

**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON ETHICS & PROFESSIONAL**  
**RESPONSIBILITY & STANDING COMMITTEE ON**  
**PROFESSIONAL DISCIPLINE**  
**PUBLIC HEARING SCHEDULE**

February 3, 2012  
9:30 a.m. – 11:30 a.m.  
Sheraton New Orleans Hotel  
Napoleon Ballroom C3, 3<sup>rd</sup> Floor  
New Orleans, LA

<b><u>TIME</u></b>	<b><u>SPEAKER</u></b>
9:30 a.m. – 10:00 a.m.	Joint Committee Opening Remarks
10:00 a.m. – 10:15 a.m.	Judge Scieszinski, ABA Justice Center
10:15 a.m. – 10:30 a.m.	Standing Committee on Judicial Independence SCJI Immediate Past Chair William Weisenberg SCJI Member Alan Dimond SCJI Member Judge James Lockemy SCJI Business Law Liaison Keith Fisher
10:30 a.m. – 10:45 a.m.	Marla N. Greenstein, Executive Director, Alaska Commission on Judicial Conduct, representing the Association of Judicial Disciplinary Counsel and the American Judicature Society
10:45 a.m. – 11:00 a.m.	Adam Skaggs, Senior Counsel, Brennan Center for Justice
11:00 a.m. – 11:15 a.m.	Matthew Berg, Justice at Stake
11:15 a.m. – 11:30 a.m.	Robert Cummins

**\* Written Submissions by Individuals Not Attending**

- \* Attorneys' Liability Assurance Society Inc.
- \* Peter Gulia, J.D., Fiduciary Guidance Counsel, Philadelphia, PA
- \* W. William Hodes, J.D., William Hodes Law Firm, Lady Lake, FL
- \* George Kuhlman, Chicago, Illinois
- \* Wendy C. Lascher, President, American Academy of Appellate Lawyers

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January 30, 2012

Standing Committees on Ethics and Professional Responsibility  
and Professional Discipline  
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Attn: Natalia Vera, Senior Research Paralegal

**RE: Proposed Amendments to the Model Code of Judicial Conduct Regarding Judicial  
Disqualification: Comments of the ABA Standing Committee on Judicial Independence**

Dear Standing Committee Members:

The ABA Standing Committee on Judicial Independence (SCJI) wishes to express its appreciation of the effort expended by the ABA Standing Committees on Ethics and Professional Responsibility and the Professional Discipline in developing proposed amendments to the Model Code of Judicial Conduct and Model Rules of Professional Conduct as they pertain to the important subject of judicial disqualification in the context of judicial election campaign support. This draft of proposed amendments, as called for by SCJI's Resolution 107, which was adopted by the House of Delegates at the ABA annual meeting last August, continues the important work begun by the Judicial Disqualification Project (JDP) and, in the wake of the excesses of the 2010 judicial elections in states such as Iowa, keeps the focus of the legal profession on this ongoing crisis in public confidence in our courts.

SCJI has undertaken a preliminary review of the proposed amendments and will appear at the February 3, 2012 public hearing to offer comments and share the benefit of our expertise on judicial independence, judicial ethics, and judicial disqualification. Our committee has identified several matters that we respectfully ask you to consider in your further deliberations on this subject. Please note that we are available to assist with further examination and discussion of the issues surrounding the proposed amendments to the Model Code of Judicial Conduct.

Let us begin with the observation that the entire subject of judicial disqualification is difficult to address because of the subjective nature of a judge's determination of whether and when to recuse/disqualify himself or herself from a particular proceeding. The very legitimacy of the judiciary is predicated on the presumption that judges will be fair and impartial, and it is only in relatively rare situations that "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonable be questioned...." The development of workable disqualification standards that do not suffer from vagueness, overinclusiveness, or underinclusiveness is by no means an easy task.

Here is a list of questions and observations with regard to the proposed amendments and comments to Rule 2.11 of the Model Code of Judicial Conduct. We respectfully note that these are discussion points only and often leave us with more questions than answers at this moment in time.

1. The proposed amendment to 2.11 (A)(4) speaks in terms of support to the judge's campaign that was "substantially important to the judge's most recent campaign." Comment [11] attempts to define "substantively important." We attempted to interpret what is meant by "clear and weighty importance to the judge" and had difficulties in pinning down this concept. Timing of contributions is certainly an important factor to consider, but "the particular needs of the judge's campaign at the time the contribution or support were made" seems vague as a standard and requires further consideration. While each situation will require careful and individualized analysis by the judge, perhaps if we put our heads together and ponder this further we will be able to create a workable set of guidelines that can be offered to the judiciary.
2. Limiting the rule to "recent campaigns" raises a host of issues. Some judges have been reelected to the bench several times. It may be a mistake to eliminate completely from Rule 2.11(A)(4) any time frame language. Let us suppose, for example, that a person or "prominent constituent" was a "supporter" of the judge in his or her initial campaign but the judge has been unopposed for re-election in the future.
  - a. Could there be significant concern with regard to this supporter who helped the judge get on the bench even if the support was not in a "recent campaign?"
  - b. How far back is the judge's memory supposed to go? Ten years? Twenty years?
3. The proposed amendments appear to apply only to contributions made to the campaign of the judge who won the election and is now on the bench -- the so-called "debt of gratitude." The situation in which a litigant or lawyer provided significant support to the judge's opponent should also be addressed. This topic came up during the *Caperton* case and was referred to

as the “debt of hostility.” There could well be situations in which a judge’s impartiality might be questioned when a significant supporter or “prominent constituent” of the judge’s opponent is before the court.

4. There does not appear in the draft any affirmative requirement of disclosure by a judge about what factors, if any, entered into a determination not to disqualify himself or herself in a particular case. There is a school of thought that, in most instances in which a judge decides not to disqualify himself or herself, a written explanation of the judge’s reasons should be made. Having the judge’s reasoning in writing in these circumstances facilitates review. In contrast, a decision to recuse, whether *sua sponte* or upon motion, probably does not require such an explanation.
5. The comments, in general, to 2.11(A)(4) appear only to address states that have elections. That is perfectly understandable. We wonder, however, whether significant support of or opposition to even an *appointed* judge might not be relevant to disqualification when the proponent or opponent appears before the court as a litigant or lawyer. Persons who are known to the judge to have made “effective recommendations” as to his or her appointment to the bench, or as to his or her retention, should be considered as “significant” as those who made a major financial contribution. Similarly, in the event a bright line test should evolve, people who played significant election-related roles, for example, the campaign chairperson or treasurer should probably be on the recusal side of such a test. We respectfully suggest that these may be points to consider in further deliberations.
6. The Conference of Chief Justices adopted a series of factors as “Judicial Disqualification Fundamental Principles” based upon factors set forth in their brief *amicus curiae* in the *Caperton* case. Hopefully these “Principles” were considered by the committees during the drafting stage of the proposed amendments. A copy of the Conference of Chief Justices “Principles” is enclosed.
7. Would a state bar association, county bar association, or specialty bar association endorsement be considered “non-financial support” to the extent that it would or should be a factor for a judge to consider in a case involving that association?
8. Would an endorsement by a newspaper, magazine, or other publication at a particular time in a campaign be “substantially important” to the extent it should be a factor in a judge’s decision whether or not to recuse in a case involving that publication?
9. The terminology section raises a series of questions we are still pondering. Could “support” include a legal organization that endorses a candidate for elective or non-elective office, or evaluates a candidate for judicial office? What about

contributions or support that go not directly to the candidate but to an independent effort involved in the campaign? The draft definition seems to exclude, for example, the techniques of contributions/support that have become most notorious recently, namely the Super-PACs, labor unions, chambers of commerce, and so forth. As drafted, this is in effect an invitation to supporters to avoid direct contributions and support and take the independent route. We may offer a few additional comments on this section at the hearing.

10. In reviewing some of the proposed commentary, we have wondered how a judge could reasonably be expected to have knowledge of some the factors mentioned as relevant to the disqualification calculus. For example, proposed comment [8] refers to a “constituent or affiliate” of a party or the party’s lawyer without ever defining what the quoted terms mean. Later in that same comment, reference is made to spouses, domestic partners, children, and parents. If the surname of the individual is not the same, or even if it is the same but the name is a common one, how can a judge reasonably be expected to discern the relationship? We recommend curing this by mandatory disclosure, in much the same way as state statutory requirements or rules of court (both state and federal) often require disclosure of parties’ affiliations or monetary support for the writing of amicus briefs, etc. This could be left to the states, or incorporated, as appropriate, into the Model Rule of Professional Conduct and thereby made a professional and ethical obligation of the lawyers litigating before the court.

As the foregoing discussion illustrates, effective regulation of judicial disqualification is multi-faceted and far from easy. Problems with setting dollar amount limitations, with the myriad relationships among parties, counsel, and all of their affiliates or related persons on the one hand and the campaign of a judge or the judge’s opponent on the other hand, with the factors identified by the Conference of Chief Justices in their “Principles,” and with questions of fairness and practicality concerning what a judge may reasonably be deemed to know present considerable drafting challenges.

In the spirit of working together to find our way through this thicket, we offer as a suggestion the following alternative to Rule 2.11(A)(4) for your consideration. Instead of working with mandatory dollar limitations, it uses an approach based on percentages of contributions and support.

**Alternative Approach to Model Code of Judicial Conduct Rule 2.11(A)(4)**  
*(offered for purposes of discussion only)*

The judge knows or learns by means of disclosures mandated by law\* or a timely motion that aggregate\* contributions\* to the judge’s campaign, to the campaign of an opponent whom the judge defeated in the election, or to an independent, third-party effort involved in the campaign, in an amount greater than

**Option 1:** \_\_ percent [individual states are free to specify this percentage] of all such contributions to the judge's or opponent's campaign; or

**Option 2:** \_\_ percent [individual states are free to specify this percentage] of all contributions to all candidates for that judicial position during the campaign; or

**Option 3:** \_\_ percent [individual states are free to specify this percentage] of all such contributions to the judge's or opponent's campaign, and \_\_ percent [individual states are free to specify this percentage] of all contributions to all candidates for that judicial position during the campaign have been made by, or by donors associated or affiliated with, a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule. In determining whether the contributions or support\* raise a question about the judge's ability to be impartial such that disqualification (with or without motion) is appropriate under this paragraph, the factors to be considered should include, *inter alia*:

(a) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;

(b) The timing of the support in relation to the case for which disqualification is sought;

(c) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, and (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.

\* \* \* \*

We welcome the opportunity to share our preliminary thoughts with you and to participate in the hearing on February 3, 2012. We commend the work of the two standing committees and look forward to working with you throughout your deliberations on this important subject.

Respectfully submitted,

William K. Weisenberg  
Keith R. Fisher

on behalf of the ABA Standing Committee on  
Judicial Independence

Enclosure

## CONFERENCE OF CHIEF JUSTICES

### JUDICIAL DISQUALIFICATION FUNDAMENTAL PRINCIPLES

Although not intended as an exhaustive list, the following fundamental principles should be considered as states and territories formulate judicial disqualification practices and procedures to promote public trust and confidence in the state courts.

1. Judges should disqualify themselves when there is actual conflict of interest or bias or other impropriety or when a reasonable, disinterested person would conclude that an appearance of impropriety exists.

In applying this Principle in the context of campaign support, factors to be considered include:

- A. The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's (or opponent's) campaign and to the total amount spent by all candidates for that judgeship;
  - B. If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
  - C. The timing of the support in relation to the case for which disqualification is sought;
  - D. If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issues before the court, (iii) the judicial candidate (or opponent), and (iv) the total support received by the judicial candidate (or opponent) and the total support received by all candidates for that judgeship.
2. Although states and territories should have flexibility to accommodate different legal cultures and practices, all states and territories should have in place clearly articulated procedures for handling disqualification motions and reviewing denials of such motions by another judge or tribunal or as otherwise provided by Rule of Court.
  3. Disqualification procedures may require different rules for trial courts, intermediate appellate courts and courts of last resort. Likewise, different rules may be appropriate for urban courts versus rural courts.
  4. States and territories should provide guidance and training to judges in applying disqualification rules, including in determining whether a judge's impartiality might reasonably be questioned.

**Association of Judicial Disciplinary Counsel  
Preliminary Comments on Draft Proposed Amendments to  
ABA Model Code of Judicial Conduct  
Regarding Judicial Disqualification**

The following comments from some of our members are only the initial reactions to the current draft. Our Association has not taken a formal position and these comments do not reflect the views of our entire membership but hope to raise issues that we would face in enforcing the proposed provisions.

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

Because of the varying state approaches to judicial selection and retention, the responses to the various provisions vary state to state. For example, in my 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 Alaska Judicial Council, 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 my 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.

It is clear that these provisions are really intended to address contested judicial elections. If so, that distinction should be articulated. Even in the context of contested judicial elections, members of the AJDC expressed concern with the “rebuttable presumption”, the “other support” language, and defining “substantially important to the judge’s most recent campaign.”

The rebuttable presumption of knowledge of contributions that are matters of public record presents at least two problems. The first is that this provision conflicts with the long-standing (if perhaps anachronistic) provisions in the Code that the judge should not get involved in the details of the campaign, and include requirements for blind campaign committees where the judge does not take an active role. The second issue is that if it were indeed a “rebuttable presumption” what information would in fact “rebut” that presumption? Would the judge’s statement that the judge was unaware be enough? Would the judge need to attack the “reasonable availability” of the information?

Related to these issues are the issues raised by “other support”. While it might be clear whether a dollar contribution was a matter of public record, it will be less clear what other support might be. “Other support” with a dollar valuation will likely need to be reported, but there is likely support that will be hard to quantify in monetary terms. When coupled with the new “substantially important” to the campaign standard, it will become even more difficult to ascertain.

As one of our members put it:

“Imagine two judicial candidates having spent a million dollars apiece against each other, and being broke, and at the last minute, some car dealer provides a few rental cars to one of them to get physically challenged voters to the polls; that candidate wins a close election. Not much cost is involved in renting a couple of cars for a day, but is it “substantially important” to the campaign? The losing candidate would surely say yes. Enough to create a disqualifying interest?”

Many of our members also question what the new standard-- “substantially important to the judge’s most recent campaign”-- adds that the present overall standard-- Rule 2.11 (A), “in which the judge’s impartiality might reasonably be questioned”--doesn’t already cover. There is a valuable body of law interpreting the existing standard, while the proposed language is untested. We are concerned that “substantially important” is a subjective standard that would be difficult to define, provides little meaningful guidance to judicial candidates, and would be difficult

to enforce. Consistent use of “in which the judge’s impartiality might reasonable be questioned” would maintain an objective standard that has been defined in case law.

