

**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY  
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE  
STANDING COMMITTEE ON CLIENT PROTECTION  
STANDING COMMITTEE ON PROFESSIONALISM  
STANDING COMMITTEE ON SPECIALIZATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 **RESOLVED, That the American Bar Association amends the Terminology Section, and**  
2 **the Black Letter and Comment of Rule 2.11 of the ABA Model Code of Judicial Conduct as**  
3 **follows:**

4  
5 (insertions underlined, deletions ~~struck through~~, \*refers to defined terms)

6  
7 **TERMINOLOGY**

8  
9 “Aggregate,” in relation to contributions for a candidate, means not only contributions in  
10 cash or in kind made directly to a candidate’s campaign committee, but also ~~all contributions~~  
11 ~~made indirectly with the understanding that they will be used to support the election of a~~  
12 ~~candidate or;~~ all contributions made to support or oppose the election of the candidate’s  
13 opponent; all contributions made to one or more other organizations that supported or opposed  
14 the judge’s election or retention; and all independent expenditures made directly to support or  
15 oppose the judge’s election or retention. “Aggregate” in relation to contributions by the law firm  
16 of a party’s lawyer includes all contributions and independent expenditures made by the lawyers  
17 who are partners, shareholders or employees of the law firm, and by the law firm itself as an  
18 entity, to support or oppose the judge’s election or retention. See Rules 2.11 and 4.4.

19  
20 “Independent Expenditures” made in relation to a judicial election or retention election  
21 campaign refers to all financial and in kind expenditures in support of or in opposition to the  
22 judge’s election or retention, other than those made in concert or cooperation with, or as a  
23 contribution to, any judicial candidate’s campaign committee. See Rule 2.11.

24  
25 **RULE 2.11 *Disqualification***

26  
27 (A) A judge shall disqualify himself or herself in any proceeding in which the  
28 judge’s impartiality\* might reasonably be questioned, including but not limited to  
29 the following circumstances:

31 **The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or**  
32 **personal knowledge\* of facts that are in dispute in the proceeding.**

33 (2) **The judge knows\* that the judge, the judge’s spouse or domestic**  
34 **partner,\* or a person within the third degree of relationship\* to either**  
35 **of them, or the spouse or domestic partner of such a person is:**

36 (a) **a party to the proceeding, or an officer, director, general**  
37 **partner, managing member, or trustee of a party;**

38 (b) **acting as a lawyer in the proceeding;**

39 (c) **a person who has more than a de minimis\* interest that could**  
40 **be substantially affected by the proceeding; or**

41 (d) **likely to be a material witness in the proceeding.**

42  
43 (3) **The judge knows that he or she, individually or as a fiduciary,\* or the**  
44 **judge’s spouse, domestic partner, parent, or child, or any other member of**  
45 **the judge’s family residing in the judge’s household,\* has an economic**  
46 **interest\* in the subject matter in controversy or is a party to the proceeding.**

47  
48 (4) **The judge knows or learns by means of a timely motion that a party, a**  
49 **party’s lawyer, or the law firm of a party’s lawyer has within the previous**  
50 **[insert number] year[s] made:**

51 (a) **aggregate\* contributions\* in support of ~~to~~ the judge’s election**  
52 **or retention election campaign;**

53 (b) **aggregate contributions in opposition to the judge’s election or**  
54 **retention election campaign; or**

55 (c) **aggregate independent expenditures\* in support of or in**  
56 **opposition to the judge’s election or retention election campaign**

57 **in an amount that [is greater than \$[insert amount] for an individual or**  
58 **[\$[insert amount] for an entity] [is reasonable and appropriate for an**  
59 **individual or an entity].**

60  
61 (5) **The judge, while a judge or a judicial candidate,\* has made a public**  
62 **statement, other than in a court proceeding, judicial decision, or opinion,**  
63 **that commits or appears to commit the judge to reach a particular result or**  
64 **rule in a particular way in the proceeding or controversy.**

65  
66 (6) **The judge:**

67 (a) **served as a lawyer in the matter in controversy, or was**  
68 **associated with a lawyer who participated substantially as a lawyer in**  
69 **the matter during such association;**

70 (b) **served in governmental employment, and in such capacity**  
71 **participated personally and substantially as a lawyer or public official**  
72 **concerning the proceeding, or has publicly expressed in such capacity**  
73 **an opinion concerning the merits of the particular matter in**  
74 **controversy;**

75 (c) **was a material witness concerning the matter; or**

76 (d) previously presided as a judge over the matter in another  
77 court.

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

82  
83 (C) A judge subject to disqualification under this Rule, other than for bias or  
84 prejudice under paragraph (A)(1), may disclose on the record the basis of the  
85 judge’s disqualification and may ask the parties and their lawyers to consider,  
86 outside the presence of the judge and court personnel, whether to waive  
87 disqualification. If, following the disclosure, the parties and lawyers agree, without  
88 participation by the judge or court personnel, that the judge should not be  
89 disqualified, the judge may participate in the proceeding. The agreement shall be  
90 incorporated into the record of the proceeding.

91  
92 COMMENT

93  
94 [1] Under this Rule, a judge is disqualified whenever the judge’s impartiality might  
95 reasonably be questioned, regardless of whether any of the specific provisions of paragraphs  
96 (A)(1) through (6) apply. In many jurisdictions, the term “recusal” is used interchangeably with  
97 the term “disqualification.”

