

## **Notice of Public Hearing**

**ABA Standing Committee on Ethics and Professional Responsibility  
ABA Standing Committee on Professional Discipline  
Friday, February 3, 2012, New Orleans, LA  
Sheraton New Orleans Hotel, 500 Canal Street, Napoleon Ballroom C3, 3<sup>rd</sup> Floor**

### **Proposed Amendments to the Model Code of Judicial Conduct Regarding Judicial Disqualifications**

On Friday, February 3, 2012, the ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) and the ABA Standing Committee on Professional Discipline (“Discipline Committee”) will hold a public hearing from 9:30 a.m. to 11:30 a.m. at the Sheraton New Orleans Hotel, 500 Canal Street, Napoleon Ballroom C3, 3<sup>rd</sup> Floor, New Orleans, LA.

In recent years, judicial disqualification has emerged as an important policy issue in several states and an important focus of discussion and debate on ways to improve both the reality and the public perception of the fairness and impartiality of our court system. That focus has been sharpened because of intense public scrutiny and criticism in several highly publicized cases of refusals by judges to recuse themselves in circumstances where the judge’s impartiality might reasonably be questioned.

Resolution 107, which was approved by the House of Delegates at 2011 Annual Meeting, stated that "the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline should proceed on an expedited basis to consider what amendments, if any, should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification."

In light of these developments and to fulfill the House of Delegates’ directive, the Ethics and Discipline Committees are circulating for comment proposed amendments to Model Code of Judicial Conduct Rules 2.11, 4.4, the Terminology section, alternative proposals for amendments to the Model Rules of Professional Conduct, new Rule 5.1 A, and a new Model Supreme Court to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.

This February 3, 2012 public hearing will serve as an open session to discuss these proposals. The Committees welcome testimony from the profession and the public. Appearances are limited to five minute presentations followed by a five minute question and answer period. The Committees will work to accommodate all appearance requests.

Individuals or organizational representatives interested in testifying should contact Senior Research Paralegal Natalia Vera at [natalia.vera@americanbar.org](mailto:natalia.vera@americanbar.org) or 312/988-5328, **no later than Friday, January 13, 2012**. To assist the Committees in preparing for the

hearing and to facilitate discussion, please provide to Ms. Vera, by **January 13, 2012** via email or hard copy, a written submission outlining your anticipated testimony and providing citations to relevant resources. You may email submissions to Ms. Vera or send them to her attention at the ABA Center for Professional Responsibility, 17th Floor, 321 N. Clark Street, Chicago, IL 60654. If you are unable to attend the hearing, you may send written comments to Ms. Vera. *Written submissions may be posted to the Center for Professional Responsibility's website.*

The Committee's proposals are appended to this Notice and also may be viewed at the Center for Professional Responsibility's website:

[http://www.americanbar.org/groups/professional\\_responsibility.html](http://www.americanbar.org/groups/professional_responsibility.html).

**REPORT AND RECOMMENDATION OF THE  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY  
AND THE STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE RE:  
DISQUALIFICATION BASED  
ON CAMPAIGN CONTRIBUTIONS TO AN ELECTED JUDGE**

RESOLVED, That the ABA Model Code of Judicial Conduct (2007) and the ABA Model Rules of Professional Conduct (2002) be amended as follows (additions are underlined; deletions are indicated by ~~strike-through~~) and that a new Model Supreme Court Rule be adopted.

## Rule 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge\* of facts that are in dispute in the proceeding.
- (2) The judge knows\* that the judge, the judge's spouse or domestic partner,\* or a person within the third degree of relationship\* to either of them, or the spouse or domestic partner of such a person is:
  - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
  - (b) acting as a lawyer in the proceeding;
  - (c) a person who has more than a de minimis\* interest that could be substantially affected by the proceeding; or
  - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that he or she, individually or as a fiduciary,\* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,\* has an economic interest\* in the subject matter in controversy or in a party to the proceeding.
- (4) ~~The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made within the previous [insert number] year[s] aggregate\* contributions\* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].~~ or given other support to the judge's campaign or organizations that contribute to or support the judge's campaign in an amount or value that was substantially important to the judge's most recent campaign. It is a rebuttable presumption that the judge knows the amount, source, and value of direct and indirect campaign contributions to the extent that they are matters of public record and reasonably available.
- (5) The 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.

(6) The judge:

- (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
- (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
- (c) was a material witness concerning the matter; or
- (d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

#### Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] The fact that a judge in an election campaign received contributions or other support from a litigant, the litigant's lawyer, or such lawyer's firm, does not of itself require the judge's disqualification.