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**Comments of Adam Skaggs**  
**Senior Counsel, Brennan Center for Justice at NYU School of Law**

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

**Before the American Bar Association's**  
**Standing Committee on Ethics and Professional Responsibility and**  
**Standing Committee on Professional Discipline**

**February 3, 2012**

On behalf of the Brennan Center for Justice at NYU School of Law, I want to thank the American Bar Association's Standing Committees on Ethics and Professional Responsibility and Professional Discipline for the opportunity to speak with you today—and for the important leadership the Committees have demonstrated on strengthening judicial disqualification rules.

The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on fundamental issues of democracy and justice. Our Fair Courts project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in our constitutional democracy. Our research, public education, and advocacy focus on improving judicial selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches.

The Brennan Center commends the Committees for their attention to the important matter of judicial disqualification, and for their leadership in working to develop model rules for state courts. In particular, we applaud the Committees' prompt response to the call in Resolution 107, approved by the ABA's House of Delegates in 2011, for the Committees to consider what amendments, if any, should be made to the ABA's Model Code of Judicial Conduct or Model Rules of Professional Conduct.

Reforming judicial disqualification practice in the states, and the related rules of professional conduct, is necessary to combat mounting threats to public confidence in the impartiality of the judiciary. In particular, recusal reform is needed to defeat the growing perception that judges' decisions in the courtroom are influenced by partisan political concerns and—in the 39 states that elect judges—judicial campaign spending.

In the last decade, spending on state supreme court elections more than doubled, from \$83.3 million spent in 1990-1999 to \$206.9 million in 2000-2009. Of the 22 states that hold competitive elections for their top judges, 20 set all-time spending records between 2000 and 2009.<sup>1</sup> At the same time, state and national surveys have repeatedly shown that large, bipartisan majorities are extremely wary of the role that money plays in judicial elections and believe that financial campaign support buys favorable legal outcomes.<sup>2</sup>

In 2009, the United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.* recognized the serious threats to public perceptions of judicial impartiality that arise when judges preside over cases involving their campaign supporters.<sup>3</sup> In *Caperton*, the Court disqualified a West Virginia justice from a case in which the CEO of a party had spent \$3 million on independent expenditures to elect the justice. The Court concluded that because the spending, which exceeded the total amount spent by all of the justice's other supporters—and by his campaign committee—created a “serious objective risk of actual bias,” due process required disqualification.<sup>4</sup>

The Court also encouraged states to adopt rigorous disqualification standards to address the conflicts of interest stemming from campaign cash in the courtroom. Nearly three years later, however, the majority of state courts have failed to adopt *any* reforms that respond to the threats identified in *Caperton*<sup>5</sup>—despite the fact that spending in judicial elections continues to spiral out of control. In 2009-2010, for example, \$16.8 million was spent on television advertising—the most ever spent on judicial television advertising in a non-presidential election cycle.<sup>6</sup> Outside groups—uncontrolled by the candidates themselves and unaccountable to voters—were responsible for an increasingly large percentage of this spending.<sup>7</sup> During a highly politicized 2011 supreme court election in Wisconsin, special interest groups shattered records for spending on television advertisements during a judicial contest.<sup>8</sup>

When the House of Delegates approved Resolution 107 last summer, it sent a strong signal to state courts that judicial disqualification procedures are crucial to shoring up public confidence in the judiciary. The work of the Committees in proposing amendments to the model code and rules is the crucial next step in providing state courts useful guidance in fashioning needed new rules. We thank the members of the Committees for their extensive and swift attention to this challenge, and we strongly urge adoption of new provisions along the lines of the proposed amendments to the model code and rules.

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<sup>1</sup> See James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* (2010), available at <http://www.brennancenter.org/NPJE09>.

<sup>2</sup> See, e.g., Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections 4-7* (2010) (collecting survey data), available at [http://www.brennancenter.org/buying\\_justice](http://www.brennancenter.org/buying_justice).

<sup>3</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

<sup>4</sup> *Id.* at 2265.

<sup>5</sup> See *Judicial Recusal Reform—Two Years After Caperton* [http://www.brennancenter.org/recusal\\_after\\_caperton](http://www.brennancenter.org/recusal_after_caperton).

<sup>6</sup> See Adam Skaggs, et al., *The New Politics of Judicial Elections 2009-2010* (2011), available at [http://www.brennancenter.org/new\\_politics\\_2010](http://www.brennancenter.org/new_politics_2010).

<sup>7</sup> *Id.*

<sup>8</sup> See Press Release, Brennan Center for Justice, *Special Interest TV Spending Sets Record in Wisconsin* (Apr. 5, 2011), available at [http://www.brennancenter.org/WI\\_TV\\_record](http://www.brennancenter.org/WI_TV_record).

While we agree with the overall direction of the proposed amendments, there are several areas in which we feel the current draft amendments could be improved. We offer the following observations with an eye toward further improving the very promising draft amendments under consideration, and hope that these comments may assist the Committees as they continue to polish the draft language.

First, although we strongly agree with the general approach reflected in the proposed amendments to Rule 2.11(a)(4), we question the inclusion of the “substantially important” standard used to assess the contributions or support provided to a judge’s campaign. We understand the proposed comment 11 to indicate that this standard is to be interpreted from the point of view of a reasonable person, but we are concerned this may unnecessarily complicate the task of judges assessing putative conflicts under the rule. The rule already calls for an objective inquiry into reasonable perceptions—in requiring an analysis of whether the judge’s impartiality “might reasonably be questioned”—and we question the utility of adding a second “reasonable person” prong within the required analysis. There currently exists a body of precedent that can guide judges in assessing whether impartiality may be reasonably questioned, and we believe decision-making on recusal may be conducted effectively under this standard without resort to an additional inquiry into whether campaign spending was “substantially important.” We believe that in the context of judicial campaign spending, the substantial importance criterion aims to assess effectively the same question as the existing standard—and that adopting a second standard may lead to unnecessary confusion.

Second, we question whether it is advisable to remove the reference to a timely motion from Rule 2.11(a)(4) and to adopt a “rebuttable presumption” that a judge knows the details regarding all spending associated with his or her campaign. Adopting such a presumption will require judges, in every case, to conduct an inquiry into their campaign committees’ finances and operations. Even leaving aside the drain on judicial resources that could result, such a requirement would conflict with judicial ethics rules in some states, which specifically prohibit judges from learning the financial details of their campaign committees.

Adopting a presumption that judges know the financial details of all the spending in their campaigns also presumes knowledge of a category of spending—independent expenditures—which, by definition, judges cannot know the details of, and which may be highly significant in the context of disqualifying conflicts. Independent expenditures as a category of spending in judicial races have increased in recent years, and it was independent expenditures to the tune of \$3 million which necessitated recusal in *Caperton*. Because judges cannot know the extent of any party’s involvement in financing independent expenditures in a judge’s election campaign, we would prefer a rule that, rather than charging judges with knowledge of parties’ spending in judicial campaigns, requires litigants to disclose any relevant spending in the campaigns of a judge or judges hearing the case—whether such spending took the form of direct contributions or independent expenditures.

We believe that the proposed alternative Rule 5.1A provides a useful model for requiring such disclosure by counsel (though we would broaden the rule to require counsel to disclose spending by the party they represent, in addition to spending by counsel and counsel’s firm). And while we understand that there have been some objections to imposing a duty on lawyers to report election spending, we believe that requiring such disclosures would not be unnecessarily burdensome. Rather, such a disclosure requirement would be similar to those already routinely required in federal court, such as the requirement that corporate parties file statements identifying parent corporations or publicly traded companies that own a significant amount of the party’s stock.

Next, we would note that the existing draft amendments are not entirely clear as to the extent that they are intended to reach independent expenditures in judicial campaigns. To the extent that the proposed Rule 2.11(a)(4) contains language referring to spending that is routed through “organizations that contribute to or support the judge’s campaign,” it could be read to reach independent expenditures. (Of course, as noted, to the extent that such organizations may engage in electioneering independent of the judge’s campaign and may not disclose their donors, it is neither realistic nor fair to presume a judge’s familiarity with such spending.) Alternatively, the reference to “indirect contributions” in comment 7 could be construed to reach independent expenditures. In any event, the lack of clarity as to which, if either, of these references is intended to capture independent expenditures suggests that the draft language of the amendments could be strengthened to include explicit reference to independent campaign spending. Helpful model language may be found in new recusal rules recently adopted in Tennessee, which make clear that, as part of the recusal inquiry, “if the support [provided during a judge’s election campaign] is monetary, [judges should assess] whether any distinction between direct contributions or independent expenditures bears on the disqualification question.”<sup>9</sup>

We offer one final observation for the Committee’s consideration, which relates not to the substantive standards for recusal embodied in the Model Code of Judicial Conduct, but rather, to the procedures used to handle recusal motions. While the Committees’ work revising the substantive recusal standards at issue in today’s hearing is a necessary and hugely important aspect of reforming state recusal practice, we would urge the Committees, in conjunction with the proposed amendments, to also call upon state courts to amend their rules of procedure. We believe other states should be urged to follow the example set recently by the Tennessee Supreme Court, whose recently adopted court rules require written orders on recusal motions that state the reasons for the ruling, and provide a process for litigants to obtain *de novo* review of recusal requests that are denied in the first instance.

One of the most criticized features of the recusal rules in many states is that the judge subject to a recusal motion has the unreviewable last word on whether to step aside. For many, it flies in the face of fundamental notions of disinterested, impartial decision-making to allow judges accused of bias to be the only ones who decide whether or not they are, in fact, subject to disqualification. *De novo* review of a recusal motion denied in writing promotes public confidence in the judiciary by ensuring that the final disqualification decision is made by a judge or group of judges impartial both in fact and in appearance.

By calling for independent, *de novo* review of denied recusal motions, the Committees would prompt state courts to take an important step forward in promoting public confidence in their recusal practices. And by producing an even further refined version of the proposed amendments to Rule 2.11(a)(4), the Committees will take a significant step toward ensuring that the public believes decisions are reached based on the facts and the law, not on which side provided the most support to the judge’s campaign.

I thank the Committees again for the opportunity to submit these comments, and would be happy to answer any questions that could help the Committees with the vitally important task at hand.

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<sup>9</sup> TN Code of Judicial Conduct, Rule 2.11(a)(4), cmt. 7.2.



**Justice at Stake**  
c a m p a i g n

**Testimony to the ABA Standing Committee  
on Ethics and Professional Responsibility and  
the ABA Standing Committee on Professional Discipline**

Submitted February 3, 2012

Good morning, my name is Matthew Berg, and I am here to speak on behalf of the Justice at Stake Campaign. Justice at Stake is a nonpartisan organization working to keep our courts fair and impartial. We are part of a national coalition of concerned civic and legal leaders promoting substantive and procedural reforms aimed to secure a fair and impartial judiciary. We seek in particular to reduce situations where judicial campaign conduct, campaign cash, or special interest pressure could cast the impartiality of judges into doubt. We have more than 50 partner organizations from across America and across the political spectrum, and our board consists of judges, academics, business and political leaders, both Democrats and Republicans.

We do not endorse candidates for judicial office, or any one system of selecting judges. But we do educate the public and work for reforms to keep politics and special interests out of the courtroom – so judges can do their job protecting our Constitution, our rights, and the rule of law. I should also note our views – and my testimony today – do not necessarily reflect the positions of all Justice at Stake partner organizations or board members.

As Mr. Skaggs highlighted before me, a report we publish in collaboration with the Brennan Center and the National Institute for Money in State Politics has noted the skyrocketing spending on judicial elections across the country in recent years. In light of these figures – and in the aftermath of the landmark United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co.* – we have been urging states to adopt stronger recusal rules. In *Caperton*, the Court observed that the requirements of constitutional due process set “only the outer boundaries of judicial [recusal],” and many states have gone further and implemented judicial reforms that eliminate “even the appearance of partiality.”

We congratulate both committees for their work in revising the ABA Model Code of Judicial Conduct to address these challenges. Last fall, the ABA House of Delegates adopted Resolution 107, urging states to adopt new guidelines governing disclosure and disqualification requirements for judges who are elected. We admire the speed with which these committees took up the challenge of revising the ABA Model Code in order to provide additional guidance to the states.

Before proceeding too far into my remarks, I should mention that Justice at Stake often works quite closely with the Brennan Center on recusal reform in the states. With that in mind, we would agree with many of the points Mr. Skaggs made before me. And rather than treating the committees to two speeches covering the same ground, I will try to complement as much as possible what Mr. Skaggs said before me.

First, some have suggested that the proposed rules address a problem that has been overstated – that instances where campaign cash has caused unfair, biased decision-making by a judge are rare. In other words, they might say that this process is a solution in search of a problem. With that point, we would respectfully disagree.

I will not go into detail about the tremendous rush of cash into judicial campaigns across the country; Mr. Skaggs has already covered that ground. Instead, I will focus on the public perception that that spending has created across America. Justice at Stake has conducted several statewide and national public opinion surveys whose results illustrate the dramatic impact campaign spending has had on people's perceptions of the justice dispensed by our courts.

In several national surveys, we have asked voters how much influence they think campaign contributions to judges have on their decisions. In 2001, 76 percent said some or a great deal of influence. In 2004, that number was 71 percent. It was 71 percent again in a survey conducted in 2010, and in a 2011 survey, it was 83 percent. Additionally, in 2011, when we asked whether a judge should step aside when one of the two opposing parties in a lawsuit had spent a significant amount to support the judge's election campaign, 93 percent said yes.

Statewide surveys have borne the same trends. In a 2008 survey in Wisconsin, 78 percent said they thought campaign cash to judges had at least some influence on their decisions. In 2010 in West Virginia, that number was 78 percent, and in 2011 in North Carolina, it was 83 percent.

Voters have also expressed general concerns about the amount of cash being poured into judicial elections. In a 2008 survey in Minnesota, 78 percent said they were at least somewhat concerned. In the 2010 West Virginia survey I just mentioned, 68 percent said campaign contributions to judges were a serious or very serious problem, and a 2011 North Carolina survey had 79 percent expressing the same view. Finally, in a 2011 poll which also showed the approval rating for the Wisconsin Supreme Court shrinking significantly in recent years, 88 percent said that the rising costs of judicial elections, combined with their deteriorating tenor and tone, were a somewhat or very serious problem.

Finally, in 2001, we surveyed nearly 2500 state judges. In that survey, almost half of the judges agreed that campaign decisions influence the courtroom decisions of some judges. And most elected state supreme court justices reported feeling pressure to fundraise during election years.