98 [2] A judge’s obligation not to hear or decide matters in which disqualification is required  
99 applies regardless of whether a motion to disqualify is filed.

100 [3] The rule of necessity may override the rule of disqualification. For example, a judge  
101 might be required to participate in judicial review of a judicial salary statute, or might be the only  
102 judge available in a matter requiring immediate judicial action, such as a hearing on probable  
103 cause or a temporary restraining order. In matters that require immediate action, the judge must  
104 disclose on the record the basis for possible disqualification and make reasonable efforts to  
105 transfer the matter to another judge as soon as practicable.

106 [4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a  
107 relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge’s  
108 impartiality might reasonably be questioned under paragraph (A), or the relative is known by the  
109 judge to have an interest in the law firm that could be substantially affected by the proceeding  
110 under paragraph (A)(2)(c), the judge’s disqualification is required.

111 [5] A judge should disclose on the record information that the judge believes the parties  
112 or their lawyers might reasonably consider relevant to a possible motion for disqualification,  
113 even if the judge believes there is no basis for disqualification.

114 [6] "Economic interest," as set forth in the Terminology section, means ownership of  
115 more than a de minimis legal or equitable interest. Except for situations in which a judge  
116 participates in the management of such a legal or equitable interest, or the interest could be  
117 substantially affected by the outcome of a proceeding before a judge, it does not include:

118 (1) an interest in the individual holdings within a mutual or common investment  
119 fund;

120 (2) an interest in securities held by an educational, religious, charitable, fraternal,  
121 or civic organization in which the judge or the judge's spouse, domestic partner,  
122 parent, or child serves as a director, officer, advisor, or other participant;

123 (3) a deposit in a financial institution or deposits or proprietary interests the judge  
124 may maintain as a member of a mutual savings association or credit union, or  
125 similar proprietary interests; or

126 (4) an interest in the issuer of government securities held by the judge.

127 [7] “Knows,” “aggregate,” “contributions” and “independent expenditures” in paragraph  
128 (A)(4) are defined in the Terminology Section. However, no inference about a judge’s actual  
129 knowledge should be drawn solely from the fact that reports of campaign contributions or  
130 independent expenditures have been filed by individuals or organizations as required by law and  
131 may be available as public records or in the public domain. For purposes of paragraph (A)(4),  
132 contributions or independent expenditures made by an officer of an entity or organization that is  
133 a party should be deemed to be contributions or independent expenditures made by that party.

134 [8] In determining whether contributions or independent expenditures are “greater than is  
135 reasonable and appropriate” for the individual or an entity to make, the judge should consider all  
136 relevant factors that may result in the judge’s impartiality reasonably being questioned. Relevant  
137 considerations may include:

138 (a) the amount, value, source and timing of the contributions and independent  
139 expenditures made by the individual or entity, and the importance of these  
140 contributions and independent expenditures to the judge's election or retention  
141 election campaign or opponent’s campaign; and

142 (b) the relative size of the contributions and independent expenditures in comparison  
143 to the total amount of money contributed to or expended in connection with the  
144 judge's election or retention election campaign or opponent’s campaign.

145 [9] The fact that a party, a party’s lawyer, or the law firm of a party’s lawyer has made a  
146 contribution to a judge’s election or retention election campaign in an amount up to the limit  
147 allowed by law should not, of itself, be a basis for the judge’s disqualification.

## **REPORT**

### **Introduction**

The ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee) and the ABA Standing Committee on Professional Discipline (Discipline Committee) propose amendments to the Terminology Section, Rule 2.11(A)(4) and related Comments of the Model Code of Judicial Conduct (Model Code).

This Resolution was developed in response to the House of Delegates' August 2011 mandate to the Ethics and Discipline Committees set forth in Resolution 107,<sup>1</sup> which was filed with the House by the Standing Committee on Judicial Independence. The relevant part of Resolution 107 provided:

That the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline should proceed on an expedited basis to consider what amendments, if any, should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.

The increasing amounts of independent expenditures and campaign contributions made during judicial election or retention election campaigns have raised concerns with the public and the profession about the possible effect of those contributions and expenditures on judicial impartiality and independence.<sup>2</sup> From 1990-2009, campaign fundraising for judicial elections more than doubled—from \$83.3 million to \$206.9 million—with much of the funding coming from “super spender” organizations with specific agendas seeking to influence the composition of the courts.<sup>3</sup> In light of this environment and the landscape of judicial election finance, discussed below, the Ethics and Discipline Committees are proposing in this Resolution amendments to the Model Code that will provide enhanced guidance to judges, lawyers and the public as to when disqualification of a judge is appropriate due to campaign contributions or independent expenditures made in support of, or in opposition to, the election or retention of a judge or the judge’s opponent. If adopted by the House, these proposed amendments will provide a current model for states to set ethical standards in the context of judicial election and retention election campaigns.

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<sup>1</sup>ABA Standing Comm. on Judicial Independence et al., Report accompanying Resolution 107, AMERICANBAR.ORG (rev'd July 22, 2011), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_107.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_107.doc).