[6] Whether any campaign contributions, other financial support, or non-financial support requires disqualification will turn on a variety of factors, any one of which, or several in combination, may require disqualification. In making this evaluation, a judge should consider the factors described in Comments [7] through [10]. When measuring the value of contributions or importance of non-financial support, a judge should take into account monetary and non-monetary significance, including the visibility and public impact of the contribution or other support.

[7] Both the amount or value of campaign contributions or other financial support, and the importance of non-financial support to the candidate's campaign, may give rise to a reasonable question as to the judge's impartiality. Examples of campaign contributions that may give rise to a reasonable question as to the judge's impartiality include direct or indirect contributions by an individual or entity that are significantly greater in size than those of other contributors, or the amounts received by other candidates against whom the judge ran for election. Non-financial support that should be considered include endorsements, or similar advocacy, that are substantially important to the campaign.

[8] The source of the contribution or other support may give rise to a reasonable question as to the judge's impartiality. This is especially the case, for example, where the contribution or other support has come directly or indirectly from a party to a proceeding before the judge or from the party's lawyer or the lawyer's firm. Similar concerns may arise when the contribution or other support has come from a prominent constituent or affiliate of a party or the party's lawyer, or an organization that is substantially funded or directed by them. Concerns may also arise when the contributor has a close personal relationship to a party or the party's lawyer, for example, if he or she is a spouse, domestic partner, child, or parent of such person.

[9] The timing and history of a donor's contribution or support to a judge's campaign should also be considered. For example, the closeness in time between the contribution or support and the hearing by the judge in which his or her disqualification is being considered may give rise to a reasonable question as to the judge's impartiality.

[10] The campaign contribution or financial support provided by a law firm shall be the sum total of all financial contributions, plus the value of all other support by all lawyers and employees in the firm and by the firm itself.

[11] “Substantially important” contributions or support are those that provide the judge with assistance that a reasonable person would find to be of clear and weighty importance to the judge, taking into consideration all the circumstances, including the timing of the contributions or support and the particular needs of the judge’s campaign at the time the contribution or support were made.

{5} [12] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

{6} [13] “Economic interest,” as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (4) an interest in the issuer of government securities held by the judge.

#### RULE 4.4

##### Campaign Committees

(A) A judicial candidate\* subject to public election\* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.\*

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

- (1) to solicit and accept only such campaign contributions\* and other support\* as are reasonable, in any event not to exceed, in the aggregate\* amount of or value of \$[insert amount] from any individual or \$[insert amount] from any entity or organization;

(2) not to solicit or accept campaign contributions or other support for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions or provided financial support to the committee in an aggregate value exceeding \$[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.

## Comment

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions.

[2] Campaign committees may solicit and accept campaign contributions and financial and other support, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such campaign contributions and financial and other support as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions and provide financial and other support, the candidate should instruct his or her campaign committee to be especially cautious in connection with such campaign contributions and financial and other support, so they do not create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

## Terminology

"Contribution" or "Support" means ~~both~~ financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, ~~which~~ whether or not, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4. In the context of judicial

campaigns, "support" includes such assistance that a reasonable person would believe is intended to influence the election or defeat of a particular judicial candidate, such as fund-raising, letter-writing, emailing, assisting in telephone banks, managing (including directing or supporting the management of) a campaign, endorsing a judge's candidacy, getting-out-the-vote efforts, and other advocacy services. See Rules 2.11, 2.13, and 4.4.

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Proposed New Model Rule of Professional Conduct, Rule 5.1A: Responsibility of Partners, Managers, and Supervisory Lawyers Regarding Contributions to Judicial Campaigns.

A lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall institute procedures pursuant to which all lawyers and other employees in the firm report to the firm all financial and other support provided, directly or indirectly to any judge or judicial candidate running for election. Records of such reports shall be retained for at least [number] years.

(1) The aggregate information compiled by the firm shall be reported to the agency, if any, designated by Court Rule.

*Alternatively:*

(1) When a lawyer appears before an elected judge, the lawyer shall inform the judge of the aggregate financial or other support the lawyer, the lawyer's firm, or other lawyers or employees in the firm have provided to the [most recent] election campaign of the judge.

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Proposed Model Supreme Court Rule Number \_\_\_\_\_. Maintenance of Records Regarding Contributions to Judicial Campaigns.

A lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall institute procedures pursuant to which all lawyers and other employees in the firm report to the firm all financial and other support provided, directly or indirectly to any judge or judicial candidate running for election. Records of such reports shall be retained for at least [number] years. The aggregate information compiled by the firm shall be reported to the [designated agency of the Court].

*Alternative additional language if Court does not have a designated agency:*

If information about the aggregate financial or other support the lawyer, the lawyer's firm or other lawyers or employees in the firm have provided to the [most recent] election campaign of the judge is not public and reasonably available when a lawyer appears before an elected judge, the lawyer shall provide such information to the judge.

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