Taken together, these survey results show that there is a significant problem that needs to be addressed. And the proposed amendments to the Model Code of Judicial Conduct take a big step toward that end. With that in mind, I would like to turn to the proposed rules and offer a few comments on them.

First, we have some concerns about the “substantially important” standard created under proposed Rule 2.11(A)(4). As others have pointed out, “substantially important” appears to be a subjective standard. In our view, an objective standard similar to the one recently adopted by the Tennessee Supreme Court would be more appropriate. The corresponding Tennessee Rule 2.11(A)(4), which we have called one of the most forward-looking recusal rules in the nation, requires a judge to disqualify him or herself when he or she has received campaign contributions or other support such that “the judge’s impartiality might reasonably be questioned.” We believe that this provides a more workable standard, because it relies on the objective, reasonable-person perspective rather than those of the individual litigants in a case. In addition, it adds consistency to the rules by repeating the language of Rule 2.11(A).

Second, we believe comments [6] through [9], which mention many of the considerations used in *Caperton* – and follow factors endorsed by the Conference of Chief Justices in their amicus brief in *Caperton* – could be clearer. Again, we point to the rule that was recently adopted in Tennessee. There, comment [7] calls on judges to consider the following factors when deciding whether campaign contributions or other support might raise reasonable questions about his or her impartiality:

- (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct or indirect) for the individual judge's campaign and to the total amount spent by all candidates for that judgeship;
- (2) If the support is monetary, whether any distinction between direct contributions and indirect expenditures bears on the disqualification question;
- (3) The timing of the support or contributions in relation to the case for which disqualification is sought; and
- (4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.

In our view, this comment covers much of the same ground as proposed comments [6] through [9], but does so in a fashion that is cleaner, clearer, and easier for both litigants and judges to follow. As the committees revise the proposed rules, we would encourage them to take a look at the rules recently adopted by the Tennessee Supreme Court, as we feel that they may provide helpful models.

Finally, we have some concerns about the shift in Rule 2.11(A)(4) toward a rebuttable presumption that judges are aware of campaign contributions that are public record. First, we are concerned that in some cases, a rule requiring judges to become aware of their campaign donors may conflict with the spirit of the rules in Canon 4 that attempt to insulate judges and judicial candidates from the fundraising process. Second, we would urge further examination of the possible administrative burdens this rule might create for judges.

Again, we congratulate the committee for the attention it has given to these important recusal issues. Of course, the issue of recusal is rapidly growing more complicated across the country, and new guidance from the ABA Model Code of Judicial Conduct will help states across the country develop and adopt more robust recusal rules. Thank you for your time.

## **Robert P. Cummins**

It would seem that the proposed amendments to the Judicial Code reflect a positive approach to the problem of “big money and its effect on judicial campaigns”. Those efforts should be applauded. However, I am concerned that the proposed amendments fall short of addressing the increasingly greater number of circumstances in which substantial contributions from special interests are employed to **defeat** [rather than support the election or retention of] qualified judicial candidates in both contested and retention elections. Disturbing examples from Illinois and Iowa tell the tale.

### THE PREMISE FOR MY COMMENTS:

In 2009, a seriously divided Supreme Court told us that there is a significant risk of bias when the judge on a case has been the beneficiary of substantial campaign funds delivered by those having an interest in the outcome of that controversy. For purposes of this presentation, we refer to [*Caperton 129 S.Ct. 2252 –6/8/09*] as the “Katy bar the door” ruling i.e. take precaution, there is trouble ahead.

Shortly thereafter, an even more seriously fractured Court told us - in the words of Roseanne Roseannadanna –“never mind”. The view expressed by a majority of the Court in the Federal Election Commission case [*Citizens United 130 S.Ct.876 – 6/21/10*] seems to be that our citizens are united in the belief that huge corporate / special interest contributions to judicial election campaigns are no big deal.

So where does this leave us when it comes to the matter of putting the independence and integrity of elected judges on the auction block? My answer is: In big trouble!

Consider the following real world example: A highly respected State Supreme Court jurist is considered too “liberal” by deep pocket corporate interests. They devote millions in an effort to defeat the justice. The substance of the actual, patently false, seven figure television and radio attacks is as follows—exact transcript quotes have been redacted to protect the identity of the targeted judicial officer:

*I was convicted of stabbing my victim 24 times with a kitchen knife.  
I was convicted of shooting my ex-girlfriend in the face and murdering her sister while her daughter watched.  
I was convicted of sexual assault on a woman and her 10 year old daughter then I slashed their throats and burned them.  
On appeal Justice -----sided with us over law enforcement or our victims.  
Unfortunately for felons like us other judges overruled Justice -----and our convictions stood.  
Justice ----- sided with violent felons in these and dozens of other cases that you can find at [web cite]  
Justice ----- chose criminal rights over and over again.  
Vote to defeat Justice -----. Please make it a top priority.  
Paid for by [Corporate Interests Pac]*

The currently proposed amendments simply do not address this situation.

If the Judicial Code is to be amended, I respectfully submit that a far more comprehensive view of the influence of money and special interests -- **both in support of and in opposition to judicial candidates** -- is in order.

I reserve further comment as to the proposed amendments to the MRPC but note that aspects of these proposed amendments are real mischief makers.

And here is yet another question: If lawyers participate in efforts to defeat a judge through television and radio attacks such as those set out above, are the current provisions of the MRPC (e.g. Rule 8,2) sufficient?

MY EARNEST CONCLUSION IS THAT THESE MATTERS SHOULD BE GIVEN FURTHER STUDY BEFORE ESSENTIAL AND ADDITIONAL AMENDMENTS ARE IMPLEMENTED

**Robert P. Cummins**

Supplementing my earlier submission regarding the current SCEPR proposals, please consider the attached media attacks referenced in the 12/31 e-mail.

Based on recent occurrences in Illinois and Iowa, it is certainly reasonable to assume that these are merely examples of the false and malicious assaults likely to face judges that are targeted by special interests in future campaigns. It is matters such as this that should also be addressed when suggesting amendments to the Code.

Indeed and even with the assistance of a well organized campaign committee (Canon 4, Rule 4.4), what options are available to the targeted judicial candidate under the current Code in order to fairly respond to such attacks without running afoul of current restrictions (e.g. limitations on the solicitation of assistance and on the amount and sources of campaign contributions)? Questions such as these need answers if the integrity and independence of the judiciary are to be maintained. I believe it can be argued that matters such the Kilbride attack offer a far more difficult challenge than does dealing with the more routine *Caperton* disqualification scenario.

[FYI - In the Illinois, our State Bar committee offered at least some assistance to the targeted Justice.]



**ILLINOIS STATE  
BAR ASSOCIATION**

Mark D. Hassakis • *President*  
mhass@hassakislaw.com

October 18, 2010

Justice Thomas Kilbride  
2305 – 12<sup>th</sup> Street  
Rock Island, IL 61201

Dear Justice Kilbride:

The Illinois State Bar Association's Standing Committee on Supreme and Appellate Court Judicial Election Campaign Tone and Conduct has been asked to review and consider certain allegations directed at you and your retention campaign via certain third party advertising by an entity identified as "JUSTPAC" – a political action committee of the Illinois Civil Justice League.

The Standing Committee has a role in educating the public on ethical conduct in judicial elections and discouraging campaign advertisements that reflect negatively on the integrity and independence of the judiciary

The Standing Committee finds that the allegations directed at you are inappropriate and distort your opinions in the referenced cases.

Attached is a public statement approved by the Standing Committee which will appear on our website, [www.isba.org](http://www.isba.org), and which you may reference as the position of the Illinois State Bar Association.

Respectfully,

Mark D. Hassakis  
President

Attachment

cc: Robert P. Cummins, Chair, ISBA Standing Committee on Supreme and Appellate Court Judicial Election Campaign Tone & Conduct

**Public Statement:**

***The Illinois State Bar Association through the Association's Standing Committee on Supreme and Appellate Court Judicial Election Campaign Tone and Conduct has been asked to review certain tactics by an entity identified as "JUSTPAC" in opposition to the retention of Illinois Supreme Court Justice Thomas L. Kilbride.***

***The Standing Committee has a role in educating the public on ethical conduct in judicial elections and discouraging campaign activities that are unfair and reflect negatively on the integrity and independence of the judiciary.***

***The Standing Committee finds that the "JUSTPAC" campaign directed at Justice Kilbride is inappropriate and distorts his record. As such, it reflects negatively on the integrity and independence of the judiciary. Specifically, based upon the advertisements reviewed by the Standing Committee, we find that "JUSTPAC" has distorted the record and rulings of Justice Kilbride by characterizing him as allegedly soft on crime and criminals.***

***Voters should become informed about the qualifications of Justice Kilbride. And while the decision regarding the retention of Justice Kilbride or any other judge rests with the voters, that decision should not be based on distortions regarding a judge's record.***

***Voters may learn more about Justice Kilbride and all other judicial candidates by visiting: <http://www.isba.org/judicialevaluations>***

**American Bar Association**  
**Standing Committee on Ethics and Professional Responsibility**  
**Comments on Proposed New Model Rule of Professional Conduct 5.1A**

Submitted by:

Attorneys' Liability Assurance Society, Inc., A Risk Retention Group  
311 S. Wacker Drive  
Chicago, Illinois 60606

Contact: Jeffrey T. Kraus  
Vice President—Loss Prevention Counsel  
312.697.6900  
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Dated:  
January 13, 2012

Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS), submits the following comments on the ABA Standing Committee on Ethics and Professional Responsibility's Proposed New Model Rule of Professional Conduct 5.1A.

**I. Introduction**

Founded in 1987, ALAS is a mutual insurance company that insures 230 major law firms, including over 58,000 lawyers in 49 states, the District of Columbia, and 27 foreign countries, and is the leading provider of professional liability insurance for large law firms in the United States. Lawyers from ALAS were actively involved in the American Law Institute's development of the *Restatement Third, The Law Governing Lawyers* and in the American Bar Association's 2002 revision of the Model Rules of Professional Conduct, and they are involved with other professional and bar associations that have defined the ethical and professional duties of lawyers. Among other services, ALAS provides its insured lawyers with extensive loss prevention advice. ALAS also actively monitors the defense of professional liability claims asserted against its insured firms and lawyers. By virtue of the services it renders, ALAS has a unique understanding of problems confronting law firms today.

ALAS submits the following comments regarding the Standing Committee's proposed new Model Rule of Professional Conduct 5.1A because it raises important issues regarding the professional responsibility obligations of lawyers. While disclosure of possible external influences on judicial decision making may be a desirable goal, the imposition of discipline on law firm partners and management is not a proper way to achieve that goal. Additionally, the

proposed new rule is particularly inapposite because it is overbroad and contains ambiguities that are not appropriate in disciplinary rules.

## **II. Imposing Discipline on Law Firm Management for a Lawyer’s Failure to Report Judicial Campaign Contributions Is Inappropriate**

Proposed new Model Rule 5.1A would expand disciplinary regulation significantly into an area that enjoys a level of First Amendment protection. Existing Model Rule 5.1(a) requires lawyers possessing managerial authority in a law firm to take reasonable measures designed to ensure that all lawyers in the firm conform their conduct to the Model Rules. We express no quarrel with that principle, but no Model Rule requires an individual lawyer to report a contribution to a judicial candidate, nor does any Model Rule require an individual lawyer to maintain a record of any such contribution. Proposed new Model Rule 5.1A thus would expose law firm managers to discipline even where law firm lawyers violated no rule. That goes beyond the words, and indeed the spirit, of the existing rules, and the Standing Committee has made no showing why such a dangerous departure is warranted.

## **III. The Proposed Recordkeeping Rule Is Overbroad and Ambiguous**

Proposed new Model Rule 5.1A directs lawyers possessing managerial authority in a law firm to “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.” This wording does not limit the rule to contributions to or support of a judge’s or judicial candidate’s election campaign, but instead encompasses anything that could be considered financial or other support of a judge or judicial candidate who happens to be running for election. That covers too wide a range of activity. Indeed, it goes beyond the proposed amendment to Rule 2.11(A)(4) of the Model Code of Judicial Conduct, which only reaches “support to the judge’s campaign or organizations that contribute to or support the judge’s campaign.”

Moreover, the proposed rule provides no guidance on what reporting procedures are adequate, or on what constitutes “indirect” or “other” support. Suppose the managing partner of a 300-lawyer firm with offices in four states adopts, distributes, and republishes annually a policy requiring all lawyers and staff to make the required report. Should that managing partner be subject to discipline if a lawyer or staff member in a branch office forgets the policy when making a one-time contribution to a friend’s judicial campaign? And, if the contribution comes not from a firm lawyer, but from that lawyer’s spouse who is a partner in another firm, is that “indirect” support that needs to be reported? Further, it is common in some jurisdictions for campaigns to solicit signatures at mass transit stops and other public venues for a petition to include a judicial candidate on the ballot. Should the managing partner be subject to discipline if a firm lawyer or staff member forgets the policy when signing a petition, an event that often transpires in less than 60 seconds? Also, consider a firm lawyer who, while traveling on

business, takes a law school roommate to lunch and that roommate happens to be running for judicial office in another state. Is the free lunch “other” support within the meaning of the proposed rule? Assuming it is (a proposition with which we disagree), should a managing partner be subject to discipline if the lunch-paying lawyer fails to report the “support?” This level of ambiguity is improper in a brand new area of regulation that addresses protected First Amendment conduct.

#### **IV. The Proposed Rule Could Have a Chilling Effect on Protected and Positive Conduct**

Imposing a reporting and recordkeeping requirement on a law firm, with the potential for discipline of firm partners, could have a negative impact on the willingness of lawyers to support judges and judicial candidates they believe will enhance the quality of the judiciary. Such a result would be inconsistent with a lawyer’s “special responsibility for the quality of justice.” Model Rules, Preamble, Comment [1]; *see also id.*, Comment [6] (“a lawyer should seek improvement of ... the administration of justice”).

The internal reporting requirement also could have a chilling effect independent of any disciplinary concern. Suppose a new associate wishes to contribute to Candidate A’s judicial campaign but knows that the firm’s managing partner favors Candidate B. Might the associate think twice before writing the check to her candidate of choice, knowing that she must report it to the managing partner? If there is even the possibility that the answer is yes, the rule reaches too far.