<sup>2</sup> See generally, Editorial, *Judicial Elections and the Bottom Line*, N.Y. TIMES (Aug. 19, 2012), available at <http://www.nytimes.com/2012/08/20/opinion/judicial-elections-and-the-bottom-line.html>; James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment*, 1 POL. RES. Q. 64, no. 3 (2011); Deborah Goldberg et al., *The New Politics of Judicial Elections 2004*, JUSTICE AT STAKE (June 2005), [http://www.justiceatstake.org/media/cms/NewPoliticsReport2004\\_83BBFBD7C43A3.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf).

<sup>3</sup> James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, JUSTICE AT STAKE 1 (2010), [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf).

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

In developing the proposed amendments to the Terminology Section and Model Rule 2.11, the Ethics and Discipline Committees recognized that election environments, circumstances of contributions, and identity of donors will differ in each judicial election or retention election from state to state, and often within a state. The Ethics and Discipline Committees' proposal gives each state the flexibility to craft a rule to suit their individual circumstances.

The Ethics and Discipline Committees first propose amendments to enhance the definition of "Aggregate" in the Terminology Section of the Model Code, and provide a new definition of "Independent Expenditures." Next, the Ethics and Discipline Committees propose changes to the black letter of Model Rule 2.11(A)(4) and its Comments to assist judges in evaluating whether disqualification is appropriate when faced with questions relating to the financing of the judge's election/retention or financing in opposition to the judge's election/retention. The proposed amendments to the black letter delineate each category of financing at issue. In addition, new language in the Comments describes relevant factors judges should consider when determining whether their impartiality might reasonably be questioned, clarifies the extent to which a judge may be deemed to have knowledge of contributions, and recognizes that a contribution within a state's lawful limits to a judicial campaign, standing alone, should not be a basis for disqualification.

### **Fulfilling Resolution 107's Mandate**

In fulfilling the mandate in Resolution 107, the Ethics and Discipline Committees recognized that judicial disqualification is a controversial subject requiring an open, transparent and participatory process to develop necessary changes to the Model Code. The Ethics and Discipline Committees also understood that any proposal developed on this topic would need to balance the interest in sustaining an independent and impartial judiciary with the need to avoid placing undue burdens on already resource-strapped courts and judges. To that end, the Chairs of the Ethics and Discipline Committees co-chaired a Joint Subcommittee, which included judicial members, to examine the disqualification issues arising in the context of judicial election and retention election campaigns and draft proposals for the Committees' review.

Both the Joint Subcommittee and, then, the Ethics and Discipline Committees carefully studied the issues presented and disseminated broadly for comment a number of draft proposed amendments to the Model Code. The Ethics and Discipline Committees are grateful to all those who commented and contributed recommendations during this process. In particular, the Ethics and Discipline Committees thank the ABA Standing Committee on Judicial Independence; the ABA Judicial Division; the ABA Tort, Trial and Insurance Practice Section; the Judicial Advisory Committee of the Ethics Committee; the Brennan Center for Justice; and the Association of Judicial Disciplinary Counsel.

The Ethics and Discipline Committees released the first draft proposal in December 2011. It was the subject of a public hearing at the 2012 ABA Midyear Meeting.<sup>4</sup> Thereafter, the Ethics and

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<sup>4</sup> Public Hearing Transcript, ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, AMERICANBAR.ORG (Feb. 3, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/scepr\\_february\\_3\\_2012\\_public\\_hearing\\_transcript\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/scepr_february_3_2012_public_hearing_transcript_authcheckdam.pdf).

Discipline Committees evaluated the testimony and submissions received in response to the call for comments.<sup>5</sup> The result was a substantially revised proposal that was released for comment in July 2012.<sup>6</sup> That revised draft was the subject of a well-attended public roundtable discussion at the 2012 ABA Annual Meeting.<sup>7</sup> The meeting was hosted by the Chairs of the Ethics and Discipline Committees as well as leaders of the Judicial Division and the Chairs of the Standing Committee on Judicial Independence. Following the Roundtable, the Ethics and Discipline Committees again reviewed and deliberated on all comments and submissions.

In October 2012, the Ethics and Discipline Committees released for comment a third draft proposal.<sup>8</sup> Finally, in December 2012, the Ethics and Discipline Committees released for a final round of comments a slightly amended version of the October 2012 draft.<sup>9</sup> Throughout the policy development process, the Ethics and Discipline Committees engaged in continued discussions and exchange of views with the Judicial Division. The last such meeting occurred at the 2013 ABA Midyear Meeting. The Ethics and Discipline Committees considered the comments and concerns expressed by all of those in attendance as well as written submissions from interested entities in formulating the Resolution now before the House.<sup>10</sup>

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<sup>5</sup> [Public Hearing Schedule & Written Submissions](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/feb_2012_scepr_written_testimony.authcheckdam.pdf), ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, AMERICANBAR.ORG (Feb. 3, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/feb\\_2012\\_scepr\\_written\\_testimony.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/feb_2012_scepr_written_testimony.authcheckdam.pdf).

<sup>6</sup> Cover Memo, ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Revised Draft for Comment: Rule 2.11 of the Model Code of Judicial Conduct*, AMERICANBAR.ORG (July 16, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120716\\_scepr\\_cmtee\\_on\\_discipline\\_revised\\_draft\\_for\\_comment\\_rule\\_2\\_11\\_status\\_memo.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120716_scepr_cmtee_on_discipline_revised_draft_for_comment_rule_2_11_status_memo.authcheckdam.pdf).

