

**STANDING COMMITTEE ON ETHICS & PROFESSIONAL RESPONSIBILITY
AND
STANDING COMMITTEE ON DISCIPLINE**

**MODEL CODE OF JUDICIAL CONDUCT RULE 2.11 COMMENTS
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September 18, 2012

Paula J. Frederick, Chair, Standing Committee on Ethics and Professional Responsibility
Myles V. Lynk, Chair, Standing Committee on Professional Discipline
ABA Center for Professional Responsibility
321 N. Clark Street, 17th Floor
Chicago, Illinois 60654

Re: Comments of the Tort Trial and Insurance Practice Section on Proposed Revisions
to Section 2.11 of the Model Rules of Judicial Conduct

Dear Ms. Frederick and Mr. Lynk:

The Tort, Trial and Insurance Practice Section (TIPS) appreciates the opportunity to comment on the current draft of possible changes to the ABA Model Code of Judicial Conduct in response to the decisions by the Supreme Court of the United States in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), as directed by Resolution 107 of the ABA House of Delegates. To do so, TIPS appointed a task force to review the proposed changes. That task force, representing attorneys for plaintiffs, defendants, and insurance companies, examined the proposals, relevant caselaw, and changes adopted in the states in response to these recent Supreme Court decisions.

In undertaking its examination, the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline undoubtedly understood that the issue of judicial disqualification presents a series of knotty problems involving clashing doctrines of uncertain application that must be tailored to the specific judicial selection, administrative structure, and legal culture of each state. Any project along those lines begins with the unassailable proposition that due process guarantees all litigants a fair and impartial tribunal, regardless of which State or courtroom entertains a matter. Moreover, because public perception plays such an important role in the continuing legitimacy of the Judicial Branch, both the reality and the appearance of bias in favor of or against a party can threaten the ability of the courts to dispense justice while adhering to the rule of law. See *United States v. Mistretta*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”).

In the judgment of the TIPS Section, these considerations apply with equal force, regardless of whether the judiciary is elected or appointed. The danger of *quid pro quo* bias exists both between the outsized financial participant in an election campaign and the candidate, as well

as between those influencing the appointing authority and the nominee. The potential bias merely is often more recognizable in the more public process of an election.

We recognize, in the majority of states where some form of election exists for those seeking or wishing to retain judicial office, that exercise of popular sovereignty necessarily imposes a need to raise campaign funds, inspires others to spend independently, and brings with it at least the theoretical possibility of bias in favor of financial supporters. That recognition was at the heart of the decision in *Caperton*. While *Citizens United* recognized no appearance of corruption in the exercise of First Amendment-protected rights to participate financially in a campaign, *Caperton* imposed limits on judges who may have been beneficiaries of that electoral financial largess. Thus, recusal performs a remedial function when improper influence appears to tilt the playing field in favor or against one or another litigant.

At the same time, the most natural sources of funding in these races are comprised of those who have a heightened knowledge of the courts, the judges, and the would-be judges -- in other words, those who appear before these tribunals with some frequency: lawyers and frequent litigants. Their participation in these elections should neither be condemned nor discouraged, for the danger to an impartial judiciary would be enhanced by leaving those elections to special interests that can muster an outsized financial or political role. The legal profession's participation in these elections is nothing less than the discharge of a high civic duty. *Cf. Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (the First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office"). Nor should the judges they support normally be rendered ineligible to preside over or participate in decisions affecting those parties or those legal representatives, provided that their financial contributions are within the normal limits established by the law of the State or the normal means of advocacy for appointive office. No due process violation occurs from participation in judicial elections within the scope of existing legislated limits on financial support. Thus, if state law limits contributions to \$1,000 per candidate, contributions within that limitation should presumptively raise no basis for disqualification. In fact, in today's contentious judicial elections, where fact is often supplanted by wild accusations, there may well be a duty on the part of members of the bar to rally to the support of the courts and a truthful electoral record, particularly, as experience has shown, in retention elections.

The balance between proper civic participation and an appearance of potential bias, however, tips decisively in favor of a due-process requirement of recusal when great financial resources, well beyond the scope of legislated limits, are contributed by those involved in a pending matter that the electoral candidate may be called upon to decide or when a promise or pledge of a judicial result is made by a candidate for judicial appointment. In the election context,

it should not matter whether that largess comes in the form of an outsized direct campaign contribution or an enormous independent expenditure designed to promote the candidate's election, for both can pose the same danger of public perception that justice will be skewed in favor of the judge's unusually significant political patron (or opponent). It also should not matter if the financial support comes in the form of so-called issue advocacy, because that type of political speech, which typically urges constituents to tell the officeholder how to vote on some issue of public policy, has no place in our system of justice. Unlike decisions in the political branches which are designed to be responsive to the ebbs and flows of fashionable sentiment, judicial determinations are not guided by the results of a popularity contest but by the application of the rule of law to facts in the record. In fact, the *Caperton* case was primarily about an enormous independent, issue-advocacy expenditure.