#### **V. The Model Rules Are Not the Appropriate Place to Address Recordkeeping Obligations for Contributions to Judicial Campaigns**

The purpose of the Model Rules of Professional Conduct is to protect clients and the public from lawyer misconduct. To that end, they already address what constitutes appropriate professional conduct in relation to the judiciary. For example, under Model Rule 3.5(a) it is improper for a lawyer to seek to influence a judge by means prohibited by law, and under Model Rule 8.4(f) it is improper to knowingly assist a judge in conduct that is a violation of applicable rules of judicial conduct or other law. However, lawyers who contribute to judicial campaigns are not engaged in misconduct unless the intent of the contribution is to obtain a judicial appointment. Model Rule 7.6. In fact, the Model Rules recognize that lawyers “have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial ... office.” *Id.*, Comment [1]. To the extent a need exists for better recordkeeping with respect to judicial campaign contributions, the Model Rules are not the appropriate place to address the issue.

#### **IV. Conclusion**

ALAS respectfully submits the foregoing for the Standing Committee’s consideration.

## Responsibility Regarding Contributions to Judicial Campaigns

I do not seek to testify, but invite the committees to consider my written comment.

As you consider proposed Rule 5.1A (with a regime for collecting information that already was reported when the judge was a candidate), I ask you to grapple with a “mental picture” that’s quite different from the one that I suspect motivates the proposed rule.

*Illustration:* A firm has one office only in Boston. The firm’s practice **never** includes litigation. In the past half-century, none of the firm’s partners or associates has ever entered any appearance in any court (and the firm expects that none will in the next half-century). Moreover, the firm’s written procedures forbid a lawyer to accept a matter that would involve the lawyer or anyone associated with the firm in a court proceeding. A senior associate learns that her Princeton roommate is a candidate for a judgeship in Pittsburg. This associate contributes \$250 to her friend’s campaign. Do we really want to compel her to report this to her firm’s administrative partner? Do we really want to require this firm to maintain records of political contributions that have no realistic possibility of involving any lawyer or judge in an untoward appearance?

I invite you to consider the following refinement for proposed Rule 5.1A:

- (b) The lawyer or lawyers who have a law firm’s managerial authority need not keep or request records otherwise required by paragraph (a) if:**
- (i) the law firm currently has no lawyer associated with it who is eligible to practice before the court that is the subject of the election, and reasonably anticipates that the firm will have no such lawyer during the next [number] years; or**
  - (ii) the law firm has adopted, and reasonably anticipates that the firm will maintain during the next [number] years, a written policy of not representing any client concerning any proceeding before the court that is the subject of the election.**

### *Comment*

The exceptions stated by paragraph (b) recognize that some circumstances do not involve the concerns that motivate the general rule. For example, a lawyer’s political contribution to support a candidacy for a judicial office of a jurisdiction in which no lawyer associated with the firm is admitted to practice (and the firm anticipates none will become admitted) is unlikely to raise a concern of the kind to which the Rule is directed. For another example, a firm might restrict its lawyers’ practices to matters only in the United States’ courts, for which there is no elected judge. Yet another firm might restrict its lawyers’ practices so that none ever appears in any court. The fact that a lawyer associated with a firm provided support to a judicial candidate should not require record-keeping if it is substantially certain that no lawyer associated with the firm will appear before that court. Not providing these exceptions could burden a law firm with keeping records that are substantially certain not to be needed, and could needlessly invade the privacy of lawyers and employees.

Peter Gulia  
215-732-1552  
[Peter@PeterGulia.com](mailto:Peter@PeterGulia.com)

January 15, 2012

Center for Professional Responsibility  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654

Re: Comments on Proposed  
Judicial Disqualification Amendments  
New Orleans; February 2012

Dear Colleagues:

Although I will be in New Orleans at the time appointed for the public hearing on the proposed new amendments to the CJC and the Model Rules on the disqualification of judges, I will be otherwise engaged and unable to testify in-person. Please accept these brief comments as a substitute.

The proposed amendments to the CJC are obviously designed to codify the "not-impartial-as-a-matter-of-due-process" result of *Caperton v. Massey Coal Co.* into a "not-impartial-as-a-matter-of-mandatory-disqualification" rule of judicial discipline. But because the proposed Rule amendment and accompanying Terminology amendment dance so furiously away from the actual financial transactions involved in *Caperton*, it's not even clear whether West Virginia Supreme Court Justice Brent Benjamin would have been required to disqualify himself if these amendments had been in force at the time.

The problem lies in the new term "support," by which is obviously meant something *other* than a campaign contribution. It is also clear that "support," which can include "financial support," is within the ambit of the proposed Rule, even if the support goes to an organization that itself "supports" a candidate, rather than to the candidate or the candidate's campaign. But it is

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PLEASE RESPOND TO:

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not at all clear whether “support” includes independent expenditures—which is the only thing that is likely to matter in practice, and was the only thing at issue in *Caperton* (despite the Supreme Court’s failure to acknowledge it).

Independent expenditures constitute constitutionally protected activity, as the Supreme Court has uniformly said, from *Buckley v. Valeo* to *Citizens United*, but the impact on judicial disqualification goes deeper than not restricting or punishing the person making the expenditures. Even if a judicial candidate would prefer that certain “support” *not* be given, the candidate is powerless to do anything about it, if the support is given in the form of independent expenditures. If a judge must disqualify himself—on pain of discipline else—if even unwanted independent expenditures are made on his behalf (or perhaps against his opponent)—the potential for mischief is great.

If independent expenditures can cause mandatory disqualification—as they did in *Caperton*, in which Don Blankenship of Massey Coal made completely unremarkable *contributions* to the Brent Benjamin campaign—then how long will it be before the *opponent* of a candidate makes large expenditures to defeat another candidate who was going to lose anyway, *thus at least assuring that he can always disqualify the winner?*

And if that is too Machiavellian, why has the fear of a “debt of ingratitude” been dropped from the equation? If the point of the amended Rule is to give further examples of when a judge’s impartiality might “reasonably be questioned,” then shouldn’t heavy supporters of a *losing* candidate reasonably fear that the winning candidate would be biased against them after taking office? Moreover, even if the supporters did not fear this effect, what about members of the public, whom we are trying to convince to maintain confidence in the judiciary?

The vagueness of the proposed new disciplinary standard is also constitutionally troublesome. Disqualification is only required if the support for the winning candidate was “substantially important” in the most recent election. The new Comments provide a matrix of concerns and factors to be considered, but that only makes the situation worse. Must every elected

judge in every subsequent case hire a team of political scientists to deconstruct the election results?

The election that Justice Benjamin won was a blow-out, and many knowledgeable West Virginia commentators thought that the chief reason his opponent lost so badly was a series of odd-ball statements and decisions made by his campaign. Even if the independent expenditures made by Blankenship counted as “support,” what measuring rod would make them “substantially important” under those circumstances?

This is a matter of constitutional concern, because individual judges can face government-imposed sanctions if they make a wrong guess. A judge who received “substantially important support” from a lawyer or party and did not voluntarily disqualify himself would violate Rule 2.11; the very purpose of that Rule is to require just such disqualification. But a judge fearful of running afoul of Rule 2.11 could be sanctioned under Rule 2.7 instead, if he stepped aside from a case when it was *not* “required” by Rule 2.11, including the proposed new language in Rule 2.11(A)(4).

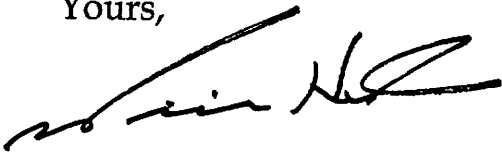
With respect to the proposed new Model Rule 5.1A, perhaps the less said the better. It is hard to imagine a rule that would be more divisive within law firms, or a rule less likely to garner support from leftwing, rightwing, supervisory, or junior lawyers.

The proposed Rule was no doubt intended to counter “bundling” by law firm managers, or, where that is forbidden by campaign contribution limit laws, efforts to coerce junior lawyers and lay employees into making “voluntary” contributions to candidates favored by the managers. But without an enforcement mechanism thoughtfully provided by the government (as proposed Rule 5.1A would be), how would firm leaders discover which people in the firm were toeing the firm’s party line, and which were not?

Moreover, if individual members of law firms were free to make their own contributions, without any formal record being kept, would that not *lessen* any sense that “the firm” might be thought to have provided “substantially important support?”

I am sure that I share with many of you an antipathy to the direct election of judges. But as *White* taught us, once a state elects to go down that foolish road, it's impossible to have genuine elections without allowing candidates to campaign and to raise money (perhaps within reasonable campaign contribution limits). But the Court has also long taught us that independent expenditures are a part of the package of democratic rights that cannot be trifled with.

Yours,

A handwritten signature in black ink, appearing to read "W. William Hodes". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

W. William Hodes

January 30, 2012

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

Myles V. Lynk, Chair  
ABA Standing Committee on Professional Discipline

Dear Paula and Myles:

I am glad to have the opportunity to submit to you and your Committees my comments regarding the recently-released draft of possible amendments to the ABA's Model Code of Judicial Conduct, a possible addition to the ABA Model Rules of Professional Conduct, and a proposed rule of court regarding the collecting and reporting of information related to judicial campaign contributions made by lawyers.

During the thirty-five years in which I was engaged in both the development and interpretation of judicial campaign conduct standards, I have strongly supported sweeping campaign contribution disclosure requirements in any jurisdiction in which judges are elected. I think such requirements belong in a jurisdiction's election law. I do not consider the disclosure process to be inherently a matter of ethical conduct, however, and therefore do not believe that it should be incorporated into the ABA Model Rules of Professional Conduct. Campaign contribution disclosure is an administrative process that, if carefully and effectively designed, makes it possible (and, ideally, inescapable) for judges, when they turn to the clear language that already resides in the Judicial Code, to make proper decisions on questions of disqualification related to campaign contributions of any sort.

I also believe that amendments to the ABA Model Code of Judicial Conduct of the sort contemplated here are both unnecessary, as judged by the rarity of actual abuses so far brought to light, and unwise, both from a practical and from a Constitutional perspective.

I remain unpersuaded, even in the wake of egregious (and very rare) disqualification cases such as Massey, that judicial campaign contributions cause any significant number of partial, biased, or otherwise unfair verdicts in the nation's courts. Although I well understand the inclination, shared by those of us who have labored long at the constant refinement of judicial and legal ethics standards, to want to draft code provisions that can, completely on their own, manage or resolve every ethical challenge, it is more reasonable for us to lower our sights. The provisions of state judicial codes simply are not the sole influence on judicial decision-making; they are simply one among many factors that influence the resolution of potential disqualification issues. There are a variety of other mechanisms that contribute equally to the fair operation of our courts in all of their decisions. For example, like it or not, energetic and conscientious "watchdog" organizations

have emerged as a useful part of the modern political and judicial landscape; woe be to the judge who does not keep them in mind. The exponential increase in the dissemination of information about money and politics, especially via the Internet, aids not just those watchdog organizations, but parties to court proceedings and even members of the public at large, in identifying potentially disqualifying conflicts. Finally, appellate review, although clearly a final resort, retains its “in terrorem” effect. I think it should be the responsibility of the various “commentariats,” whoever they might be, to fairly examine judicial outcomes, and to make their evaluations widely available, so that the public is able to judge those outcomes on their merits, instead of on the narrow question of appearances.

To date, no substantial evidence has been produced to demonstrate that any more than the tiniest fraction of cases in which judges were the recipients of campaign contributions from persons or parties connected in some way with the matters before them have resulted in questionable, or questionably unfair, decisions. This is not because concise provisions of state judicial codes have been able to carry all the freight, but because such provisions operate within an open system having numerous additional safeguards in place.

My perspective on this subject has been shaped to a great extent by having served as Ethics Counsel during the two most recent, multi-year revisions of the ABA’s model Judicial Code (1987-90 and 2003-07), and having participated in the work of the ABA Task Force on Judicial Campaign Finance. Each of those efforts was designed and executed to discover and explore the broadest possible range of voices and opinions about the best ethical practices for judges in the milieu of campaigning for judicial office, and I believe they did just that. As a result of those efforts, and the action of the ABA’s House in endorsing their recommendations, the ABA’s present Judicial Code provisions, including Rule 2.11 on “Disqualification,” strike as delicate a balance as is possible between ensuring appropriate disqualification and preserving the rights of all, including lawyers and their clients, to endorse and contribute to judicial candidates.

I recognize that many voices are nonetheless calling – some very loudly – for your Committees to take some action along the lines of their current proposals. Thus it would be unwise of me not to engage in a bit of alternative pleading: if the Model Code of Judicial Conduct and the Model Rules of Professional Conduct are to be amended, I submit here my concerns about the proposals as most recently presented. In providing these comments, I hope only to stimulate further consideration among all who are interested in the material at hand. I recognize and respect the complexity of the Committees’ charge, the amount of work that has gone into the formulation of the draft proposals, and the strong commitment of the ABA in this arena.

1. The proposed amendment to Rule 2.11(A)(4) establishes a “substantial importance” test to determine whether the acceptance of particular contributions requires disqualification. This concept is so vague as to be almost impossible to pin down. Proposed Comment [11] supplies a definition of “substantial importance” that seems to me more circular than enlightening: substantially important means “of clear and weighty importance, taking into consideration all the circumstances.” It

then cites, presumably as examples, circumstances that might be of concern, though without indicating which way they might “cut.” I do not understand the significance of the conjunctive “and” between “timing of the support” and “the particular needs of the judge’s campaign at the time [of the support].” Are these two separate observable facts, or one? More importantly, I believe that as examples, they demonstrate all too clearly how difficult it will be to decide such questions. For example, when a judge’s campaign is running low on funds, are the next dollars in the door tainted, or “weighty” because they had been desperately needed? If so, it would appear that the unlucky contributor, who may have had no sense of the supposedly “substantial important” value of her contribution, suffers the unfair consequence of not being able to have her clients’ matters decided by the judge she has supported. If a judge has just been lambasted in the media by advertisements of an opponent, is the money that comes in making it possible to place responsive advertisements “weighty”? How if at all does this discussion relate to the discussion of “timing” of contributions in proposed new Comment [9]? I would suggest that the difference between these two “timing” analyses might be made a bit clearer if Comment [9] were to be revised to eliminate the first sentence entirely. This would resolve what I believe is another difficulty in that Comment, which is that the “history” of donor contributions is alluded to, but there is no explanation of what that term contemplates. In the alternative, if a review of a donor’s “history” of contributing to the judge is substantively significant (and therefore necessary), then some additional explanation should be presented. If there is to be no explanation of what the “history” of contributions means, I would recommend that the phrase be deleted.