<sup>7</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Rule 2.11 Disqualification Working Draft*, AMERICANBAR.ORG (July 16, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120712\\_scepr\\_rule\\_2\\_11\\_disqualification\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120712_scepr_rule_2_11_disqualification_final.authcheckdam.pdf); ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Model Code of Judicial Conduct Rule 2.11 Comments*, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120801\\_judicial\\_disqualification\\_roundtable\\_rule\\_2\\_11\\_comments\\_all.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120801_judicial_disqualification_roundtable_rule_2_11_comments_all.authcheckdam.pdf) (last visited Apr. 19, 2013).

<sup>8</sup> Cover Memo, ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *For Comment: Revised Draft Amendments to Rule 2.11 of the Model Code of Judicial Conduct*, AMERICANBAR.ORG (Oct. 16, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121016\\_frederick\\_lynk\\_rule\\_2\\_11\\_cover\\_memo\\_posting.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121016_frederick_lynk_rule_2_11_cover_memo_posting.authcheckdam.pdf); ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Rule 2.11 Disqualification Working Draft*, AMERICANBAR.ORG (Oct. 16, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121016\\_rule\\_2\\_11\\_draft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121016_rule_2_11_draft.authcheckdam.pdf); ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Model Code of Judicial Conduct Rule 2.11 Comments*, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/mcjc\\_rule\\_2\\_11\\_october\\_proposed\\_draft\\_amendments\\_comments\\_all.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/mcjc_rule_2_11_october_proposed_draft_amendments_comments_all.authcheckdam.pdf) (last visited Apr. 19, 2013).

<sup>9</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Rule 2.11 Disqualification Working Draft*, AMERICANBAR.ORG (Dec. 11, 2012), [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121212\\_rule\\_2\\_11\\_of\\_model\\_judicial\\_code\\_working\\_draft\\_clean\\_myles\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20121212_rule_2_11_of_model_judicial_code_working_draft_clean_myles_final.authcheckdam.pdf).

<sup>10</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility & Standing Comm. on Discipline, *Model Code of Judicial Conduct Rule 2.11 Comments*, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/021913\\_mcjc\\_rule\\_2\\_11\\_comments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/021913_mcjc_rule_2_11_comments.authcheckdam.pdf) (last visited Apr. 19, 2013).

## **The Judicial Campaign Finance Landscape**

In recent years, several United States Supreme Court decisions have highlighted issues that may affect the impartiality of judges who receive judicial campaign contributions. The Court set the stage for the change in judicial campaigns when it held unconstitutional a state judicial conduct rule prohibiting a judicial candidate's "announcement" of views on subjects of public interest (*Republican Party of Minnesota v. White*, 563 U.S. 765 (2002)). Then, the Court ruled that due process had been violated by a state high court judge's denial of a motion to disqualify where the CEO of a party spent over \$3 million in furtherance of the judge's election, resulting in a serious objective risk of actual bias (*Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868 (2009)). Finally, the Court held that a statutory limitation on independent expenditures by corporations and labor unions for political campaigns is unconstitutional (*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

In *Caperton*, the Court noted the important role that state codes of judicial conduct serve to "maintain the integrity of the judiciary and the rule of law" while providing "[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"<sup>11</sup> The *Caperton* Court observed that "public confidence in the fairness and integrity of the nation's elected judges" is "a vital state interest."<sup>12</sup>

One year after the *Caperton* decision, the Court in *Citizens United* considered more generally the subject of independent expenditures. In the context of elections, independent expenditures are not paid to the candidate, or coordinated with the candidate or made at the request or suggestion of the candidate, but are initiated independently to advocate the election or defeat of a candidate. In *Citizens United*, the Court, following the same philosophy that it had propounded in *Republican Party of Minnesota v. White*, held that the constitutionally protected right to free speech prohibited the government from placing restrictions on political speech and, as a result, the law limiting campaign spending by corporations and unions violated the First Amendment. The *Citizens United* Court explained its decision in *Caperton* by stating that, unlike a ban on political speech, the "remedy of recusal [is] based on a litigant's due process right to a fair trial before an unbiased judge."<sup>13</sup>

*Caperton* and *Citizens United* have served as catalysts for states to examine disclosure requirements for judges, litigants and lawyers with regard to contributions received or expenditures made in support of or in opposition to judicial election or retention campaigns.<sup>14</sup>

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<sup>11</sup> *Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868, 889 (2009) (quoting Brief for Conference of Chief Justices as Amicus Curiae 4, 11).

<sup>12</sup> *Id.*

<sup>13</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010).

<sup>14</sup> Several states have either adopted new rules or amended code provisions to address recusal or disqualification issues arising from judicial election campaign contributions. For example, Georgia, Iowa, Michigan, New Mexico, New York and Tennessee adopted or amended their judicial codes to incorporate the *Caperton* analysis. Other states, such as Florida and Illinois, have formed committees to study judicial campaign reform.