The challenge then is how to permit those most knowledgeable about judges and the legal system to participate fully in the judicial selection/retention process, while providing both litigants and the public with the assurance that cases will be fairly judged and not on the basis of who comprised a judge's political patrons.

Given the nature of that challenge, which will differ over a range of factors in each state, TIPS urges the Standing Committees to recognize the need for individually tailored approaches that do not always comfortably fit within the Model Rules of Judicial Conduct. We believe the Standing Committees recognized the importance of that type of individualized State flexibility when it left blank, for States to fill in, the dollar amounts that might trigger disqualification in proposed Model Rule 2.11(A)(4). Still, the proposed solution is flawed as both overinclusive and underinclusive.

First, the proposed revision is overinclusive in that it provides no basis for parties to waive recusal. During oral argument in *Caperton*, Chief Justice Roberts raised the possibility of a litigant, knowing that he could not defeat a judge expected to rule against him, nonetheless seeking his recusal after putting enough money into support for the judge that recusal would be required. A rule permitting waiver would dispense with this concern.

Second, the proposal is woefully underinclusive. It simply does not cover the situation that *Caperton* presented. In *Caperton*, Don Blankenship, the principal in A.T. Massey Coal, Co., merely contributed \$1,000 to the Brent Benjamin campaign. If that was all he had done, no case for recusal would have been presented when now-Justice Benjamin sat on the dispute between A.T. Massey Coal and Hugh Caperton. It was, however, Mr. Blankenship's contribution of nearly \$2.5 million to a political advocacy group, "And For The Sake Of The Kids," which spent that money and more to oppose the incumbent justice and support Benjamin by emphasizing how court decisions, in which the incumbent's vote was supposedly decisive, hurt needy children, while

Benjamin championed their cause. As proposed by the Standing Committees, the new Model Rule would be silent and inapplicable to the situation that prompted the *Caperton* decision. As such, it fails to address the mandate of Resolution 107.

It is further underinclusive because it requires knowledge on the judge's part of the potential for bias and does not allow a judge to consider information put forth by a party. Such a requirement places an enormous and often untenable burden on a judge, but also misses the thrust of the *Caperton* decision, which was premised on the notion that it is the litigant's due-process right that is affected by a judge who may appear *to them or the public* to be beholden to a political patron that must be vindicated. The deletion of language "or learns by means of a timely motion" creates this problem.

We further recognize several practical problems that any approach to judicial disqualification along the lines proposed by the Standing Committees necessarily entails. First, in most states with judicial elections, a campaign committee but not the judge tracks contributions. Thus, to set a standard where it is incumbent on the judge to know who contributed and in what amounts undermines those states that have sought to assure impartial judgments by cordoning off the contribution data from the judges. Second, not all states have administrative mechanisms that would permit them to implement the system anticipated by the proposed rule – and today's fiscal climate, where courts must close one weekday each week and struggle to hold timely trials in civil matters, advise against another mandate that would further impose on the financially strapped judicial branch.

Finally, we find it odd that rules concerning disqualification would be contained within a Rules of Judicial Conduct that provide a basis for disciplinary action, rather than rules of procedure where it seems far more appropriate and does not carry an implication of condemnation. That potential for confusion also suggests reconsideration of the approach undertaken here.

For all the foregoing reasons, we believe that the knotty problem posed by assuring an impartial tribunal without creating a means by which judges are strategically and unnecessarily disqualified and that properly responds to the recent U.S. Supreme Court jurisprudence advises in favor of an individualized approach, State by State. To be sure, ABA guidance is desirable, but the problem is one that calls for state experimentation carefully tailored to the laws and structures extant in those states. It is telling that the careful and well-meaning effort of the Standing Committees has produced a proposal that would not apply to the *Caperton* facts. That result, we believe, advises strongly in favor of working with the states to develop multiple models that strike a balance appropriate to each state's legal system and that are fine-tuned with experience to resolve permutations of facts that we may not yet be capable of imagining.

Comments of the Tort Trial and Insurance Practice Section

September 18, 2012

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We hope these comments are helpful in the Committees' ongoing deliberations and will make ourselves available to assist in further efforts.

Sincerely,

Robert S. Peck
Chair, TIPS Task Force on Judicial
Disqualification

cc: Dick A. Semerdjian, Chair, TIPS

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DATE: September 13, 2012

TO: Paula J. Frederick, Chair, Standing Committee on Ethics and Professional Responsibility
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Chicago, Illinois 60654

RE: Comments of the Judicial Division to the 16 July 2012 Proposed Revisions to
Section 2.11 of the Model Code of Judicial Conduct

Dear Ms. Frederick and Mr. Lynk:

The Judicial Division (JD) Council has reviewed the 16 July 2012 proposed revisions to Section 2.11 of the Model Code of Judicial Conduct. As you may recall, the Council is composed of the JD officers as well as the chairs of the six JD constituent conferences, which include the National Conference of Administrative Law Judiciary, the National Conference of State Trial Judges, National Conference of Specialized Court Judges, National Conference of Federal Trial Judges, Appellate Judges Conference, and the Lawyers Conference.