2. Also in proposed Rule 2.11(A)(4), a first reference is made to “amount.....and value of direct and indirect campaign contributions.” I have two concerns about this. The first is that nowhere in the remainder of the proposed amended Rule is there a definition of what “indirect” campaign contributions are. If “indirect” is meant to apply to those situations in which a contribution is made to an entity, other than a judge’s campaign committee, that in turn acts to endorse, promote or otherwise support the judge, this should be spelled out. My second concern is that in numerous of the proposed new Comments to Rule 2.11(A)(4), the types or categories of support are described and enumerated differently. In proposed Comment [5], the universe is described as “contributions or other support.” Comment [6] then refers to “campaign contributions, other financial support, or non-financial support.” The third sentence there refers to “value” of contributions or “importance” of non-financial support, which seems especially confusing, since the “substantial importance” test is clearly meant to be applied to “valued” contributions. Then in Comment [10], the universe – within a law firm – is described as “campaign contributions or financial support,” clearly redefining the description in Comment [5].
3. Comment [7] calls for an evaluation of the “substantially important” value of endorsements or similar advocacy. This provision would appear to make for considerable mischief. If a lawyer’s endorsement of a judicial campaign, in a

crowded locker room after a round of golf with a friend, convinced that person (a wealthy and potentially large contributor) to donate to the campaign, is it the lawyer's obligation to report the endorsement? If a lawyer's endorsement of a judicial candidate successfully puts out a fire created by an opponent's earlier false accusation against that candidate in the media, can the judge not hear any matter in which the endorsing lawyer appears?

4. Comment [10] leaves little room to imagine that the "substantial importance" rubric, applied consistent with the proposed amended "Terminology" language identifying service on a campaign committee as "support," would not compel the conclusion that if a lawyer from a large firm were to serve as a campaign manager for a judicial candidate, the candidate, if elected, would be disqualified from any matter handled by the lawyer's firm. Although Rule 2.11(C) does provide a means whereby such a potential conflict may be disclosed and the parties may agree to proceed, I have little confidence that this provision will not be frequently abused.
5. The Committees' proposed revision to Rule 2.11(A)(4) eliminates reference to dollar amounts of contributions. Therefore, it is not clear why those dollar limits remain in Rule 4.4. As the Judicial Code was revised after the work of the ABA's Task Force on Judicial Campaign Finance, the substance of present 2.11 was meant to be mirrored in the 1999 equivalent of present Rule 4.4. If the retention of the dollar amounts in proposed revised 4.4 is meant only to accommodate any state limits that have been separately set, it would be cleaner simply to bracket a phrase such as "insert here amount permitted under state law." More troublesome in proposed Rule 4.4(B), however, is the incorporation of "other support" beyond monetary contributions. This is especially troublesome in subsection 4.4(B)(2) and (3). The substance of present 4.4(B)(2) was originally drafted with the intention of prohibiting judges and judicial candidates from endlessly raising funds, especially when the intention of doing so was to build "war chests" that would discourage potential challengers from beginning their own campaigns. It seems to me unnecessary to apply specific time limits to prohibit a judge's campaign committee from accepting other assistance or "support" that has nothing to do with money.
6. I believe that the proposed amendment to the Model Rules of Professional Conduct, Rule 5.1A, requiring the institution of law firm procedures whereby lawyers and all other law firm employees are obligated to report their contributions to judicial campaigns, is unwise, unwieldy, and unworkable. If there were a state statute or rule of court that were to require individuals (as opposed to lawyers alone) to make full disclosure of their contributions, (as there certainly could be) the failure of a lawyer to do so could – possibly – be a violation of the Model Rules. The existence of present Rule 5.1 already addresses the duty of managers and partners to develop a system for compliance, and one of the myriad details of that system might then need to be advice to firm lawyers to be mindful of such reporting obligations. It is not necessary, however, to shoehorn such a detail into the Model Rules. More important, however, is the breathtaking scope of the proposed amendment. The amount of disclosure is stunning in its breadth, expanded beyond monetary

contributions to include “other support.” “Endorsements” is not, in the proposal at hand, a defined term, and I believe it would be impossible to arrive at a commonly-accepted definition of the term. “Advocacy” is a similarly broad term, defying any reasonable possibility that every act of advocacy could be remembered, much less recorded. The chilling effect of the proposed amendment is considerable, a matter on which I strongly concur with the comments already submitted to your Committees by the Attorneys’ Liability Assurance Society and Prof. William Hodes III.

7. Finally, I do not believe that it is reasonable to place judges in the position of needing to set any particular contribution alongside every other contribution he or she may have received, a comparison that is clearly mandated by proposed Comment [6]. Equally troubling is the challenge inherent in proposed Comment [7]’s instruction to measure such ineffable concepts as “visibility” and “public impact.” My opinion in this regard is based upon my sense that it would be virtually impossible to amass, evaluate, and act in a timely fashion on the mountains of data that the proposed provisions would require. Were judges and others who expect to be directly engaged in these affairs to review these proposals and declare that they are untroubled by their complexity and breadth, I would of course defer to their judgment.

Thank you again for inviting comments, and for your ongoing labors.

Respectfully,

George Kuhlman  
415 W. Aldine  
Chicago, Illinois 60657

cc: Dennis A. Rendleman, Counsel, Standing Committee on Ethics and Professional Responsibility  
Ellyn S. Rosen, Counsel, Standing Committee on Professional Discipline



# AMERICAN ACADEMY OF APPELLATE LAWYERS

February 1, 2012

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Ms. Natalia Vera  
ABA Standing Committees on Ethics  
and Professional Responsibility and Professional Discipline  
ABA Center for Professional Responsibility  
321 N. Clark St., 17th Floor  
Chicago, IL 60654

Dear Ms. Vera:

The American Academy of Appellate Lawyers is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. The Academy is an invitation-only organization that brings together 300 leading attorneys who devote their practices to appellate representation. The Academy has for many years addressed issues of appellate judicial disqualification, which are of particular significance because of the key constitutional role appellate courts play in making law, interpreting constitutions, and leading the judiciary in their jurisdictions throughout the nation.

The Academy has followed with interest the efforts within the ABA to address emerging issues of judicial disqualification in the Model Code of Judicial Conduct and the Model Rules of Professional Responsibility. The Academy supports the proposed amendments directed toward campaign contributions and support of elected judges that will be considered in the public hearing scheduled for February 3, 2012, in New Orleans, and urges the ABA to continue its efforts to define appropriate standards for disqualification.

In considering these proposed amendments and further changes to the Model Code, we hope the ABA will consider and benefit from the Principles of State Appellate Judicial Disqualification promulgated by the Academy in April 2010. A copy of these Principles is attached.

Bias or perceived bias of a decision maker in the appellate courts affects not only the immediate case before the court, but also other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. Appellate courts, particularly in states with an elected judiciary, will continue to be confronted with increasingly difficult issues of judicial disqualification and recusal. The Academy looks forward to working with the ABA in seeking solutions to these challenges.

Sincerely,

Wendy C. Lascher  
President

# **PRINCIPLES OF STATE APPELLATE JUDICIAL DISQUALIFICATION**

## **AMERICAN ACADEMY OF APPELLATE LAWYERS**

**April 2010**

Every State should have clearly articulated procedures for disqualification that incorporate the following protections for the public and the litigants:

1. The right to review on the merits by judges whose impartiality cannot reasonably be questioned.
2. The right to be timely informed of who will decide an appeal.
3. The right to seek disqualification of any member of the merits panel pursuant to clearly articulated procedures.
4. The right to know who will decide a disqualification request.
5. The right to decision on any disqualification request before an appeal is submitted on the merits.
6. The right to be informed of grounds for disqualification of any member of the merits panel.
7. Review of the disqualification decision pursuant to clearly articulated procedures.
8. Replacement of a disqualified judge to maintain a quorum or prevent a tie.

## **Why Procedural Standards For State Appellate Court Judicial Disqualification Are Needed**

Appellate courts make law, interpret constitutions, and lead the judiciary in their jurisdictions. Appellate courts play a key constitutional role arising from “[d]ifferences in the institutional competence of trial judges and appellate judges.” *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). Bias or perceived bias of a decisionmaker in the appellate courts affects not only the immediate case before the court, but also other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. “Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Indeed, if the bias of an appellate decisionmaker affects his or her reasoning about an appeal, then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of *stare decisis*. Appellate opinions “collectively form the body of the common law” and “govern what a trial judge does, even if no appeal is ever taken in a particular case . . . .” Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* xxxi-xxxii (Michie 1994) (hereafter “Meador”). Decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. The text of the opinion

deciding a case may have as much effect on future litigants and on others who depend on the state of the law as it does for the immediate parties to a case.

Not every action by an appellate court creates precedent or resolves a constitutional dispute, of course. Correcting trial court error is another important role played by appellate courts. For more than two centuries, the American people have made provision for appellate courts in their state constitutions, to elevate fairness and equal application of justice over the risks of local bias and the fallibility of trial judges acting alone. Overwhelmingly, state constitutions and statutes provide a right of review. Today, first resort is usually to an intermediate court that emphasizes the error-correcting function. When trial court decisions are reviewed, they should be reviewed carefully to ensure that they are free of improper influence, and that the review itself is free from taint.

Appellate oversight of trial courts brings consistency to the legal system as a whole. That oversight must be exercised without bias. For that reason, *why* an appellate court decides a case a certain way can be as important as *what* the court decides. When an improper factor taints appellate decisionmaking, it also distorts the process of explaining judicial reasoning – *i.e.*, writing opinions – that is at the heart of an appellate court’s mission.

The U.S. Supreme Court recently recognized that there are circumstances under which the appearance of bias of an appellate decisionmaker will violate due process. It said disqualification is required when there is “a serious, objective risk of actual bias” in *Caperton v. A.T. Massey Coal Co., Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2252 (2009). The majority found such a risk in the size of the

campaign contributions made by the owner of Massey Coal to the election of a justice of the West Virginia Supreme Court who voted to overturn a \$50 million verdict against the company. But, as Chief Justice Roberts' dissent noted, the majority decision in *Caperton* provides little "guidance to judges and litigants about when recusal will be constitutionally required." Roberts' dissent identifies 40 questions that courts may have to resolve in future disqualification cases. And there is very little case law to guide the practitioner, or the courts, in deciding future challenges.

**The Academy's Interest And Expertise In Appellate Decisionmaking,  
And The Scope Of This Disqualification Project**

This paper is an effort to begin establishing the principles that should govern the disqualification of appellate judges. The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. It is dedicated to the improvement of appellate practice, the administration of justice, and the ethics of the profession. The Academy brings together 300 leading attorneys who devote their practices to appellate representation. Membership in the Academy is by nomination or invitation only.

Although the Academy has for many years addressed issues of judicial disqualification in its discussions, the impetus for the current project and paper arose at the Academy's Fall 2008 meeting in Portland, Oregon, which was held in conjunction with the Conference celebrating the 40<sup>th</sup> anniversary of the Federal Judicial Center. At the time, *Caperton* was pending in the U.S. Supreme Court.

It was apparent that, regardless how the case was decided, appellate courts would continue to be confronted with increasingly difficult issues of judicial disqualification and recusal.

A committee was appointed to survey and study the state of judicial selection and disqualification in the states. After reviewing relevant statutory and regulatory provisions, case law, and available literature, the committee quickly decided to focus its efforts on trying to establish principles that should govern the disqualification of state appellate court judges. A preliminary draft of these Principles was presented to and extensively discussed by the Fellows at the Academy's Fall 2009 meeting in Philadelphia, Pennsylvania, and then submitted for review by the Fellows on the Academy's website.

Although many of the Principles proposed in this paper will have equal application to federal courts, the Academy chose to focus on state appellate courts because of the Academy's comprehensive knowledge of those courts and the difficult issues raised by disqualification in the various state court systems, where appellate judges generally are neither appointed by an executive officer and confirmed by a legislative body nor hold their positions for life. The Principles are intentionally broadly drafted, and intended to apply regardless of the method of selection and retention of judges in a particular state.

Because the Academy is an organization of appellate advocates, these Principles are written from the perspective of our clients, who are litigants in the appellate courts, and the public and private interests they represent. When the consensus of the Academy was that a particular Principle should be universally

honored, the Principle is articulated as a “right.” In the case of the last two Principles, addressing review of disqualification decisions and replacement of a disqualified judge, because application of the Principle depended upon how a related “right” was addressed by a state’s disqualification procedures, the Principle was drafted in the form of a “best practice.”

This paper generally follows the convention of the ABA Model Code of Judicial Conduct in use of the term “disqualification.” Only when the Academy’s view of the applicability of a particular Principle depends upon whether removal is voluntary or requested by a party, this paper refers to “recusal” when a judge voluntarily removes him or herself from consideration of an appeal on the merits.

The remainder of this paper discusses the reasons for Principles proposed by the Academy in more detail:

### **PRINCIPLES OF STATE APPELLATE JUDICIAL DISQUALIFICATION**

The Academy proposes that every State should have clearly articulated procedures for disqualification that incorporate the following protections for the public and the litigants:

**1. The Right To Review On The Merits By Judges Whose Impartiality Cannot Reasonably Be Questioned.**

This Principle is embodied in Canon 3 of the Code of Judicial Conduct, and by the restrictions imposed on judges’ conduct in each Canon of the Code in order to enhance and maintain confidence in our legal system. Some version of the Code has been adopted by each of the states. The precise nature of conduct that might raise a reasonable question of the impartiality of an appellate decision-maker may depend upon many factors, including a state’s method of selection

and retention of judges, other avenues for review of judicial conduct, and the nature, scope, and consequence of appellate review and decision-making in a particular case. This paper does not attempt to set out in any detail the substantive bases for raising a reasonable question of a judge's impartiality. In general, these potential sources of concern can be identified as follows:

***Campaign contributions.*** *Caperton* holds that the appearance of a state appellate judge's bias arising from campaign contributions can become so intolerable as to offend federal constitutional due process. The majority opinion gives little guidance to identify such violations. It gives no advice at all to states that appropriately want to adopt rules and procedures for a more secure promise of fairness and a less disruptive method of deciding a judge's qualification to serve.

The appropriate limits in each state will depend on a variety of factors, including the type of election through which judges are selected or retained, whether judicial races are partisan, existing campaign financing restrictions, and historic campaign practices and experience. For instance, some states have limitations on the amount of contributions, or on who can contribute. Those limitations should be considered in deciding when campaign contributions require disqualification. In other states, there are limits to the amount any individual or entity can contribute to a judge's campaign. There are, however, very few attempts to limit "public issue" campaigns that do not directly target a particular individual but instead may use issues to promote or challenge a judicial candidate's perceived philosophy. These independent expenditures also must

be considered. Further, we write at a time when the constitutionality of campaign finance limits is itself in doubt.

