To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals

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

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

Date: July 16, 2012

Re: Revised Draft for Comment—Rule 2.11 of the Model Code of Judicial Conduct

Consistent with the House of Delegates’ charge under Resolution 107, adopted in August 2011, the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Discipline are pleased to release for public comment revised draft amendments to Rule 2.11 of the ABA Model Code of Judicial Conduct. The proposed amendments address judicial disqualification issues that may arise as a result of contributions made to a judge’s election or retention campaign. The Standing Committees believe that the revised proposed amendments will assist individual state jurisdictions in setting the standards for judicial disqualification and provide the necessary helpful guidance and clarity to judges and professionals when addressing disqualification issues, while recognizing that circumstances vary regarding the election and retention of judges in each jurisdiction.

By way of background, at the 2011 ABA Annual Meeting, the House of Delegates adopted Resolution 107, which was prepared by the Standing Committee on Judicial Independence after extensive consultations and negotiations under the auspices of then ABA President Stephen N. Zack. Resolution 107 had a number of co-sponsors, including the Association’s Judicial Division. Resolution 107 represented a comprehensive response by the Association to the issue of judicial disqualification by elected state judges. As a part of this response, the House of Delegates, in Resolution 107, directed

That the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline should proceed on an expedited basis to consider what amendments, if any, should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.
In compliance with this charge, the two Standing Committees appointed a joint subcommittee to examine this issue and recommend proposals. As a result of the work of this subcommittee, in December 2011, the two Standing Committees distributed widely for comment a preliminary working draft of possible amendments to the Model Judicial Code and the Model Rules of Professional Conduct. This draft was the subject of a public hearing organized by the two Standing Committees at the 2012 Midyear Meeting. http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/scepr_february_3_2012_public_hearing_transcript.authcheckdam.pdf

At the public hearing, the Standing Committees heard testimony from the Association’s Judicial Division, the Standing Committee on Judicial Independence, the Brennan Center for Justice, the Conference of Chief Justices, American Judicature Society, Association of Judicial Disciplinary Counsel, and others. Very helpful testimony and written submissions were received at this hearing. As a result, the Committees agreed that only minor revisions to Rule 2.11 of the Model Code of Judicial Conduct would offer the necessary additional guidance to address campaign contribution disqualification issues. The Committees further decided not to pursue the initial proposed amendments to Rule 4.4 of the Model Code of Judicial Conduct and the proposed new Rule 5.1A of the Model Rules of Professional Conduct.

They directed their joint subcommittee to prepare these draft revisions and report back to both Standing Committees in time for them to circulate the revised draft for comment in advance of the 2012 Annual Meeting and to inform the discussion at a roundtable discussion about the revised draft at that time. The joint subcommittee met in person in Boston on May 31, 2012 in conjunction with the National Conference on Professional Responsibility. That meeting produced a new draft that was reported to the Standing Committees. Upon due consideration by each of the Standing Committees, further revisions were made in the joint subcommittee’s work product and a final working draft was approved. The attached Working Draft—July 16, 2012 is the product of this process.

Importantly, the revised draft amendments to Rule 2.11 are designed to provide an objective standard that may be utilized by each individual state jurisdiction and implemented to achieve a fair and consistent approach in determining disqualification issues arising in the context of campaign contributions. In response to what the Standing Committees heard from the Judicial Division, Standing Committee on Judicial Independence, the Brennan Center, and others who testified about and provided comments in response to the initial draft, the Standing Committees made changes that include, but are not limited to, the elimination of the initial proposed “rebuttable presumption” and terms such as “substantially important.”

The pertinent changes in the revised working draft of amendments to Rule 2.11 include:

- An added paragraph (b) to Rule 2.11 addressing contributions made to organizations that support a judge’s election or retention campaign.
Comment [5] provides additional guidance in determining what constitutes “knowledge” consistent with the Terminology Section of the Model Code.

Comments [6] and [7] provide factors which may be considered when evaluating a situation which may give rise to impartiality and disqualification issues.

Comment [8] provides guidance about the extent or value of the contributions to be considered.

Comment [9] refers to other Rules of the Model Code of Judicial which may be applicable and helpful in determining disqualification issues.

The Standing Committees seek additional comments to this revised Working Draft. To facilitate this process, an open informal roundtable will be held during the 2012 Annual Meeting in Chicago on Friday, August 3, 2012, from 3:15-5:00 p.m. at Westin River North Grand Ballroom A River Level II. Written comments may be submitted to Natalia Vera, Center for Professional Responsibility Senior Paralegal, at Natalia.Vera@americanbar.org, by September 15, 2012.