As Chair of the Division, I appointed a 10-member ad hoc committee to comprehensively review the 16 July 2012 proposed revisions to the Code and to make recommendations for consideration by the JD Council. As summarized in the attached comments, the JD Council continues to believe that amendments to the Code of Judicial Conduct are not the best way to address the threats to judicial independence posed by 527 activity in state judicial elections. We acknowledge the existence of differing viewpoints on this question. We are hopeful, however, that the standing committees will give every consideration to our viewpoint and the multiple rationales that support it. We sincerely believe the credibility of the ABA to promulgate uniform standards in this area may be negatively impacted if proposals are disseminated that do not acknowledge the need for additional resources to implement the administrative structures necessary to fairly implement judicial disqualification rules relating to financial support of state judicial elections. In the event the standing committees elect to proceed at this juncture, we trust that any recommendations will take the form of a proposed rule of procedure rather than an amendment to the Code of Judicial Conduct. Alternatively, in the event the standing committees proceed with proposed amendments to the Code, the attached comments reflect the Council's recommended revisions to Model Rule 2.11.

In closing, the 4600 members of the Judicial Division wish to express their appreciation to the Standing Committee on Professional Discipline and the Standing Committee on Ethics and Professional Responsibility for the opportunity to offer comments in connection with the 16 July 2012 proposed revisions to Section 2.11 of the Model Code of Judicial Conduct.

Sincerely,



William D. Missouri
Chair, Judicial Division

Enclosure (comments to proposed revisions)

COMMENTS FROM THE JUDICIAL DIVISION REGARDING PROPOSED AMENDMENTS TO RULE 2.11 OF THE MODEL CODE OF JUDICIAL CONDUCT

In its present form, Rule 2.11(A)(4) of the ABA Model Code of Judicial Conduct incorporates a clear and unambiguous rule specifying when a campaign contribution requires judges to disqualify themselves from a pending case. That rule encompasses only contributions received directly by the judge's campaign committee. For these contributions, judges or their campaign committees presumably have direct control over the receipt and disbursement of such funds.

Following the decisions of the Supreme Court of the United States in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), the ABA House of Delegates passed Resolution 107, which urged states to adopt disqualification guidelines for judges and disclosure requirements for parties who have provided direct or indirect campaign support to a judge. The resolution further authorized the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline to consider whether amendments should be made to the ABA Model Code of Judicial Conduct or the ABA Model Rules of Professional Conduct, *if any* such amendments would provide additional guidance to the states on disclosure requirements and standards for judicial disqualification.

The process within the ABA of examining the rules and engaging in dialogue has been helpful and constructive. The dialogue has demonstrated that judicial disqualification involves many potential issues—many outside the judge's knowledge or control—and thus does not lend itself to a "one size fits all" rule of disciplinary conduct. Further, requiring a judge to investigate the nature and amount of contributions to the judge's campaign where knowledge of such contributions is not actually known or readily inferable runs counter to the basic constitutional precept of an independent judiciary, particularly where systems have been established to insulate a judge from such knowledge.

States have different models for judicial selection, different customs, and different patterns of population growth. As noted by the Conference of Chief Justices, what works for a heavily populated state may not work for a less populated state. If the ABA model rule appears to be administratively untenable or unfair, states may decide neither to adopt nor consider the model rule when drafting their own rules.

We all share the goal of holding judges to high standards of ethics and professionalism. We also share the goal of protecting and promoting the ABA's important role in assisting states in their drafting of ethical rules and guidelines. Nonetheless, it cannot be overlooked that jurisdictions have been cautious in their adoption of the current version of Model Rule 2.11(A)(4). Among other considerations, this reluctance stems from a realization that adequate administrative mechanisms are not currently in place to ensure either an efficient or fair administration of a rule requiring disqualification in elective jurisdictions based on campaign contributions. At a time when many courts are laying off employees, struggling to provide essential interpreter services, and closing courthouses due to inadequate funding, there is not a reasonable likelihood that states

will be able to implement these administrative systems. In the absence of an effective administrative infrastructure, such as utilized in New York State for trial court recusals based on campaign contributions, proposals like Model Rule 2.11(A)(4) cannot be fairly implemented in most situations. As a result, reasonable concerns exist that elective judges will be unfairly criticized and maligned, and perhaps even vilified, in situations where they did not even have knowledge or notice that a recusal question was looming or present in a pending proceeding.

We believe that moving forward within the ABA in the face of these significant obstacles, and adopting additional disqualification rules applicable only to judges subject to election, would potentially erode the moral authority of ABA model code pronouncements. Accordingly, the Judicial Division believes the ABA's role in judicial disqualification should be to encourage states to reassess their disqualification rules and to provide guidance for this task.