A related question concerns the consequence of not only contributions, but also of the solicitation of contributions. The ABA Model CJC provides that a judge or judicial candidate shall not “personally solicit or accept campaign contributions.” But candidates can establish a committee to do so in most states. MCJC Canon 4, Rule 4.4(A)(8)(2007). Courts are divided as to whether candidates themselves can solicit contributions, or if candidates can even sign mass solicitation letters. Solicitation prohibitions have been held to be unconstitutional in several states. Whether judicial candidates may personally solicit, or even know of the sources of, campaign contributions in a particular state may affect whether and what contributions could be considered to raise a reasonable question of a judge’s impartiality.

Finally, it should be recognized that the significance of campaign contributions and independent expenditures will likely be greater in elections for appellate judges than in trial court races because of the policy-making role of the appellate courts. The appellate courts declare the law. The decision-making and the consequence of decisions in the appellate courts are decidedly of a higher profile than in most trial court races. The decisions of appellate courts are closely watched, are often the subject of intense press coverage, and have consequences far beyond the individual case being decided. Races for appellate court positions, which are often state-wide, attract far more attention and funding than trial court races – precisely because of the broader consequences of

appellate court decisionmaking. And as *Caperton* illustrates, a case involving a contribution or campaign contributor may be in the appellate courts during a campaign. The potential consequence of campaign contributions to appellate court judges thus deserves heightened concern in establishing standards for disqualification.

***Campaign and Judicial “Speech”***. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), the Supreme Court determined that Minnesota’s judicial conduct rule prohibiting judicial candidates from announcing positions on controversial issues violated the First Amendment because the rule was overbroad and the state lacked a compelling reason for it. The *White* Court did not reach the issue of whether Minnesota’s companion rule prohibiting specific pledges or promises was unconstitutional. 536 U.S. at 770, 780. States and courts are divided on the constitutionality of these clauses, and of five other judicial canons arguably implicated by the reasoning of *White*. Since *White*, many states have amended their judicial canons in an attempt to avoid challenges. The status of these restrictions on judicial and judicial candidate speech in each state may affect whether a judge’s impartiality may reasonably be questioned in later decision-making:

**“Pledges or Promises” Clause**. Under the ABA Model CJC, a judge or judicial candidate “shall not...in connection with cases, controversies, or issues that are likely to come before the court, make pledges [or] promises...that are inconsistent with the impartial performance of the adjudicative duties of the office.” MCJC Canon 4, Rule 4.1(A)(13) (2007).

**“Commit” Clause.** Under the ABA Model CJC, a judge or judicial candidate “shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments.” [1990 ‘appeared to commit’ Canon 5(A)(3)(d)(ii)] MCJC Canon 4, Rule 4.1(A)(13) 2007. Some states combine the commit clause with the pledges or promises clause, while others separate them.

**“False and Misleading Statements” Clause.** The ABA Model CJC provides that “[a] judge or judicial candidate shall not ... knowingly, or with reckless disregard for the truth, make any false or misleading statement.” MCJC Canon 4, Rule 4.1(A)(11)

**“Political Activity” Clause.** Essentially, this clause in the ABA Model CJC prohibits judges or judicial candidates from participating in or speaking for , or endorsing, political organizations or non-judicial candidates. MCJC Canon 4, Rule 4.1(A)(1)-(7) (2007). A state’s approach to this provision may depend in large part on whether judges are elected in “partisan “ elections in which party affiliations are announced, or required, or in elections in which candidates are prohibited from revealing their party affiliations, and on whether judicial candidates can endorse other candidates, judicial or partisan.

In considering the consequences of judicial speech, any disqualification standards also must recognize that a sitting appellate judge’s “speech” is far more likely to be targeted because it will often appear in published decisions. An appellate judge’s written opinions should not be a basis for disqualification in a subsequent case. Establishing reasoned standards for disqualification should

make less likely questions of impartiality raised as a result of the appellate courts' law-declaring function. The Academy understands that appellate judges need to be supported in unpopular decisions. The standards for disqualification must make clear that an appellate judge's fulfillment of his or her obligation to decide a case is not a basis for disqualification.

***Precedent.*** Particular concerns may be raised by a judge's participation in an appeal if the consequence of the decision would be to bolster pending litigation involving the judge or closely affiliated entities or individuals by providing helpful precedent. The participation of an appellate judge in cases in which he or she have no direct stake, but who may be personally affected by the precedent established in the case, may raise reasonable questions of impartiality that would not arise in lower courts, where the judge's decision would not have impact beyond the case in question.

## **2. The Right To Be Timely Informed Of Who Will Decide An Appeal.**

Briefs have become the primary input that parties have to the appellate decision making process. Even in states in which oral argument is liberally granted, judges typically come to argument prepared to decide the case based on the briefs and the court's internal work product. In some states, oral argument occurs in a diminished and diminishing percentage of cases or is restricted in time. The consequence of briefing, and who is considering the briefing, thus becomes more important.

Appellate courts also typically sit in multi-judge panels. Substitutions may be made to the panel before consideration of a case on the merits, or the panel

may be constituted to avoid potential grounds for disqualification. In order to ensure that both the court and the parties are able to assess and act on grounds for questioning the impartiality of a judge, state appellate courts should timely inform the parties which judges will decide an appeal.

What is timely will vary in practice from state to state. This Principle is universal: parties should be informed of the identity of each member of a panel who will decide an appeal on the merits at a time that will give the parties a reasonable opportunity to inform the court of a potential basis for recusal, or make a motion to disqualify, before an assigned judge invests material effort in a case. The identity of who will decide an appeal on the merits should be made available: (1) by a process explained in published rules or operating procedures, (2) to all parties by the same process at the same time, (3) in a manner that does not require unusual expertise or methods for access, and (4) that is identical in all divisions of a court that has multiple districts, divisions, or departments.

### **3. The Right To Seek Disqualification Of Any Member Of The Merits Panel Pursuant To Clearly Articulated Procedures.**

Many states have no disqualification procedure at all. Some states follow the rule that an appellate judge decides his or her own qualification, but provide no orderly means to inform an appellate judge of grounds for disqualification. In states that have a motion or affidavit procedure, accessing it may still have “black box” aspects. This is a remarkable contrast in most states to the process for disqualification of trial court judges, which is usually explained in reasonably clear statutes or rules.

The Academy believes that the time has come for states to provide and disclose clear disqualification procedures at the appellate level:

- The fact that any appellate judge is only one of multiple decision-makers is not a reason to preclude formal procedures for disqualification. The litigants are entitled to a full panel of impartial judges to fulfill the collegial nature of appellate decision-making.

- For the parties, there should not be any question of guessing how to go about seeking disqualification. A system in which specialists have inside knowledge of such a basic process increases public perception of unfairness. Establishing a clear procedure for seeking disqualification also is a protection for the courts. If an appellate court provides a clear and transparent means for seeking disqualification, a party may waive or be estopped from seeking disqualification if the procedure is not followed. Establishing procedures for disqualification requests also reduces the possibility of tactical rather than substantive disqualification requests.

- Under the Principles proposed by the Academy, the right to seek disqualification is limited to parties. This Principle serves to ensure that there is not an overly broad or artificial means for disqualifying a judge from a case. This Principle also limits “judge- (or lawyer-) shopping” to prevent recruitment of counsel on the basis that a judge might as a result feel the need to recuse, or be subject to disqualification.

- When a state's intermediate appellate or supreme court has more than one district, division, or department, the disqualification procedure should be uniform statewide.

#### **4. The Right To Know Who Will Decide A Disqualification Request.**

A variety of options may be acceptable on a state-by-state basis in designating the individual or collective body giving initial consideration of disqualification decisions in state appellate courts. At a minimum, however, the parties must know who will decide a request for disqualification. A state's appellate procedures should make clear who will decide a request to disqualify a judge. Several potential decision-making processes have been identified:

***Recusal by the judge.*** In the absence of established procedures for seeking disqualification in most states, this appears to be the way in which disqualification is addressed. Leaving to the judge whose impartiality is being questioned the initial decision whether to sit on a case has several advantages. It encourages compliance with ethical rules by the judge and draws on the judge's knowledge of the facts that may call for recusal. The disadvantages include a perception that a judge who has not voluntarily recused is not likely to favorably entertain a request for disqualification. There is a corresponding fear that making a disqualification request may infect decision-making on the merits, or subject to question a substantive decision made by a judge who declined to recuse even if the merits decision was unaffected by bias.

Although the Academy was not able to reach a consensus on the wisdom of leaving the decision on a disqualification request to the judge, there was a

general consensus that if the judge rules initially on the request, the judge's decision must be subject to some form of further review, in accord with the fundamental proposition that no one should be a judge in his or her own case. Further, some Academy members believed that if the disqualification decision is left to the judge, judges should be encouraged to consult with a trusted colleague before ruling on the request.

***Disqualification by chief administrative judge.*** One advantage to decision by the chief administrative judge of an appellate court is that disqualification can arguably be properly characterized as the type of interlocutory decision often made by judges acting in an administrative capacity within any particular court. Having another judge decide the issue of disqualification as an administrative matter may also reduce the ethical burdens on the judge and eliminate or reduce the need for further review. On the other hand, not requiring the judge to confront potential grounds for questioning the judge's impartiality may discourage full compliance with the rules governing judicial behavior. Allowing or requiring one judge in an administrative capacity to consider the disqualification of another may lead to intercollegial difficulties among judges who, by the very nature of appellate decision-making, must work collaboratively.

***Disqualification by appellate court panel or en banc.*** Consideration of a disqualification request by a panel of the appellate court, or by the court sitting *en banc* with or without the judge whose disqualification is sought, raises many of the same collegiality concerns raised by decision by a chief administrative judge.

The desire for collegiality (or mutual back-scratching) on the appellate bench also may lead to "rubber stamping" a judge's desire not to be disqualified from a case. On the other hand, diffusing responsibility for the disqualification decision promotes impartiality and may reduce the possibility that the decision could turn on irrelevant inter-personal factors.

***Disqualification by an "ethics judge."*** Having disqualification decisions made by a single independent judge, designated either by the chief administrative judge or another State officer or body, would allow development of substantial expertise and a body of precedent in considering disqualification requests. An "ethics judge" could be viewed as a neutral authority whose decision is respected as impartial, well-grounded, and less subject to question. The disadvantages in such a procedure include the excess of discretionary power residing in any single individual and the danger of arbitrary decisions grounded on personal factors.

***Independent judicial conduct commission.*** Although an independent body such as a state Judicial Conduct Commission might well be assigned the duty of final review of recusal and disqualification decisions, either in examining the initial disqualification decision or in addressing ethics complaints arising from the challenged judicial conduct, the consensus of the Academy was that the initial disqualification decisions generally should not be made by such an independent body. Taking the disqualification decision wholly outside the appellate court system discourages judicial self-examination. Further, the procedures these bodies use are often geared to protecting the procedural rights

of judges, and so tend to be laborious, time-intensive, and not conducive to a timely decision on disqualification requests. There also was concern that placing disqualification decisions within the purview of such bodies ran the risk of politicizing both the body and decision-making in a manner that would hamper respect for the disqualification decision. Finally, placing the responsibility for disqualification decisions with an independent body unduly conflates disqualification and discipline.

**5. The Right To Decision On Any Disqualification Request Before An Appeal Is Submitted On The Merits.**

Whether an appellate judge is disqualified from deciding a case should not in any way be governed by, or be perceived as being governed by, the result reached, or the substantive position taken by the judge in the appeal at issue. Procedures established for dealing with appellate disqualification requests should ensure that the decision on a disqualification request is made before the appeal is submitted on the merits. This Principle protects the right of all the parties and the public, not just the party seeking disqualification, to a decision-making process that avoids any appearance of impropriety.

**6. The Right To Be Informed Of Grounds For Disqualification Of Any Member Of The Merits Panel.**

It is not uncommon on appeal for a judge to recuse without explanation. Motions to disqualify are also usually granted, or denied, without explanation. In part because judges have a duty to sit on cases where there is not a ground for disqualification, many members of the Academy believed that an explanation should be provided whenever an appellate judge does not sit on a case.

Recognizing that there are circumstances under which an appellate judge may wish or need to recuse for personal or private reasons, the Academy chose to limit this Principle to grounds for disqualification, and not to require a judge to explain his or her grounds for recusal.

Adherence to this Principle would also allow the establishment of a body of precedent in this area. Many disqualification decisions are made ad hoc, are not reported, and often are not even reduced to writing. This decreases confidence in the judiciary and is inconsistent with the courts' mission and contrary to purposes of the rule of law.

If courts adhere to Principle 2 requiring that the parties be informed who will decide their appeal, this Principle also may help to relieve the court and its judges of the burden of identifying grounds for disqualification for every judge on a court where all judges do not sit on a particular merits panel. The obligation to inform would only arise once, when an arguably partial judge is scheduled to sit on a particular appeal.

#### **7. Review Of The Disqualification Decision Pursuant To Clearly Articulated Procedures.**

Particularly where a state has determined that the judge is entitled to determine whether he or she should recuse from participation in a particular appellate case, the parties should have the right to seek review of the disqualification decision on an interlocutory basis. In many instances, a state's current rules governing appellate procedure need be only slightly modified to accommodate this review of an individual judge's decision.

**8. Replacement Of A Disqualified Judge To Maintain A Quorum Or Prevent A Tie.**

Any set of Principles established to govern disqualification of judges must insure that disqualification does not depopulate the appellate courts. Appellate decisions are made collegially to ensure collective wisdom. Cases are decided by a panel of appellate judges so that the quirks or misconceptions of any single judge will not have a significant effect on the decision reached by a majority of the panel.

One of the objections sometimes made to recusal or disqualification of appellate judges is that if a judge does not sit on a case, no replacement would be available – the so-called "Rule of Necessity". In the states, at least, the "Rule of Necessity" has limited application. In all but four states, justices of the state's highest court who are disqualified from sitting in a particular case may be replaced on the court for that case by a temporary justice.

The authority for such single-case replacement may be a provision of the state constitution, a statute, or a rule or policy of the state supreme court in these states. The appointing authority may be the chief justice of the Supreme Court, the Supreme Court as a whole, the remaining non-disqualified justices, or the governor. Generally, the provision authorizing the designation of replacement justices for a particular case specifies the persons eligible for such designation – for example, all retired Supreme Court justices, or all intermediate appellate court judges, or all judges of lower courts of record, or all persons who have been members of the state bar for at least a prescribed period of time. The pertinent

constitutional, statutory, and rule provisions are set discussed, alphabetically by state, in the Appendix to this paper.

