stating: "The filing of a [FPPC] statement of contributors to a judge's campaign is generally sufficient disclosure to persons appearing before that judge. The document should not be prominently displayed in the courthouse.[9] However, further disclosure is required if a person appearing before judge is not only a campaign contributor but is also active on the campaign committee." (1994 Update III F.)

When read together it is apparent that some disclosure of the identity of contributors and the amounts contributed has been required, and that this disclosure requirement has been minimally satisfied by the judge's FPPC filings. As to persons or entities who do more than make monetary contributions, the only additional disclosure required appears to have been limited to those who are "announced supporters" of the judge[10] or those who were "active on the campaign committee." However, both of these Updates were published before the current version of Canon 3E requiring disclosure of information "the parties or their lawyers might consider relevant to the question of disqualification" was codified.[11]

The Committee believes that disclosure of financial contributions limited to the threshold amount required for disclosure in the candidate's FPPC filings remains adequate for compliance with Canon 3E. The minimum reportable contribution is currently $100.00 (Gov't Code § 84211(f)). Contributions less than this amount simply are too de minimis to rise to the level of relevance defined in the Canon. But contributions of $100 or more are arguably the very type of information which the parties and counsel may consider relevant to the issue of disqualification. Therefore, both the identity of the contributor and the amount contributed should be disclosed.

However, implied disclosure simply by referring to the candidate's FPPC filing with the county elections office appears to be no longer satisfactory in light of the specific language of the Canon now requiring that such information "be "disclose[d] on the record." Expecting attorneys or litigants to procure these filings recorded in remote locations on their own to determine if opponents contributed to the judge's campaign is neither practical nor realistic. To the extent a judge wishes to rely in part on his or her FPPC filing as compliance with Canon 3E, an oral disclosure on the record that the filings are available with the judge's courtroom clerk appears to be the minimum mandated.

On the other hand, the same contribution in a small county where the total cost of the campaign is expected to be $25,000 very well may raise such a doubt.

9 The caution about displaying the filing statement in the courthouse derives from a concern that posting may have an undesirable coercive effect on non-contributors who appear before the judge.

10 Although the Update does not define the expression of support sufficient to require disclosure, it is assumed that "announced supporters" is synonymous with a public endorsement of some type.

11 This Canon is commonly interpreted to require disclosure of information not only relevant to a potential challenge for cause (CCP 170.1), but also relevant to the exercise of a peremptory challenge (CCP 170.6).

Similarly, in light of the expanded scope of the disclosure requirement in Canon 3E, limiting the disclosure of nonmonetary contributors to judicial campaigns to those who were active on the judge's

"campaign committee" and those who publicly supported the judge is no longer adequate. It is common for persons or entities to lend important non-monetary support to judicial campaigns which might be relevant to the question of disqualification. For example, persons may not have been on a campaign committee but nevertheless worked behind the scenes enthusiastically or indefatigably for the candidate. Individuals and entities, including law firms, may have hosted fundraising "coffees" for the judge, or regularly assisted in precinct walking. The nature of this type of participation, beyond the cash value itself, appears to be information which the parties or counsel might consider relevant to the issue of disqualification.

Accordingly, we believe it prudent for judges to disclose the identity of persons or entities who have made a significant non-monetary contribution to the judge's campaign, including a disclosure of the nature of the contribution. In addition to the above examples, such non-monetary contributions include, but are not limited to, those who provide non-monetary "in kind" assistance such as accounting services, use of office space and equipment, and materials for use in signage and campaign literature.[12] This would apply to parties, witnesses whose credibility the judge may be called upon to evaluate, attorneys appearing before the judge, and their law firms.

No authority exists as to how long a judge must continue to make campaign-related disclosures. We note that the 1993 Update limits disclosure "*during* a contested judicial election." The 1994 Update does not clarify this point. Some, but not all, judges appear to follow a two-year disclosure period based on an analogy to Code of Civil Procedure section 170.1, subdivision (a)(2).[13]

We agree that disclosures for a two year period after the contribution is made is sufficient. In setting a two year period for disqualifications based on past close relationships with counsel and parties (CCP § 170.1), the Legislature inferentially concluded that the risk of favoritism fades substantially with the passage of that length of time. We see no reason that this inference is not equally applicable to disclosures. While one can argue that two years is a somewhat arbitrary measure, the fact remains that the potential importance to a litigant as to whether an opponent contributed time or money to a judge's election campaign pales with time. While we fully support judges who may wish to make disclosures for longer periods, or who adopt a more qualitative approach pegging the time for disclosure to the size or importance of the contribution made, we believe two-years is a reasonable and adequate time.

V. Conclusion

No judicial campaign can be run without reliance on campaign funds. Inherent in fundraising is the concern that it might negatively impact at least the perception of judicial impartiality. Nevertheless, ensuring a fair and meaningful election process requires that judicial candidates be presented to an informed voting public. In affirming the right of political parties to endorse candidates for judicial office in California, the Ninth Circuit in *Geary* v. *Renne III* (9th Cir. 1996) 911 F.3d 280, noted: "The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate." (*Id.* p. 294) We believe this opinion, grounded in Canon 3E, has found the practical balance between the need to mitigate the potential threat fundraising poses to impartiality with the need to uphold the constitutional imperative of public selection of the state's judicial officers.

1998/99 COMMITTEE ON JUDICIAL ETHICS
(October 1999)

---

12 This view is also consistent with FPPC regulations which require reporting of "in-kind" contributions in candidate disclosures forms.

13 "A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years: [¶] (A) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or (B) A lawyer in the proceeding was associated in the private practice of law with the judge."