If the ABA determines that some form of a rule change is the most appropriate vehicle to address this issue, we recommend that it be addressed as a rule of procedure for a motion to recuse or disqualify, not as a disciplinary rule. This approach avoids the need for judges and staffs to develop administrative systems for tracking direct and indirect campaign contributions and it puts the onus on the lawyers and parties to decide whether they believe a judge can be impartial in a particular circumstance. *Caperton* itself arose in the context of a motion to disqualify, not a judicial disciplinary action.

Lastly, if the ABA determines that a disciplinary rule change is appropriate, we submit the following amendments to Rule 2.11 would be acceptable.

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 is 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 within the previous [insert number] year[s] made aggregate* contributions* to the judge's election or retention campaign committee 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 entity]~~
The disqualification required under this paragraph may be waived by the party that did not make the contribution.

(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 substantially be affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] The fact that a judge in an election or retention campaign received

contributions from a litigant, the litigant's lawyer, or such lawyer's firm does not of itself require the judge's disqualification. Paragraph (A) (4) sets forth the circumstances under which contributions to a judge's election or retention campaign may require disqualification. Knowledge is defined in the Terminology Section.

[6] In determining whether a contribution is such that there is a probability of actual bias, the amount, value, source, timing, and importance of contributions to an organization (other than the judge's election or retention campaign committee) that contributed to a judge's election or retention campaign may give rise to a reasonable question as to the judge's impartiality. Whether contributions to such organizations require disqualification depends on the circumstances. In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others, to the extent known by the judge:

- (a) The amount of the contributions in terms of their relative size in comparison to the total amount of money contributed to the judge's campaign and to the total amount spent in the election or retention;
- (b) The temporal relationship between the contributions, the election or retention of the judge, and the pendency of the case;
- (c) The apparent effect the contributions had on the election or retention;
- (d) The nature of the case and its importance to the parties; and
- (e) Whether any distinction between contributions made directly to the judge's campaign committee or made independently to an organization (other than the judge's election or retention campaign committee) that contributed to the judge's campaign bears on the disqualification question.

[7] Paragraph (A)(4) contains an expanded waiver provision. If the judge, under paragraph (C) of this Rule, discloses on the record that this reason is the basis for his or her disqualification, then the party that did not make the contribution may waive the disqualification. The expanded waiver provision is intended to preclude parties from engaging in judge-shopping or seeking other tactical advantages by making disqualifying contributions. The expanded waiver provision does not apply

if there is also bias or prejudice that would prohibit a waiver under paragraphs (A)(1) and (C).

[58] 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.

[69] “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.



**To: Paula J. Frederick, Chair
ABA Standing Committee on Ethics and Professional
Responsibility**

**Myles B. Lynk, Chair
ABA Standing Committee on Professional Discipline**

**From: Marla N. Greenstein, Secretary
Association of Judicial Disciplinary Counsel**

Date: August 30, 2012

**RE: Association of Judicial Disciplinary Counsel Comments on
7-16-12 Draft Proposed Amendments to ABA Model Code of Judicial
Conduct Regarding Judicial Disqualification**

The following comments represent views from across our national membership, which also reflect the diversity of judicial selection methods and judicial disqualification and campaign laws in each state. On behalf of the Association, we would like to thank the drafting Committee for addressing many of the concerns we raised over earlier language.

Uniformly, our members who have commented on the Code agree that the changing landscape of money and judicial campaigns raises new challenges to maintaining impartiality for judges who are involved in campaigns. This is a new and evolving election environment that will affect different judicial systems differently.

Because of the varying state approaches to judicial selection and retention, the responses to the various provisions vary from state to state.

Some other issues that the Code might address include:

A lawyer's contribution to a campaign against the judge's opponent in an election (not directly in support of the judge's campaign).

The timing of disclosure/disqualification when campaign contributions occur during the course of litigation. And how long the disclosure obligation lasts. At times, only the contributor may be aware of the contribution and not the judge.

Whether any or all campaign contributions are waiveable for disqualification purposes.

By using mandatory language, do the drafters intend these provisions to provide a basis for discipline if there is a failure to disclose or disqualify?

A specific drafting suggestion is to address expenditures as well as contributions. It may work to substitute "contributions to or expenditures by" where "contributions" is mentioned in most instances (similar to how it is used in draft Comment paragraph [7]).

While the provisions appear intended to address contested judicial elections, that intent is not articulated. The impact of the provisions on states that do not have contested judicial elections may be very different. Even in the context of contested judicial elections, members of the AJDC expressed concern with focusing solely on those lawyers who directly contribute to a campaign. For example, in a state where we have a Merit Selection System, where the only elections involving money are the occasional attacks on a sitting judge or the infrequent recommendation to vote "no" from the evaluating agency, the provisions as drafted do not resonate and may create new issues. Where a judge is attacked by an outside group with an issue-based agenda, those who contribute to the judge's campaign may not necessarily be making a statement in strong support of the individual judge as much as responding to the attack on Judicial Independence that the counter campaign created. When, in addition to money, other indirect support is included, the impact in a merit selection state could be to preclude concerned groups of lawyers such as private bar associations, from supporting the incumbent judge or justice because it could lead to that judge's inability to sit on cases involving those lawyers.