In some states, the pertinent provisions are regularly applied to provide single-case replacement judges for disqualified judges. In other states, however, a culture of appellate collegiality has led to the disuse of such provisions, and the non-replacement of disqualified judges. This latter practice seems troubling, particularly where a policy that a fully-constituted appellate court panel should consider cases on review has been established by state constitution or statute.

Invocation of the "Rule of Necessity," or refusal to use established replacement provisions, often boils down to the dubious proposition that a biased judge is better than no judge at all. States should take measures to avoid inappropriate reliance on the "Rule of Necessity" by enacting or encouraging resort to preexisting provisions for temporary replacement of a disqualified appellate judge, particularly if the failure to replace the judge would prevent a case from being heard by a number of appellate judges sufficient to maintain a quorum or avoid a possible tie vote. In cases where the grounds for a judge's disqualification are discovered by a party only after the appeal has been decided, rehearing should be granted and a replacement judge appointed if the original decision could be upheld only by invocation of the "Rule of Necessity" to count the vote of the disqualified judge.

## APPENDIX

### State Provisions for Replacement of Disqualified Justices

Justices of the state's highest court who are disqualified from sitting in a particular case may be replaced on the court for that case by a temporary justice (usually, although not always, a judge of an inferior state court) in 46 states – every state but Indiana, Michigan, Virginia, and Wisconsin. The authority for single-case replacement is a provision of the state constitution, a statute, or a rule or policy of the state supreme court. The appointing authority is the chief justice of the supreme court, or the supreme court as a whole, or the remaining non-disqualified justices, or the governor.

Part A of this Appendix sets out, alphabetically by state, the provisions for appointment of temporary supreme court justices in each of the 46 states identified as having such provisions.<sup>1</sup> Part B addresses the four states that do not have provisions for the appointment of temporary supreme court justices.

#### A. Provisions for appointing temporary supreme court justices

1. Alabama. Justices of the Alabama Supreme Court are elected and re-elected in partisan elections for six-year terms. A provision of the state constitution (Ala. Const. art. VI, § 149) allows the chief justice to appoint an active or retired judge of an inferior court as a special justice of the supreme court. See *City of Bessemer v. McClain*, 957 So. 2d 1061, 1092-1093 (Ala. 2006). The provision has occasionally been applied to create a special supreme court composed entirely of special justices. See *McClain*, 957 So. 2d at 1093-1095.
2. Alaska. Justices of the Alaska Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of three years and thereafter are elected and re-elected for ten-year terms in retention elections. A provision of the state constitution (Alaska Const. art. IV, § 16) allows the chief justice to assign a judge of an inferior court to serve temporarily on the supreme court. See *Oxereok v. State*, 611 P.2d 913, 916 n.8 (Alaska 1980).
3. Arizona. Justices of the Arizona Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of two years and thereafter are elected and re-elected in retention elections to six-year terms. A provision of the state constitution (Ariz. Const. art. VI, § 3) authorizes the chief justice to “assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties.” See, e.g., *In re Marriage of Zale*, 972 P.2d 230 (1999).
4. Arkansas. Justices of the Arkansas Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A provision of the state constitution (Ark. Const. amend. 80, § 13) allows the governor to appoint a retired justice, an active judge of an inferior

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<sup>1</sup>Information about the methods of selection and retention of regular supreme court justices is taken from American Judicature Society, *Judicial Selection Methods in the States* (2008).

court, or a licensed attorney as a special justice of the supreme court in place of a regular justice disqualified from sitting in a particular case. See *White v. Priest*, 73 S.W.3d 572, 583-584 (Ark. 2002) (supplemental concurring opinion of Brown, J., on recusal). The provision has been applied to create a supreme court composed entirely of special justices. See *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988).

5. California. Justices of the California Supreme Court are appointed by the governor for a term of twelve years and thereafter are elected and re-elected in retention elections to twelve-year terms. A provision of the state constitution (Cal. Const. art. 6, ' 6) creates a Judicial Council and authorizes, in subsection (e), the chief justice to assign active or retired judges of inferior courts to serve as judges pro tempore of the supreme court. See *Mosk v. Superior Court*, 601 P.2d 1030, 1034-1036 (Cal. 1979).

6. Colorado. Justices of the Colorado Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of two years and thereafter are elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Colo. Const. art. VI, ' 5(3)) authorizes the chief justice to assign any active or retired judge of an inferior court "temporarily to perform judicial duties in any court."

7. Connecticut. Justices of the Connecticut Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of eight years and thereafter are re-nominated and reappointed every eight years. A statute (Conn. Gen. Stat. Ann. § 51-204 (West, Westlaw through the 2010 supplement to the Connecticut General Statutes)) allows for superior court judges to be designated as temporary supreme court justices.

8. Delaware. Justices of the Delaware Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of twelve years, and are eligible for reappointment by the governor on recommendation of the nominating commission for terms of the same length. A provision of the state constitution (Del. Const. art. IV, ' 12) authorizes the chief justice, in the event of the lack of a quorum, to designate judges of inferior courts "to sit in the Supreme Court temporarily to satisfy the number of Justices required by law." Another provision of the state constitution (Del. Const. art. IV, ' 15) allows the governor to appoint a judge or judges ad litem to sit in a particular case in the supreme court when there is lacking a sufficient number of justices to hear the case. See *Nellius v. Stiffel*, 402 A.2d 359, 361-362 (Del. 1978). A third provision of the state constitution (Del. Const. art. IV, ' 38) allows for the appointment of temporary assignment of retired judges and justices to the supreme court.

9. Florida. Justices of the Florida Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections for six-year terms. A provision of the state constitution (Fla. Const. art. 5, ' 2(b)) authorizes the chief justice to assign active and retired judges of inferior courts "to temporary duty in any court for which the judge is qualified. . . ." See also Fla. Const. art. 5, ' 3 ("When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.")

10. Georgia. Justices of the Georgia Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A provision of the state constitution (Ga. Const. art. 6, ' 6, ¶ 1) provides that if a justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve.

11. Hawaii. Justices of the Hawaii Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of ten years and thereafter are

reappointed for ten-year terms by a judicial selection commission. A provision of the state constitution (Haw. Const. art. 6, ' 2) authorizes the chief justice to assign judges of inferior courts and retired supreme court justices to serve temporarily on the supreme court. For a case anticipating decision by a supreme court composed entirely of district court judges, see *Kekoa v. Supreme Court*, 488 P.2d 1406, 1406-1407 (Haw. 1971).

12. Idaho. Justices of the Idaho Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A provision of the state constitution (Idaho Const. art. V, ' 6) allows the supreme court to call a district court judge to sit in a particular case in the supreme court in place of a disqualified, ill, or absent justice. A statute (Idaho Code ' 1-215(2) (Michie Supp. 2008)) allows the supreme court to assign a retired justice or an active or retired judge of an inferior court to sit on the supreme court in a particular case in place of a disqualified justice.

13. Illinois. Justices of the Illinois Supreme Court are elected and re-elected in partisan elections for ten-year terms. A provision of the state constitution (Ill. Const. art. 6, ' 16) provides that the "Supreme Court may assign a Judge temporarily to any court."

14. Iowa. Justices of the Iowa Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections to eight-year terms. A statute (Iowa Code Ann. ' 602.1612 (West, Westlaw current with legislation signed as of 3/9/2010 from the 2010 Reg.Sess.)) provides that retired judges may be appointed to temporary judicial duties by the supreme court.

15. Kansas. Justices of the Kansas Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections to six-year terms. A provision of the state constitution (Kan. Const. art. 3, ' 6(f)) authorizes the supreme court to assign a district judge to serve temporarily on the supreme court. The power appears to be exercised by the chief justice. See *Kellogg Mall Associates v. Board of County Commissioners*, 607 P.2d 1330, 1339 (Kan. 1980); *Leek v. Theis*, 539 P.2d 304, 329 (Kan. 1975). A statute (Kan. Stat. Ann. ' 20-2616(a) (2007)) authorizes the supreme court to assign any retired supreme court justice or retired judge of an inferior court "in connection with any matter pending in the supreme court . . . ."

16. Kentucky. Justices of the Kentucky Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A policy adopted by the supreme court in 1989 (set out in an appendix to *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 411 (Ky. 1992)) pursuant to statutory (Ky. Rev. Stat. Ann. ' 26A.015(3)(a) (Michie 1998)) and constitutional (Ky. Const. ' 116) authority provides, in the event of the disqualification of a regular justice from sitting in a particular case, for the appointment by the chief justice of an attorney as special justice of the supreme court to sit in that case. If at least two regular justices decline or are unable to sit in a particular case, the state constitution (Ky. Const. ' 110(3)) provides for appointment by the governor of special justices "to constitute a full court." *Kentucky Utilities Co.*, 836 S.W.2d at 409.

17. Louisiana. Justices of the Louisiana Supreme Court are elected and re-elected in partisan elections for ten-year terms. A provision of the state constitution (La. Const. art. 5, ' 5(A)) authorizes the supreme court to "assign a sitting or retired judge to any court."

18. Maine. Maine's judicial selection process is similar to the process for selecting federal

judges—judges are nominated by the governor and confirmed by the senate, but they serve seven-year terms rather than serving for life. A statute (4 Me. Rev. Stat. Ann. § 6 (West, Westlaw through Chapter 469 of the 2009 Second Regular Session of the 124th Legislature)) provides that retired justices may be appointed as an “Active Retired Justice” who may then be assigned to judicial duties by the Chief Justice. Under the statute, such Justices may “hear all matters and issue all orders, notices, decrees and judgments in vacation that any Justice of the Supreme Judicial Court is authorized to hear or issue.” 4 Me. Rev. Stat. Ann. § 6.

19. Maryland. Judges of the Maryland Court of Appeals are appointed by the governor on recommendation of a nominating commission to serve until the first general election following the expiration of one year from the date of the occurrence of the vacancy being filled, and thereafter are elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Md. Const. art. IV, § 18(b)(2)) authorizes the chief judge to assign a judge of an inferior court “to sit temporarily in any court. . . .” See also Md. Const. art. IV, § 3(a)(1) (“any former judge . . . may be assigned by the Chief Judge of the Court of Appeals, upon approval of a majority of the court, to sit temporarily in any court of this State”). A statute (Md. Code Ann., Cts. & Jud. Proc. § 1-302(b) (2006)) authorizes the chief judge to assign any “former judge” of any court (with specified exceptions) “to sit temporarily in any court . . . .”

20. Massachusetts. Justices of the Massachusetts Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until age 70. A statute (Mass.Gen. Laws Ann. ch. 211 § 24 (West, Westlaw through Chapter 46 of the 2010 2nd Annual Sess.)) provides that a retired justice whose name has been placed on a designated list may be appointed by the Chief Justice to perform “such of the duties of the office of associate justice of the supreme judicial court as may be requested of him and which he is willing to undertake, provided that no single assignment shall be for a term longer than ninety days, and provided that full-bench duties may be assigned only to fill a temporary vacancy, including temporary disability, on the court.”

21. Minnesota. Justices of the Minnesota Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A statute (Minn. Stat. Ann. § 2.724(2) (2006)) enacted pursuant to a provision of the state constitution (Minn. Const. art. 6, § 2) allows the supreme court to assign a retired justice or an active judge of an inferior court to sit in a particular case in the supreme court in place of a disqualified regular justice.

22. Mississippi. Justices of the Mississippi Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A provision of the state constitution (Miss. Const. art. 6, § 165) construed in *Hewes v. Langston*, 853 So. 2d 1237, 1241-1243 (Miss. 2003), allows the governor to appoint a special justice of the supreme court to sit in a particular case in place of a recused regular justice “where the Court lacks a quorum and where the parties are unable to agree in the selection of special justices to hear [the] case.” 853 So. 2d at 1243. The constitutional provision requires the gubernatorial appointee to be a person “of law knowledge.” In *Public Employees Retirement System v. Hawkins*, 781 So. 2d 899 (Miss. 2001), “all justices recused . . . and the parties agreed on five special justices (who constituted a quorum and) who were appointed by the Supreme Court, to determine the case.” *Hewes*, 853 So. 2d at 1241 (internal citations omitted). A statute (Miss. Code Ann. § 9-1-105 (Supp. 2008)) allows, in paragraph 1, the chief justice to appoint a “special judge” to hear a case in place of any disqualified “judicial officer.” Paragraph 4 of the same statute provides that if the appointment is within the governor’s constitutional power to make under Miss. Const. art. 6, § 165, the governor may subsequently make the appointment and the “appointment made by the Chief Justice . . . shall be void and of no further force or effect from

the date of the Governor's appointment." The interrelationship of the constitutional and statutory provisions is analyzed by Judge Leslie Southwick in *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony*, 23 Miss. C. L. Rev. 1, 11-15 (2003), in the context of "the never-ending and ever-escalating tort wars being fought out at every level of the Mississippi court system." *Id.* at 11.

23. Missouri. Justices of the Missouri Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected for twelve-year terms. A provision of the state constitution (Mo. Const. art. 5, ' 6) authorizes the supreme court to assign any judge to sit temporarily on any court.

24. Montana. Justices of the Montana Supreme Court are elected and re-elected in non-partisan elections for terms of eight years. A provision of the state constitution (Mont. Const. art. VII, ' 3(2)) provides for the substitution of a district judge for a supreme court justice "in the event of disqualification or disability," but it does not designate the substituting authority.

25. Nebraska. Judges of the Nebraska Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of three years and thereafter are elected and re-elected in retention elections for terms of six years. A provision of the state constitution (Neb. Const. art. V, ' 2) authorizes the supreme court to appoint judges of inferior courts to sit temporarily as supreme court judges "in the event of the disability or disqualification by interest or otherwise of any supreme court judge. A statute (Neb. Rev. Stat. Ann. ' 24-729 (2004)) extends that authority to the appointment of retired judges of inferior courts. See *Conagra, Inc. v. Cargill, Inc.*, 388 N.W.2d 458, 459-460 (Neb. 1986).

26. Nevada. Justices of the Nevada Supreme Court are elected and re-elected in non-partisan elections for six-year terms. Constitutional (Nev. Const. art. 6, ' 4) and statutory (Nev. Rev. Stat. Ann. ' 1.225(5) (2004)) provisions allow the governor to designate a state district judge to sit on the supreme court in a particular case in place of a disqualified regular justice.