As the August 2011 Report to Resolution 107 noted, “[t]he dramatic escalation in campaign support through independent committees and the phenomenon of widespread public perceptions about the influence of money on judicial decisions had fundamentally altered the landscape from that which existed in the 1990’s when Rule 2.11(A)(4) was adopted.”<sup>15</sup> For example, in a poll conducted in 2001, early in the explosion of judicial campaign financing by special interests, 76% of respondents said that campaign contributions have some or a great deal of influence in judicial decision-making.<sup>16</sup> A 2007 poll of American Business Leaders found that “four in five business leaders worry that financial contributions have a major influence on decisions rendered by judges.”<sup>17</sup> Finally, a 2011 poll found that 93% of the public said that another judge should hear the case where one of the two opposing parties had spent a significant amount to support the judge’s election campaign.<sup>18</sup>

### **Summary of Proposed Amendments**

There are three aspects to the proposed amendments set forth in the Resolution: (1) changes to the Terminology Section; (2) changes to the black letter of Rule 2.11(A)(4); and (3) new Comments to Rule 2.11. These proposed amendments are designed to be easily utilized by each individual state in setting the ethical standards for judicial disqualification for all elected judges. This model will also allow states to achieve a fair and consistent approach in determining disqualification issues arising in the context of campaign contributions.

- (1) There are two changes to the Terminology Section of the Model Code: first, expanding the definition of “Aggregate” to recognize both the clarification of the categories in the black letter rule and to incorporate the notion of independent expenditures into the calculation for aggregate contributions by a party, lawyer or law firm of a party’s lawyer. “Aggregate” is more clearly defined as all contributions and independent expenditures made to support or oppose a judge’s election or retention campaign. This recalibrated definition makes clear that “the law firm of a party’s lawyer” includes all lawyers in the firm, regardless of title or interest, as well as the law firm entity itself. Contributions made directly by nonlawyer employees of the law firm, rather than through the firm, are not included in the calculation.

Second, a new definition of “Independent Expenditures” recognizes any and all financial and in-kind activity in support of or opposition to a judicial candidate. This definition is in line with the issues addressed in *Caperton* and *Citizens United*. The Ethics’ and

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<sup>15</sup> *Supra* note 1, at 13.

<sup>16</sup> Poll, Greenberg Quinlan Rosner Research Inc., *Justice at Stake Frequency Questionnaire*, JUSTICE AT STAKE (Oct. 30- Nov. 7, 2001), [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

<sup>17</sup> Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 3*, JUSTICE AT STAKE (May 2007), [http://www.justiceatstake.org/media/cms/CED\\_FINAL\\_repor\\_ons\\_14MAY07\\_BED4DF4955B01.pdf](http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf).

<sup>18</sup> National Registered Voters Frequency Poll, *20/20 Insight LLC*, JUSTICE AT STAKE (Oct. 10-11, 2011), [http://www.justiceatstake.org/media/cms/NPJE2011poll\\_7FE4917006019.pdf](http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf).

Discipline Committees' use of the term "Independent Expenditures" is also consistent with how the term is used in many state election codes.<sup>19</sup>

- (2) Changes to the black letter of Rule 2.11(A)(4): The Rule would be divided into three categories of contributions or expenditures that may result in a judge's impartiality being reasonably questioned. First, the proposed amendments address contributions to support a judge's campaign or retention election campaign committee. Second, the recommended changes relate to contributions to oppose a judge's election or retention election, including those to an opponent. Third, the proposed amendments focus on independent expenditures made in support of or opposition to the judge's campaign. This division makes the Rule clearer and provides greater guidance as to the type of activity in judicial elections that may lead to disqualification. The Rule in its current form does not, on its face, clearly incorporate the latter two categories.

Of particular concern to the Ethics and Discipline Committee was recognition of newer forms of judicial campaign financing that were not prevalent when Rule 2.11(A)(4) was originally adopted. The increased financial and in-kind activity in many election and retention campaigns, much of it from unidentified sources, requires attention be paid to both to campaigns opposing a judge and to independent expenditures in judicial elections.

Other standards contained in the existing Rule remain unchanged. While there were numerous discussions about changing different aspects of the existing Rule, in the end there was no substantive argument that justified any further change. Retaining the standard of a judge who "knows or learns by means of a timely motion" is commented upon in proposed Comment [7] discussed below. Retention of the options to utilize a time period, a dollar amount or a standard of "reasonable and appropriate" provides adopting jurisdictions with the flexibility necessary to adapt the rule to the special circumstances of local election law and geographic concerns.

- (3) New Comments explaining the black letter changes: Comment [7] explains what is meant by a judge's actual knowledge as referred to in the black letter Rule. Although the definition of "knows" in the Terminology Section of the Model Code states that "knowledge may be inferred from circumstances," this Comment clarifies that such knowledge should not be inferred solely because an organization, be it a judicial campaign committee, political organization or independent entity involved in the campaign, has filed a report as required by law that may be a matter of public record or in the public domain. Also, Comment [7], consistent with the Supreme Court's analysis in *Caperton*, includes contributions or independent expenditures of officers of a party who is an entity or organization for the purpose of computing the aggregate contribution or independent expenditure amounts pursuant to the Rule.

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<sup>19</sup> For example, West Virginia defines an independent expenditure as "an expenditure by a person: (A) Expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, his or her agents, the candidate's authorized political committee or a political party committee or its agents. Supporting or opposing the election of a clearly identified candidate includes supporting or opposing the candidates of a political party. An expenditure which does not meet the criteria for an independent expenditure is considered a contribution." W. VA. CODE R. § 3-8-1a(15) (2010).

Comment [8] clarifies that the phrase “greater than is reasonable and appropriate” is to be determined by considering the listed factors to help determine whether a judge’s impartiality might reasonably be questioned in light of the challenged campaign contribution or expenditure. Finally, Comment [9] makes clear that a contribution to a judge’s election or retention campaign in an amount that is legal under the law of the jurisdiction is not, standing alone, a basis for disqualification.