These comments are an aggregate of our various members' experiences in their various state systems. We urge our individual members to contact the ABA Standing Committees with their state specific concerns.

I have several quick thoughts on revised Model Rule 2.11

First, I commend the committee for what it has done here: revising the rule to reach contributions to independent campaigns is sensible and important (existing a(4) had become a virtual dead letter); and adding commentary that guides judges on how to bring the Caperton factors to bear should be very helpful.

Second, suppose an individual or organization spends ungodly amounts of its own money on its own independent campaign to elect the judge, and the judge knows it. It's not clear to me that a person who spends his own money on his own campaign has made a contribution to "other organizations" that supported the judge. If your intention here is to reach any source of support "other" than a direct contribution to the judge's campaign committee (including an interest group that spends its own money rather than contributing it to another organization), some clarifying commentary might be helpful.

Third, the comments as currently sequenced, create confusion as to whether comments 6 and 7 elaborate on (a)(4) or (a). It would be helpful for the commentary to state expressly that disqualification for contributions is regulated by two subparts under the rule: 2.11(a) and 2.11(a)(4), and that comments 6 and 7 apply to the former.

Fourth, the revised blackletter's exclusive focus on contributions in support beg the question of how to cope with contributions in opposition. The implication of the current draft is that we should worry about a judge's friends gaining unfair advantage but are unconcerned about a judge's enemies getting an unfair shake. There is a reference to the candidate's opponent at the end of comment 6, but I'll be damned if I can figure out what that is supposed to mean in the context of the comment as a whole.

Hope this helps--

Charlie

Charles G. Geyh
Associate Dean of Research
John F. Kimberling Professor of Law
Indiana University Maurer School of Law

Suggested language from Cynthia Gray

Rule 2.11

(D)(1) A judge shall disqualify himself or herself in any proceeding in which a party or party's lawyer:

(a) is the judge's opponent in an upcoming primary or general election or holds any leadership position in the judge's current campaign;

(b) in connection with the campaign for the judge's current term or the judge's current campaign, made one or more contributions and/or expenditures:

- i. That were personally solicited or accepted by the judge,
- ii. That exceeded the maximum amount allowed by statute, or
- iii. That were disproportionate or exceptional in support of or in opposition to the judge's campaign or the campaign of the judge's opponent or to a political action committee campaign to elect, retain, or defeat the judge, unless the judge takes steps to ensure that he or she does not learn the identity of those who made contributions to or expenditures in support of or in opposition to the judge's campaign, the campaign of the judge's opponent, or a political action committee campaign to elect, retain, or defeat the judge.

(D)(2) Following disclosure of actions by a party and/or a party's lawyer that would require disqualification pursuant to Rule 2.11(D)(1), the opposing party or parties in the proceeding may agree, without participation by the judge, that the judge should not be disqualified, and the judge may participate in the proceeding. The agreement shall be in writing and incorporated into the record of the proceeding.

(D)(3) A judge shall:

(a) disclose on the record in a case when anyone who has contributed above the threshold amount set by statute for disclosure in the candidate's public disclosure filings is a party or lawyer in a case; or

(b) direct the parties and lawyers to disclose any contributions above the threshold amount set by statute for disclosure; or

(c) disclose that he or she has taken steps to ensure that he or she does not learn the identity of those who made contributions to or expenditures in support of or

in opposition to the judge's campaign, the campaign of the judge's opponent, or a political action committee campaign to support, retain, or defeat the judge.

COMMENT

[1] "Leadership position" includes serving as campaign manager, chair, treasurer, or other officer; serving as a member or honorary member of the campaign committee; playing a continuing fund-raising role; or planning or hosting a fund-raiser.

[2] To determine whether contributions and expenditures are disproportionate or exceptional, the judge should consider the timing of the support; the amount of the contributions and/or expenditures relative to the total amount contributed to and spend by the candidate or committee to which it was contributed or in support of which it was spent; the amount of the contributions and/or expenditures relative to the total amount contributed to and spent by all candidates and committees in the campaign; and the apparent effect the contributions and/or expenditures on the outcome of the election.

[3] To determine whether contributions and expenditures are disproportionate or exceptional, the judge shall aggregate all contributions and expenditures (1) made for primary and general elections; (2) related to the campaign for the judge's current term or to a current campaign; (3) made by the same party or lawyer; (4) made by all parties and lawyers on the same side of a proceeding; and (5) made by persons associated with a party or lawyer in the proceedings.

[4] "Associated with" means all lawyers in a law firm or other law firms representing a party in a proceeding; any person who employs, is employed by, or is employed with a party or lawyer; any person who acts in cooperation, consultation, or concert with, or at the request of, another person; any spouse, domestic partner, or member of a party or lawyer's family residing in the party or lawyer's household; and board members of corporate entities.

[5] The obligation to disclose under Rule 2.11(D)(3) continues as long as a case is pending before the judge.