27. New Hampshire. Justices of the New Hampshire Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until reaching the age of 70. A statute (N.H. Rev. Stat. Ann. ' 490:3(II) (Supp. 2008)) authorizes the chief justice to assign, on a random basis, a retired supreme court justice or, if such a retired justice is unavailable, a retired superior court justice to sit on the supreme court during a vacancy due to disqualification or other inability to sit. If no retired supreme or superior court justice is available, the selection of a replacement judge is made on a random basis from a pool of active superior court justices and, if no superior court justice is available, from a pool of active district and probate court justices. Under subsection II-a, the chief justice of the superior court may be assigned as a temporary supreme court justice by the chief justice of the supreme court on a non-random basis if the vacancy on the supreme court occurs within seven days of the scheduled oral argument of a case.

28. New Jersey. Justices of the New Jersey Supreme Court are appointed by the governor for an initial term of seven years, and thereafter may be reappointed by the governor with the consent of the Senate to serve until reaching the age of 70. A provision of the state constitution (N.J. Const. art. 6, ' 2, ¶ 1) directs the chief justice, "[w]hen necessary," to assign superior court judges, on the basis of seniority, to serve temporarily in the supreme court.

29. New Mexico. Justices of the New Mexico Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until the next general election, and thereafter are elected in a partisan election for an eight-year term, followed by election and re-

election in retention elections for eight-year terms. When a justice cannot sit on a case by reason of interest, absence, or incapacity, a provision of the state constitution (N.M. Const. art. VI, ' 6) authorizes the remaining justices to "call in any district judge . . . to act as a justice of the [supreme] court." A separate constitutional provision (N.M. Const. art. VI, ' 28) allows the chief justice to designate any intermediate appellate judge as an acting supreme court justice.

30. New York. Judges of the New York Court of Appeals are appointed by the governor on recommendation of a nominating commission for a term of fourteen years, and may be reappointed in the same manner to successive terms of the same length. A provision of the state constitution (N.Y. Const. art. 6, ' 2) authorizes, in subsection (a), the judges of the Court of Appeals to designate any justice of the supreme court (a court inferior to the Court of Appeals) to serve as a Court of Appeals judge during the absence or inability to act of a Court of Appeals judge. The same constitutional provision authorizes, in subsection (b), the governor to designate not more than four supreme court justices to sit as temporary Court of Appeals judges, upon the certification of the Court of Appeals to the governor that the number of temporary judges to be appointed is necessary "by reason of the accumulation of causes pending" in the Court of Appeals.

31. North Carolina. Justices of the North Carolina Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A statute (N.C. Gen. S. Ann. ' 7A-39.14 (West, Westlaw through S.L. 2009-577 (end) of the 2009 Regular Session)) provides that the Chief Justice, with the concurrence of the majority of the Supreme Court, "may recall an emergency or retired justice to serve on the Supreme Court in place of a sitting justice who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office."

32. North Dakota. Justices of the North Dakota Supreme Court are elected and re-elected in non-partisan elections for ten-year terms, with midterm vacancies filled by appointment of the governor on recommendation of a nominating commission. A provision of the state constitution (N.D. Const. art. VI, ' 11) directs the chief justice to assign an active or retired judge of an inferior court, or a retired justice, to hear a pending case in place of a justice unable to sit because of conflict of interest or physical or mental incapacity. For a case in which the entire supreme court was composed of district judges acting as supreme court justices, see *State ex rel. Linde v. Robinson*, 160 N.W. 512, 514 (N.D. 1916).

33. Ohio. Justices of the Ohio Supreme Court are elected and re-elected in partisan elections to six-year terms. A provision of the state constitution (Ohio Const. art. IV, ' 2(A)) authorizes the chief justice to assign any judge of an intermediate appellate court to sit on the supreme court in place of a justice unable to hear a case by reason of illness, disability, or disqualification.

34. Oklahoma. Justices of the Oklahoma Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected for six-year terms in retention elections. Rule 9(b) of the Rules on Administration of Courts (appearing in Okla. Stat. tit. 20, Ch. 1, App. 2 (2001)), on the authority of a provision of the state constitution (Okla. Const. art. 7, ' 6), allows the chief justice to assign the judge of any inferior court to sit as a special justice of the supreme court in a particular case in place of a disqualified regular justice. Rule 9(c), citing a statute (Okla. Stat. tit. 20, ' 1402 (2001)), provides that when all regular supreme court justices are disqualified from sitting in a case, "then the Chief Justice shall request that the Governor appoint qualified members of the bar to sit in the case as special justices." For a case in which the entire supreme court was composed of special justices, see *In re Grimes*, 494 P.2d 635 (Okla. 1971).

35. Oregon. Judges of the Oregon Supreme Court are elected and re-elected in non-partisan elections for six-year terms. By state constitutional (Or. Const. art. 7 (Amended), ' 2a) and statutory (Or. Rev. Stat. Ann. ' 1.600(1) (2007)) authority, the supreme court may appoint a judge of an inferior court as a judge pro tempore of the supreme court whenever it determines that "the appointment is reasonably necessary and will promote the more efficient administration of justice." Or. Rev. Stat. Ann. ' 1.600(1).

36. Pennsylvania. Justices of the Pennsylvania Supreme Court are elected in partisan elections to a ten-year term and thereafter are re-elected in retention elections to ten-year terms. A statute (42 Pa. Cons. Stat. Ann. ' 326(c) (West 2004)) provides for the temporary assignment of judges to the supreme court sufficient to make up a quorum otherwise impossible to assemble by reason of vacancy, illness, disqualification, or otherwise. The statute does not specify the assigning authority.

37. Rhode Island. Justices of the Rhode Island Supreme Court are appointed by the governor with the advice and consent of the state legislature on recommendation of a nominating commission to life terms. A statute (R.I. Gen. L. Ann. ' 8-3-8(c) (West, Westlaw through chapter 392 of the January 2009 session) provides that the Chief Justice may assign retired supreme court justices "to perform such services as an associate justice of the supreme court as the chief justice of the supreme court shall prescribe."

38. South Carolina. Justices of the South Carolina Supreme Court are appointed and reappointed by the state legislature on recommendation of a nominating commission to ten-year terms. A provision of the state constitution (S.C. Const. art. V, ' 4) authorizes the chief justice to assign any judge to sit in any court. See *State ex rel. Riley v. Martin*, 262 S.E.2d 404, 407 (S.C. 1980). A statute (S.C. Code Ann. ' 14-3-60 (West, Westlaw through End of 2009 Reg. Ses)) provides that if "all or any" of the supreme court justices are prevented by disqualification or otherwise from sitting on a case, the governor shall commission "the requisite number of men learned in the law" for its determination.

39. South Dakota. Justices of the South Dakota Supreme Court are appointed by the governor on recommendation of a nominating commission to a term of three years and thereafter are elected and re-elected in retention elections to eight-year terms. A provision of the state constitution (S.D. Const. art. V, ' 11) authorizes the chief justice to assign any circuit court judge to sit on the supreme court in place of a justice who is disqualified or unable to act. The same constitutional provision, supplemented by a statute (S.D. Codified Laws ' 16-1-5 (West 2004)), authorizes the chief justice to assign retired justices and active or retired judges to act in place of disqualified supreme court justices.

40. Tennessee. Justices of the Tennessee Supreme Court are appointed by the governor on the recommendation of a nominating commission to serve until the next biennial general election and thereafter are elected and re-elected to eight-year terms in retention elections. Under state constitutional (Tenn. Const. art. VI, ' 11) and statutory (Tenn. Code Ann. ' ' 17-2-102, 17-2-110(a) (1994)) authority, as construed in *Hooker v. Sundquist*, 1999 Tenn. LEXIS 80, at \*1-\*7 (Tenn. Sup. Ct. Feb. 16, 1999), both the chief justice and the governor are empowered to appoint special justices to replace a regular supreme court justice who is "unable" to sit in a particular case. Section 17-2-110(a) allows the chief justice to assign a judge of an inferior court to sit in the case. Section 17-2-102 allows the governor to appoint "competent lawyers" as temporary replacements for regular supreme court justices in cases in which the justices are "incompetent" to sit. The cited constitutional provision also directs that if all the justices of the supreme court are disqualified from sitting in a particular case, the

governor shall appoint the requisite number of persons “of law knowledge” for its hearing and determination.

41. Texas. Justices of the Texas Supreme Court are elected and re-elected in partisan elections for six-year terms. Under state constitutional (Tex. Const. art. 5, ' 11) and statutory (Tex. Gov't Code Ann. ' 22.005 (Vernon 2004)) authority, the governor is empowered to appoint temporary replacements for regular supreme court justices disqualified from sitting in a particular case. The constitutional provision requires that the temporary justices be “persons learned in the law.” The statute limits the appointments to judges of an inferior court. A 1924 case which was heard and decided by a supreme court consisting entirely of non-judge special justices appointed by the governor is described by Alice McAfee in *The All-Woman Texas Supreme Court: The History Behind a Brief Moment on the Bench*, 39 St. Mary's L. J. 467 (2008).

42. Utah. Justices of the Utah Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until the first general election within three years of their appointment, and are thereafter elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Utah Const. art. VIII, ' 2) directs the chief justice to assign a judge of an intermediate appellate court or the district court to sit on a case in the supreme court in place of a justice who is disqualified or otherwise unable to sit. (If the chief justice is disqualified or unable to participate in the case, the remaining justices are the assigning authority).

43. Vermont. Justices of the Vermont Supreme Court are appointed by the governor on recommendation of a nominating commission to a term of six years and are thereafter retained by vote of the General Assembly for six-year terms. A statute (Vt. Stat. Ann. tit. 4, ' 22(a), (c) (Supp. 2008)) authorizes the chief justice to appoint active and retired judges of inferior courts, and retired supreme court justices, to a “special assignment” on the supreme court, in the event of the disqualification, disability, or death of a justice.

44. Washington. Justices of the Washington Supreme Court are elected and re-elected in non-partisan elections for six-year terms. Under state constitutional (Wash. Const. art. 4, ' 2(a)) and statutory (Wash. Rev. Code ' 2.04.240(1) (2006)) authority, a majority of the supreme court may appoint active or retired judges of inferior courts of record to act as justices in the supreme court. For a case in which the entire supreme court was composed of justices pro tempore, see *In re Disciplinary Proceeding Against Sanders*, 145 P.3d 1208, 1209 n\*. (Wash. 2006), cert. denied sub nom. *Sanders v. Washington State Commission on Judicial Conduct*, 128 S.Ct. 137 (2007).

45. West Virginia. Justices of the West Virginia Supreme Court of Appeals are elected and re-elected in partisan elections for twelve-year terms. The state constitution (W. Va. Const. art. VIII, ' 2) authorizes the chief justice to assign a judge of an inferior court to serve on the supreme court in place of a disqualified regular justice.

46. Wyoming. Justices of the Wyoming Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year, and thereafter are elected and re-elected in retention elections to eight-year terms. A provision of the state constitution (Wyo. Const. art. 5, ' 4(a)) authorizes the chief justice to designate a district judge to sit on the supreme court in any case in which a regular justice cannot participate “for any reason.” A statute (Wyo. Stat. Ann. ' 5-1-106(f) (2007)) authorizes the chief justice to assign a retired supreme court justice or retired district court judge “to service on any court.”

B. States without provisions for appointing temporary supreme court justices

Three states, Indiana, Virginia, and Wisconsin, have authority expressly rejecting the appointment of temporary supreme court justices. Michigan authority seems to deny such appointments, but is somewhat ambiguous.

47. Indiana. In *State ex rel. Mass Transp. Authority of Greater Indianapolis v. Indiana Revenue Bd.*, 254 N.E.2d 1 (Ind. 1969), the petitioners filed a motion requesting that special judges be appointed to the Indiana Supreme Court to hear their petition for reconsideration. The Indiana Supreme Court denied the motion and held that “to appoint special judge(s) to sit as co-equal members on this court for the purpose of deciding these or any other issues, regardless of their import, would be in direct contravention of both our Constitution and the statutes of this state.” The Court reasoned that the court “is a creation of our Constitution, Art. 7, s 1” and thus “its composition is expressly governed by the terms of that document and can neither be expanded nor contracted at the whim of this court or the litigants standing before it.” *Id.* at 3.

48. Michigan. Michigan law is perhaps the murkiest regarding the issue of temporary appointment of supreme court justices. In *Adair v. State, Dept. of Educ.*, 709 N.W.2d 567 (Mich. 2006), two justices of the Michigan Supreme Court considered motions requesting that they recuse themselves. The court denied the motion, partially based on its assertion that “unlike members of the trial courts or the Court of Appeals, there can be no replacement of a justice who must recuse himself or herself.” *Id.* at 579. The court cited Mich. Const. art. 6, § 2 in support of this assertion, which states that “[t]he supreme court shall consist of seven justices elected at non-partisan elections as provided by law.” However, one of the other justices wrote separately to contest this assertion. See *id.* at 582-584 (Weaver, J., writing separately). Justice Weaver wrote that “the views expressed by Chief Justice Taylor and Justice Markman do not reflect those of all their colleagues, and are not binding on future decisions of this Court or on the decisions of individual justices on motions for their disqualification.” *Id.* at 582. Justice Weaver argued that a different provision of the Michigan constitution, art. 6 § 23, gave the supreme court the ability to assign active or retired judges to duty as supreme court justices. Article 6, § 23 states that “[t]he supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.” Justice Weaver argued that this “provision does not distinguish the ‘judicial duties’ of Michigan Supreme Court justices from those of other judges,” and thus active or retired judge could serve as supreme court justices.

Two Michigan statutes (Mich. Comp. Laws Ann. § 600.225-226 (West, Westlaw through P.A.2010, No. 18, of the 2010 Regular Session, 95th Legislature)), not cited by any of the justices in *Adair*, appear to support Justice Weaver’s position. Section 600.225 states that “[t]he supreme court may assign an elected judge of any court to serve as a judge in *any other court* in this state” and section 600.226 states that “[t]he supreme court may authorize any retired judge from any court to perform judicial duties in *any court* in the state.” (emphasis added).

49. Virginia. The constitution of Virginia provides that the Chief Justice of its supreme court is “the administrative head of the judicial system” and that he “may temporarily assign any judge of a court of record to any other court of record *except the Supreme Court* and may assign a retired judge of a court of record, with his consent, to any court of record *except the Supreme Court*.” Va. Const. art. VI, § 4 (emphasis added).

50. Wisconsin. The Wisconsin constitution provides that “[t]he chief justice may assign any judge of a court of record to aid in the proper disposition of judicial business in any court of record *except the supreme court*.” Wis. Const. art. VII, § 4 (emphasis added).