## **Discussion**

As noted above, the Ethics and Discipline Committees believe that the proposed amendments are necessary to provide up-to-date and forward looking guidance in the new judicial campaign finance landscape. By amending the Terminology Section and dividing the existing text of Model Rule 2.11(A)(4) into the three categories of judicial election spending, the Ethics and Discipline Committees are providing better guidance to judges, lawyers, and the public about contributions made both in support of and in opposition to a judge’s election or retention election that may impact a judge’s impartiality and require disqualification. Including contributions and expenditures made “in opposition to” a judicial candidate’s election acknowledges the perception that a “hostile bias” may exist if a judge knows that a party, the lawyer or law firm who appears before the judge supported the judge’s opponent, just as much as a positive bias may exist if they supported the judge’s election or retention. The proposal to amend Model Rule 2.11(A)(4) also will allow each state to continue to have the option of inserting a specific dollar amount for the donor contribution to be determinative of a disqualification or use the broader “reasonable and appropriate” standard. Alternatively, a state may choose to use a standard of whether a contribution “is reasonable and appropriate for an individual or an entity.”

Rule 4.4 of the Model Code governs judicial election campaign committees. It provides the vehicle by which contributions can be made to judicial candidates facing election or retention election. Rule 2.11, on the other hand, provides the parameters by which elected or retained judges must make a disqualification or recusal determination arising from campaign contributions. In both Model Rules “aggregate” contributions must be considered. The cross reference to Model Rules 4.4 and 2.11 in the definition of “Aggregate” in the Terminology Section of the Model Code of Judicial Conduct merely highlights for the reader the use of that term in both rules. The proposed amendments to the Terminology and the Black Letter of Rule 2.11 will not affect the existing policy in Rule 4.4 nor impact a judicial candidate’s compliance with the obligations set forth in that rule.

Although suggested by some commentators, the Ethics and Discipline Committees determined that no special exception was necessary to the disqualification waiver provision contained in paragraph 2.11(C) of the Model Rule. As stated in that paragraph, the parties may agree, consistent with the requirements set forth in the Rule, to waive a disqualification that arises in the context of paragraph (A)(4). There was insufficient evidence supporting the need to treat judicial campaign contributors as a special class and apply a different standard for waiver when considering disqualification as a result of campaign contributions or expenditures. Additionally, the Ethics and Discipline Committees believe that, as a matter of due process, it is better to retain the current system where all parties are involved in making a waiver decision than to have just one or some parties being asked by the judge to make that decision. It is important to note that

waiver is a relevant consideration only *after* the judge decides that, based on the facts presented, disqualification may be necessary. Then, and only then, will the parties consider waiver consistent with the Rule.

Heretofore, judges required to consider disqualification as a result of contributions made to their campaigns have been required to consider the various types of aggregate contributions previously identified in the Terminology. As stated in the Model Code, consideration must be given to all types of contributions, including those made either in cash or in-kind. This also includes the benefit of services the judicial candidate receives that otherwise would have required a financial expenditure by the candidate. These existing factors have not changed with the proposed amendments to the black letter and should continue to be a consideration in evaluating a disqualification issue. In recalibrating the definition of “Aggregate”, the Ethics and Discipline Committees considered and agreed with the views expressed by various commentators that extending “aggregate contributions” to employees of law firms raised serious constitutional implications and potentially placed unwarranted restrictions on an individual’s participation in political activity and the electoral process.

The Ethics and Discipline Committees also propose adding to the Terminology Section the new term “Independent Expenditures.” The definition includes independent expenditures that are made to organizations, other than the campaign committees, that support or oppose a judge’s election or retention campaign. The Ethics’ and Discipline Committees’ use of the term “Independent Expenditures” is consistent with how the term is used in many state election codes. Similarly, the Court in *Citizens United* defines an independent expenditure as “political speech presented to the electorate that is not coordinated with a candidate.”<sup>20</sup>

New Comment [7] addresses the concern regarding the extent of the judge’s “knowledge” of contributions or expenditures, which triggers consideration of disqualification. This Comment clarifies that although the definition of “knows” in the Terminology Section of the Model Code states that “knowledge may be inferred from circumstances,” a judge should not be presumed to know about a campaign contribution or expenditure simply because such information is part of a filing made pursuant to campaign disclosure laws or part of a public record. Many commentators expressed concern about the economic crisis confronting the states’ judiciaries and the limited administrative resources available to judges. This Comment clarifies that the Rule does not require that judges be required to actively seek out campaign contribution information or conduct research for information that the judge does not already know or is not brought to the judge’s attention by a timely filed motion. As stated in the Scope Section of the Model Code, the rules that guide judges “are rules of reason and should be applied consistent with constitutional requirements, statutes, other court rules and decisional law, with due regard for all relevant circumstances.”<sup>21</sup>

The Ethics and Discipline Committee also determined that it was appropriate to identify in Comment [7] the circumstance confronted by the Supreme Court in *Caperton*. New proposed language states that judges should consider contributions or independent expenditures of officers

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<sup>20</sup> *Supra* note 13, at 360.

<sup>21</sup> MODEL CODE OF JUDICIAL CONDUCT, Scope [5] (2007).

of organizations or entities who are parties when computing aggregate amounts pursuant to the Rule.