[6] It is not be grounds for disqualification that a party or party's lawyer responded to false, misleading, or unfair allegations made about a judge or judicial candidate, including a candidate for retention, during a campaign even if the response was made at the request of the candidate.

Please note these are my personal suggestions and have not been reviewed or adopted by the board of the American Judicature Society.

Ms. Paula J. Frederick, Chair
ABA Standing Committee on Ethics and Professional Responsibility
Prof. Myles V. Lynk, Chair
ABA Standing Committee on Professional Discipline
American Bar Association
321 N. Clark St.
Chicago, IL 60654

Dear Paula and Myles,

This is just a short note (of a sort for which I am surely not known), to congratulate you and your respective Committees on the revised draft proposal for the Code of Judicial Conduct that you recently circulated for discussion. I understand that you will have a roundtable discussion today, and I hope that you receive much and well-deserved praise both for your extensive work and for the proposal itself.

There remains, for me, a single concern that I suggest you might consider. It seems to me that the provision in proposed new Comment [7] urging that “a judge should also consider the timing and history of a contributions to the judge’s campaign,” – at least to the extent that it addresses “timing” – might not be necessary, in light of the nearly identical statement regarding timing that is to be found at lines 120-121 in the preceding Comment [6]. It also seems to me that invoking the concept of the “history” of a contribution is potentially confusing: although Comment [7] provides a (albeit duplicative) example of “timing,” it provides none with respect to what other elements would constitute “history.” If the concept of history is to survive in your final recommendation, I believe that it, too, would benefit from the provision of some explanatory example.

Thank you, as always, for your invitation of comments and suggestions. I hope you will succeed in having your proposal accepted by the House of Delegates next February.

Sincerely,

George Kuhlman
415 W. Aldine Ave. 16-C
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cc: Dennis Rendleman, ABA Ethics Counsel
Ellyn Rosen, ABA Discipline Counsel

7/17/2012

Ms Vera:

My comments on the proposed amendments to Rule 2.11:

1. The proposal appears to be not formatted correctly if the final “is reasonable” clause in (4)(a) is offered as a mutually exclusive alternative to what immediately precedes it. If so, it is very confusing about what is being proposed. Perhaps it should be formatted as follows:

(a) made aggregate contributions* to the judge’s election or retention campaign committee 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].*

I’m assuming that the “is greater” clause and the “is reasonable” clause are options and only one or the other should be adopted, since they can’t be both adopted as is and make any sense. Thus, the “is greater” clause must be bracketed like the “is greater” clause to denote that they are exclusive alternatives.

If the two clauses are not meant to be mutually exclusive, as suggested by Comment 7, then an “or” needs to be placed between them and the brackets removed from the “is reasonable” clause.

In any case, the proposal as presented is ambiguous on this point due to improper formatting.

2. I must question the use of time as the frame of reference for disqualifying contributions. This will raise many difficulties in states where judges are elected or face retention. A brief sampling of these states shows that the terms of office for appeals courts judges ranges from 6 to 12 years, while the range of the terms for lower court judges is from 4 to 6 years, generally. So, writing a rule that requires an adopting state to choose one length of time will create problems. For example, if the high court judges’ term is 12 years or 8 years and the lower courts’ term is 4 years, and the state wants to catch contributions to the judge’s last election (who cares what happened two elections ago??), if it inserts 8 years, lower court judges must consider the last two elections, whereas the 8 year term higher court judges only have to consider the last election, and the 12 year term judges don’t have to consider the last election at all. What a conundrum --- all because you choose to use years as your measuring stick. Why not use just “the last election and the next election.” Isn’t that all that counts: Who helped get the judge elected the last time for the current term, and who is contributing big time to the judge’s upcoming election?? I’d rephrase the rule in such terms.
3. Section (4) of the rule sets out the situations where the judge’s impartiality may be reasonably questioned and, therefore, “shall” recuse him- or herself. One such situation is receiving campaign contributions that meet the criteria of subsection (4). If (4)

criteria are met, the judge has no discretion; he or she must recuse. At least that is how the rule reads. However, if you turn to the comments related to (4), specifically to comments 6 and 7, they treat (4) as entirely discretionary depending on many factors not mentioned in the rule proper. Huh?? Does the rule mean what it says or not? These comments entirely undermine the clarity of the rule. In fact, they contradict the rule and comment 5. The latter say recusal is “required” if the criteria of section (4) are met. However, comments 6 and 7 seem to say that lots of other factors must be considered before a judge should decide to recuse him- or herself. Which is it?

I suggest that comment 6 & 7 should be seen as additional situations (to (4)) where the judge should recuse. That is, even if the criteria of section (4) are not met, there can be circumstances that will require the judge to recuse.

In short, as currently drafted, I do not see how discretionary comments 6 & 7 can live beside mandatory comment 5 and the rule.

I thank the committee for considering my comments.

