April 25, 2018

Hon. Richard Fybel
Chair of the Advisory Committee on the Code of Judicial Ethics
California Court of Appeal
601 West Santa Ana Blvd.
Santa Ana, Ca. 92701

Re: Proposed Change to Canon 4E (1)

Dear Justice Fybel:
The CJA Board of Directors and the CJA Ethics Committee hereby propose a change to Canon 4E (1) which deals with the fiduciary activities of judges. The Canon currently reads:

“A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate trust, or person of a member of the judge’s family, and then only if such service will not interfere with the proper performance of judicial duties.”

The proposed change would add a second sentence as follows:

“A judge may act as an agent pursuant to the Advance Health Care Directive for a person whose preexisting relationship with the judge would prevent the judge under Canon 3E from hearing a case involving that person.”

The reason for the proposed change is that the Canon’s prohibition is clearly related to financial concerns. An Advance Health Care Directive does not present such issues. Additionally, as our Bench ages, the need to have an Advance Health Care Directive increases, and as it stands, a Judge who has no family cannot select a colleague. This is a restriction without any rational justification.

Thank you for your time and consideration.

Very truly yours,

Judge Stuart M. Rice
President, California Judges Association
April 26, 2018

Hon. Richard Fybel
Chair of the Advisory Committee on the Code of Judicial Ethics
California Court of Appeal
601 West Santa Ana Blvd.
Santa Ana, Ca. 92701

Re: Proposed Revisions to Canons: SP18-02-SP18-08

Dear Justice Fybel:

The CJA Board of Directors and the CJA Ethics Committee welcomes the opportunity to comment on proposed revisions to the Code of Judicial Ethics and its commentary. Our comments to Canons: SP18-02-SP18-08 are set forth below:

1. SP18-02. This revision would add new Commentary to Canon 2A to suggest judges exercise caution when engaging in the use of electronic communication, including social media. The discussion for this revision points out that judges have been disciplined by CJP for improper use of electronic communication, and that more judges are engaging in the use of electronic communication, including social media.

The revision specifically points out that a judge must exercise caution in online communications in light of the accessibility, widespread transmission, and permanence of material posted on the Internet. CJA supports this proposal.

2. SP18-03. This proposal would amend Canons 2C, 3B (5), 3B (6), 3C (1), and Commentary to Canon 2C to add gender identity and gender expression to the list of protected categories that prohibit discrimination, bias and prejudice. The revisions extend the prohibition against judges engaging in reasonably perceived sexual harassment (per 3B (5) & 3C (1)) by changing sexual harassment to harassment based on any of the protected categories. Judges must also enforce these canons as to staff and lawyers appearing before them.

The discussion for this proposal states that the National Center for Transgender Equality defines “gender identity” as follows: “An individual’s internal sense of being male, female, or something else. Since gender identity is internal, one’s gender identity is not necessarily visible to others.” It defines “gender expression” as “how a person represents or expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics.”
CJA proposes the Canons “Terminology” section add these definitions if these revisions are adopted. Defining these terms is critical since judges can face discipline for violations and these are not commonly known phrases.

If these terms are defined, CJA supports this proposal.

3. SP18-04. This proposal amends Canon 3B(7)(a) and Commentary to clarify that a judge who will not be hearing a matter may communicate with a judge who was disqualified on the case. The problem with the current language is it is so broad that it presently prohibits a judge who will not be hearing a case from discussing it with the disqualified judge.

The result of the proposed amendments is that the new judge assigned to hear the case will not be able to discuss the case with the disqualified judge, which was the purpose of the rule all along.

CJA supports this proposal.

4. SP18-05. This proposal would amend Canon 3D (2) Commentary to state that appropriate corrective action as to attorney misconduct could include writing about the misconduct in a judicial decision. It would include both published and unpublished appellate decisions, as well as written trial court statements of decisions and court orders.

CJA supports this proposal.

5. SP18-06. This proposal is to amend Canons 4D (6) and 4D (7) so that in addition to circumstances under which a judge may accept a gift that “would not reasonably be perceived as intended to influence the judge in the performance of judicial duties”, it would also state that the gift may not actually influence the judge.

While this change seems implicit in the existing language, CJA sees no harm in amending in this fashion to make the condition explicit.

CJA supports this proposal.

6. SP-18-07. This proposal was made by CJA to add new Canon 4D (6) (i) for “nominal gifts”. CJA recommends not defining “nominal,” but leaving its interpretation to “its everyday meaning.” CJA supports the first paragraph of the commentary which includes an example of a nominal gift that would be acceptable, i.e., an art project from a school class after a presentation by a judge, as this decreases the likelihood that a judge may misinterpret the exception to apply to gifts that would not be considered nominal.

Although CJA's original proposal includes a subjective element, an alternative proposal presented uses only an objective standard, more in line with the rest of the Code. [the only subjective test is found in Canon 3E(3)(e) which provides that an appellate justice is disqualified if the “justice substantially doubts his or her capacity to be impartial”, similar to CCP section 170.1(a)(6)(A)(ii), where a superior court judge is disqualified if the “judge believes there is a substantial doubt as to his or her capacity to be impartial.” ]

This new Canon excepting “nominal gifts” is in line with CJEO Opinion 2014-005 on gifts.

The objective language is, “Gifts that are permitted by Canons 4D(6)(a) through (i) may only be accepted if acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties.”
The objective & subjective alternative language is, “Gifts that are permitted by Canons 4D(6)(a) through (h) may only be accepted if acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties:...a nominal gift, as long as acceptance would not reasonably be perceived by the judge, and would not reasonably be perceived by the public, as intended to influence the judge in the performance of judicial duties”...(may be accepted.)

After thorough review, CJA prefers the objective standard proposal, since it is more consistent with language found throughout the Code. The objective version is also clearer and easier to understand. CJA supports this proposal’s objective version.

7. SP18-08. This proposes several amendments to Canon 5. It would move existing Commentary to 5A to a new Canon, 5B(4) and the new Canon would allow judges to solicit contributions and endorsements from anyone, including attorneys and other judges, but prohibits judges from using the prestige of judicial office in a manner reasonably perceived as coercive when soliciting contributions or endorsements.

This Canon presently states that a judge may not solicit campaign contributions from court commissioners, referees, retired judges, or court personnel.

This proposal would also clarify that a judge may solicit campaign contributions and endorsements for another judicial candidate, regardless of whether the candidate is an incumbent or attorney running for judicial office.

This proposal adds that recall elections are included in “judicial elections”.

Unrelated to the proposed amendments, CJA notes that there is a prohibition extending to retired judges as a whole. There is no reason for it. If there is a concern about those in the assigned judge program, that concern can be addressed specifically. A blanket prohibition makes no sense, especially when you consider that many retired judges know incumbent judges well and would be good people from whom to seek support.

CJA supports this proposal, and requests this further amendment to the Canon be made that removes the prohibition extending to retired judges as a whole.

Thank you for your consideration of CJA’s comments and please let us know if you would like to discuss any of these matters further.

Very truly yours,

Judge Stuart M. Rice
President, California Judges Association

CC: Nicole Virga Bautista, Executive Director and CEO, CJA
Hon. Terri Mockler, Chair, CJA Ethics Committee