Proposed new Comment [8] provides the necessary guidance to judges, and enumerates relevant factors to be considered when determining whether contributions or independent expenditures are “greater than reasonable and appropriate,” resulting in the judge’s impartiality reasonably being questioned. The specific factors contained in Comment [8] are a distillation of the majority of the factors recommended by the Judicial Division<sup>22</sup> as well as the “Judicial Disqualification Fundamental Principles” adopted by the Conference of Chief Justices and cited in Resolution 107.<sup>23</sup>

The substance of Comment [9] is drawn from a recommendation received from the Judicial Division’s Ad Hoc Committee on Judicial Disqualification.<sup>24</sup>

The Ethics and Discipline Committees recognize that the Model Code of Judicial Conduct generally, and Rule 2.11 specifically, cannot address all issues raised by modern judicial election campaigns. Nor is it appropriate for the Model Code to do so. Other action by the Association can complement the obligations and guidance set forth in the Model Code. For example, the Ethics Committee co-sponsored Resolution 110B adopted by the House of Delegates at the February 2013 Midyear Meeting. That Resolution urges the ABA to “support efforts to increase disclosure of political and campaign spending”<sup>25</sup> Moreover, states providing leadership in the area of judicial disqualification, such as Tennessee and Georgia, have, in addition to amending their codes of judicial conduct, adopted procedural rules establishing a process for the filing of timely motions to disqualify, the adjudication of such motions and the prompt review thereof at both the trial and appellate levels.<sup>26</sup>

## **Conclusion**

For the reasons set forth above, the Ethics Committee and Discipline Committee respectfully request that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.

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<sup>22</sup> ABA Judicial Division, *Model Code of Judicial Conduct Rule 2.11 Comments: Comments from the Judicial Division Regarding Proposed Amendments to Rule 2.11 of the Model Code of Judicial Conduct*, AMERICANBAR.ORG,

[http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120801\\_judicial\\_disqualification\\_roundtable\\_rule\\_2\\_11\\_comments\\_all.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120801_judicial_disqualification_roundtable_rule_2_11_comments_all.authcheckdam.pdf) (last visited Apr. 23, 2013).

<sup>23</sup> ABA Standing Comm. on Judicial Independence et al., Resolution 107, AMERICANBAR.ORG (rev’d July 22, 2011), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_107.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_107.doc).

<sup>24</sup> *Supra* note 22.

<sup>25</sup> ABA Section of Administrative Law & Regulatory Practice et al., Resolution 110B, AMERICANBAR.ORG (Feb. 11, 2013), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/2013\\_hod\\_midyear\\_meeting\\_daily\\_journal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_midyear_meeting_daily_journal.authcheckdam.pdf).

<sup>26</sup> Tenn. R. App. P. 10B (2000), *available at*

<http://www.tsc.state.tn.us/rules/supreme-court/10b>; GA. R. UNIF. SUPER. CT. R. 25 (2008), *available at* [http://www.georgiacourts.gov/files/UNIFORM%20SUPERIOR%20COURT%20RULES\\_Updated\\_01\\_22\\_13\\_.pdf](http://www.georgiacourts.gov/files/UNIFORM%20SUPERIOR%20COURT%20RULES_Updated_01_22_13_.pdf).

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Respectfully Submitted,

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

Myles V. Lynk, Chair  
ABA Standing Committee on Professional Discipline  
August 2013

## GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Ethics and Professional Responsibility &  
ABA Standing Committee on Professional Discipline

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

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

### 1. Summary of Resolution(s)

As directed by the House of Delegates in August 2011, when it adopted [Resolution 107](#), this Resolution proposes necessary amendments to the ABA Model Code of Judicial Conduct (Model Code) to address ethical issues relating to disqualification of judges in the election and retention election context. There are three components to the proposed amendments to the Model Code:

#### 1. Two amendments to the Terminology Section.

- The definition of “Aggregate” is expanded to include all contributions and independent expenditures made by a lawyer, a party or the law firm of the party’s lawyer to support or oppose a judge’s election or retention election.
- A new term “Independent Expenditures” refers to any “financial and in kind expenditures in support of or in opposition to the judge’s election or retention, other than those made in concert or cooperation with, or as a contribution to, any judicial candidate’s campaign committee.”

#### 2. Changes to the black letter of Rule 2.11(A)(4). The proposed amendments delineate three categories of aggregate contributions or independent expenditures made to support a judge’s election or retention election, including those to support a judge’s opponent, that may result in a judge’s impartiality being reasonably questioned for purposes of disqualification.

#### 3. Three new Comments to Model Rule 2.11(A)(4) explain the proposed amendments to the black letter Rule.

- New Comment [7] explains what is meant by “the judge knows” of contributions or independent expenditures, as referred to in the black letter.
- New Comment [8] clarifies the phrase “greater than is reasonable and appropriate” by identifying relevant factors that may be considered in determining whether a disqualification is appropriate.

- New Comment [9] makes clear that a contribution permitted under the law should not be, standing alone, a basis for disqualification.