Prof. Frederick C. Moss (Emeritus)
S.M.U. Dedman School of Law

7/18/2012

Ms Vera:

I would like to slightly amend my comments on the proposed amendments to Rule 2.11 that I sent to you yesterday:

4. The proposal appears to be not formatted correctly if the final “is reasonable” clause in (4)(a) is offered as a mutually exclusive alternative to what immediately precedes it. If so, it is very confusing about what is being proposed. Perhaps it should be formatted as follows:

(b) made aggregate contributions* to the judge’s election or retention campaign committee 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].*

I’m assuming that the “[insert amount]” clause and the “is reasonable” clause are options and only one or the other would be adopted, since they can’t be both adopted as is and make any sense. Thus, the “[insert amount]” clause must be bracketed like the “is reasonable” clause to denote that it is a mutually exclusive alternative to the “is reasonable” option. Otherwise, the “is reasonable” clause looks like an optional “add on” criterion to the “[insert amount]” criteria.

If the two clauses are not meant to be mutually exclusive, as suggested by Comment 7, then an “or” needs to be placed between them and the brackets removed from the “is reasonable” clause.

In any case, the proposal as presented is ambiguous on this point due to its confusing formatting.

5. I must question the wisdom of using time – years -- as the frame of reference for disqualifying contributions. This will raise many difficulties in states where judges are elected or face retention. A brief sampling of these states shows that the terms of office for appeals courts judges ranges from 6 to 12 years, while the range of the terms for lower court judges is from 4 to 6 years, generally. So, writing a rule that requires an adopting state to choose one length of time will create problems. For example, if the high court judges’ term is 12 years or 8 years and the lower courts’ term is 4 years, and the state wants to catch contributions to the judge’s last election (who cares what happened two elections ago??), if it inserts 8 years, lower court judges must consider the last two elections, whereas the 8 year term higher court judges only have to consider the last election, and the 12 year term judges don’t have to consider the last election at all. And what if the state wants to include the last two elections?? What a conundrum --- all because you choose to use years as your measuring stick. Why not use just “the last election and the next election.” Isn’t that all that counts: Who helped get the judge elected the last time for the current term, and who is contributing big time to the judge’s upcoming election?? I’d rephrase the rule in such terms.
6. Section (A) of the rule sets out the situations where the judge’s impartiality may be reasonably questioned and, therefore, “shall” recuse him- or herself. One such situation is receiving campaign contributions that meet the criteria of subsection (A)(4). If the criteria in (A)(4) are met, the judge has no discretion; he or she must (“shall”) recuse. At least that is how the rule reads. However, if you turn to the comments related to (4), specifically to comments 6 and 7, they appear to treat (4) as entirely discretionary, depending on many factors (timing, amount, etc.) not mentioned in the rule proper. Huh?? Does the rule mean what it says or not? These comments entirely undermine the clarity and the mandatory dictate of the rule. In fact, they contradict the rule and comment 5. The latter say recusal is “required” if the criteria of section (4) are met. However, comments 6 and 7 seem to say that lots of other factors must be considered before a judge should decide to recuse him- or herself. Which is it?

I suggest that comment 6 & 7 should be redrafted to say that even if the strict criteria of (4)(a) and (b) are not met, there may be circumstances – spelled out in this comment -- where the judge should recuse nevertheless.

And, if this, indeed, was the intended meaning of comments 6 & 7, then they fail to express this clearly enough.

In short, as currently drafted, I do not see how comments 6 & 7’s discretionary balancing of multiple factors can live beside the mandatory rule and comment 5.

I thank the committee for considering my comments.

Prof. Frederick C. Moss (Emeritus)
S.M.U. Dedman School of Law

Natalia, Mark—

May I applaud and join Chas Geyh’s “... commend[ing] the committee for what it has done here: revising the rule to reach contributions to independent campaigns”

Going on with that, may I suggest a few changes in what are probably mere drafting matters. The version Natalia just sent me seems rather a work in progress. Below is an excerpt from that version, w/ suggestion inserted:

2.11 (A)(4) ...

(b) made contributions in an amount that is greater than \$[insert amount] to other organizations that contributed to or supported the judge’s election or retention campaign. OR

(c) made direct expenditures to support ...

Similarly, in Comment paras (5)-(8), in order to be consistent with “revising the rule to reach contributions to independent campaigns”-- the references that are limited to “contributions” seem to need expansion to cover independent efforts, both by contribution or direct action. Hope this helps,

Roy A. Schotland
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September 15, 2012

Delivered via Email

Paula J. Frederick, Chair
ABA Standing Committee on Ethics and Professional Responsibility
Prof. Myles V. Lynk, Chair
ABA Standing Committee on Professional Discipline
American Bar Association
321 N. Clark St.
Chicago, IL 60654

Re: Proposed Rule 2.11 and Formerly Proposed Rule 5.1A

Dear Paula, Myles, and Committee Members:

Please accept these brief comments in response to the public solicitation, and let me echo the several other commentators who have justifiably praised you for your hard work to date in this complex ethical, doctrinal, and political thicket.

Although I support and appreciate the current proposal as a small step forward, I am at the same time saddened to see how small and diluted this step has become. As the Supreme Court told us in *Caperton*, states are free and even encouraged to craft disqualification rules above the due process floor.¹ It is very much incumbent upon the ABA, acting through your standing committees, to craft those rules, which will provide national guidance and leadership to the states.

¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (declaring that “[s]tates may choose to adopt recusal standards more rigorous than due process requires”) (internal quotation omitted); *id.* (reiterating that “states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today”) (internal quotation omitted); *see also Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (noting that judicial disqualification rules are long-standing and relatively immune from First Amendment challenge); James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 303–04 (2010) (observing that *Caperton* “provides real momentum for state-based recusal reform efforts”). Even Chief Justice Roberts, in dissent, explicitly agreed: “States are, of course, free to adopt broader recusal rules than the Constitution requires—and every State has—but these developments are not continuously incorporated into the Due Process Clause.” *Caperton*, 129 S. Ct. at 2268–69 (Roberts, C.J., dissenting).

Commentary on the Commentary. First, with respect to the Judicial Division’s memorandum, I wonder how it came to pass for that credible division to state, incredibly but essentially, that the ABA should not add clarity to disqualification issues in elective states and that to do so nonetheless would lessen the ABA’s “moral authority” in ethical matters. Instead of proposing a better mousetrap to overcome the perceived “administrative” difficulties, moreover, the division effectively urges a do-nothing approach in the Code. Perhaps in response to those or similar comments, the current proposal is not all that it should be. Indeed, it is not all that it was: as explained briefly below, the former proposal was better (although it contained several fixable ambiguities). The Judicial Division did offer a sound comment on which I hope the committee members will act: authorizing the non-contributing side to waive disqualification. This effective solution rids the system of gaming (or at least the threat of gaming) by a party or lawyer who contributes to a judge’s campaign committee solely to disqualify that judge.

Second, with respect to the comments of Professors Geyh and Schotland, their edits should be incorporated in full in the proposal’s final form.

Rule 2.11 of the Model Code of Judicial Conduct. With respect to the current (and former) Rule 2.11 proposal, I am a little concerned about placement. In particular, the only black-letter change is attached to current Rule 2.11(A)(4), which only a few states have adopted (both pre- and post-2007 code amendments). And of these states, a few states have simply tied the disqualifying dollar amount to the state campaign contribution limits; it is at least arguable that it would be a violation of election law for a judge or judicial campaign committee to accept an amount over those limits—regardless of an overlapping ethical rule. Thus, although this is somewhat superficial, I believe that any proposed rule would be better-placed in a separate, black-letter subsection.

Second, and along similar lines, your formerly proposed 2.11 is better in many respects: Any proposed rule probably should likewise include an additional basis for disqualification beyond a universal dollar amount. For various good and bad reasons, commentators and state officials do not do well when considering whether to adopt a specific dollar amount. Furthermore, and as the committee members probably know too well by now, the former proposal also covered several controversial topics and contained several ambiguities. But those were not reasons to fold tents. The rule should deal with other forms of campaign support (e.g., campaign managers), it should likely be bidirectional (see, e.g., Prof. Charlie Geyh’s comments noting that the rule addresses only financial support and not financial opposition), and it should provide more guidance than constitutional law. I therefore would urge the committee members to continue advancing the ball. The ABA can indeed insert some careful clarity and assert some “moral authority” in this area.

Rule 5.1A of the Model Rules of Professional Conduct. With respect to the missing Rule 5.1A (or its equivalent model court rule), please bring it back. Although the state agency designation was perhaps too unruly to incorporate into the proposed rule, the lawyer and law firm court disclosure alternative was an important and practical solution. Indeed, a few states already use a similar procedure in certain courts.² A key question, then, is why this proposal ignored (retroactively) the ethics of lawyers in this

² See, e.g., Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 269–72 (2011), available at <http://ssrn.com/abstract=1685038>.

area?³ The accompanying cover letter lists no rationale. Most of the preexisting rationales (not necessarily attributable to the committee members) boil down to fear, self-interest, apathy, or complacency. Until an elusively persuasive rationale is finally discovered or articulated, I would strongly urge the committee members not to back out of progress in this area.⁴ Putting the disclosure requirement on contributing firms, for example, is administratively manageable, efficient, and feasible. Moreover, Resolution 107's text and spirit urged "disclosure requirements" and related improvements to the "Model Rules of Professional Conduct;" the current proposal contains none.

Finally, recognizing the hard work explicit and implicit in the above comments, I would be happy to answer questions, provide research, or contribute to future edits, drafts, and reports. Because it is important for us to limit the actual and apparent effects of money on our public officials—and especially our judges—I trust that your efforts will not end with the current proposal.

Thank you for your consideration. Best regards.

Sincerely,

Keith Swisher

KS

³ See *id.*; Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of "Anything Goes"*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 341 (2010).

⁴ Due to a few regrettable scheduling conflicts, I have been unable to attend the public hearings. My apologies if, through one of those hearings or related documentation, a persuasive rationale was finally discovered or articulated.