2. Approval by Submitting Entity

The Standing Committee on Ethics and Professional Responsibility approved the Resolution March 13, 2013. The Discipline Committee's approval occurred on March 21, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

No. As noted above, the Ethics and Discipline Committees are filing this Resolution in response to direction from the House in Resolution 107, adopted August 2011.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The adoption of this Resolution would result in amendments to the ABA Model Code of Judicial Conduct.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates

The Center for Professional Responsibility will publish updates to the ABA Model Code of Judicial Conduct on line and annually in print form. The Policy Implementation Committee of the Center for Professional Responsibility has existing procedures and infrastructure to promote adoption of the changes at the state level. The Policy Implementation Committee has long worked successfully with both the Ethics and Discipline Committees to achieve implementation of changed ABA policy originating with the Committees.

8. Cost to the Association (Both direct and indirect costs)

None.

9. Disclosure of Interest (If applicable)

N/A

10. Referrals

The process by which the Ethics and Discipline Committees developed the Resolution was open, transparent and participatory. The Ethics and Discipline Committees provided the Resolution to the Judicial Division, the Standing Committee on Judicial Independence, and the Section of Tort, Trial and Insurance Practice Section. Prior to filing the Committees released within and outside the Association a number of discussion drafts for comment, held public hearings and roundtable discussions, and also met separately with interested entities, including but not limited to the Judicial Division and the Standing Committee on Judicial Independence.

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The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline propose amendments to Rule 2.11, its Comments and the Terminology Section of the ABA Model Code of Judicial Conduct (Model Code) to provide enhanced guidance regarding when disqualification of an elected judge is required as a result of aggregate contributions or independent expenditures made in support of, or opposition to, the judge's election or retention election campaign.

There are three components to the proposed amendments to the Model Code:

- a. Two amendments to the Terminology Section.
  - The definition of "Aggregate" is expanded to include all contributions and independent expenditures made by a lawyer, a party or the law firm of the party's lawyer to support or oppose a judge's election or retention election.
  - A new term "Independent Expenditures" refers to any "financial and in kind expenditures in support of or in opposition to the judge's election or retention, other than those made in concert or cooperation with, or as a contribution to, any judicial candidate's campaign committee."
- b. Changes to the black letter of Rule 2.11(A)(4).
  - The proposed amendments delineate three categories of aggregate contributions or independent expenditures made to support a judge's election or retention election campaign, including those to support a judge's opponent, that may result in a judge's impartiality being reasonably questioned for purposes of disqualification.
- c. Three new Comments to Model Rule 2.11 explain the proposed amendments to the black letter Rule.
  - New Comment [7] explains what is meant by "the judge knows" of contributions or independent expenditures, as referred to in the black letter.
  - New Comment [8] clarifies the phrase "greater than is reasonable and appropriate" by identifying relevant factors that may be considered in determining whether disqualification is appropriate.
  - New Comment [9] makes clear that a contribution permitted under the law should not be, standing alone, a basis for disqualification.

2. Summary of the Issue that the Resolution Addresses

This Resolution was developed in response to the directive of the House when it adopted Resolution 107 in August 2011. What was stated in the introduction to the Report accompanying Resolution 107 holds true today:

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

This Resolution addresses the complex ethical issues associated with the disqualification of judges in the context of the continued and exponential increases in campaign contributions and independent expenditures in judicial election and retention election campaigns.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy position set forth in this Resolution will address the issue by providing necessary enhanced guidance to judges, lawyers and the public in the form of the proposed amendments to the Terminology Section and the black letter and Comments to Model Rule 2.11 of the Model Code of Judicial Conduct as described in response to Question 1 above. For example, the concept of independent expenditures is one not currently addressed in the Model Code. Yet those types of expenditures are increasingly common in judicial elections and retention elections. The proposed amendments to the black letter address this issue and provide, in the Terminology Section, a new definition of “Independent Expenditures.” Another example of how the Resolution addresses the new reality of judicial election financing issues is by including in the proposed changes to the black letter of Model Rule 2.11(A)(4) guidance regarding contributions or independent expenditures made in opposition to a judge in an election.

Similarly, the proposed new Comments to Model Rule 2.11 provide enhanced guidance to judges to help them determine when disqualification is ethically required pursuant to the black letter Rule. Of particular importance, the Comments provide necessary clarity regarding the knowledge requirement regarding contributions or independent expenditures that would trigger the obligation of a judge to disqualify himself or herself from a matter. The new proposed Comment makes clear that such knowledge should not be inferred solely from the fact that an entity, be it a judicial campaign committee, political organization, or independent group, has filed or published a report required by law identifying contributions or expenditures made to support or oppose a judicial election.

The Model Code of Judicial Conduct is the standard to which jurisdictions throughout the nation look for guidance in preparing their state and local rules. The proposed amendments set forth in the Resolution ensure the Model Code’s continued currency, and thus the currency of judicial ethics Rules in the United States.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

4. Summary of Minority Views

In developing this Resolution the Ethics and Discipline Committees utilized an open and transparent process that included posting and circulating broadly numerous discussion drafts for comment, conducting public hearings and roundtable discussions, and meeting with interested entities, including the Judicial Division and the Standing Committee on Judicial Independence.

While the Judicial Division has not expressed opposition to or concern regarding the substance of this specific Resolution, the Division has expressed opposition to and concern about earlier discussion drafts of proposed amendments to Rule 2.11 of the Model Code of Judicial Conduct. Throughout the process leading to the filing of this Resolution, the Ethics and Discipline Committees have worked closely, specifically with the Division, as well as other entities, to resolve concerns.