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: October 16, 2012

Re: For Comment: Revised draft amendments to Rule 2.11 of the Model Code of Judicial Conduct

The ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) and the ABA Standing Committee on Professional Discipline (“Discipline Committee”) are pleased to release for comment revised draft proposed amendments to Rule 2.11 of the ABA Model Code of Judicial Conduct. The new amendments address judicial disqualification issues that may arise as a result of contributions or expenditures made in support of or in opposition to a state judge’s election or retention election campaign.

After further study and consideration of the varied and thoughtful comments received in response to the Committees’ earlier iterations of draft amendments to Rule 2.11, the Committees decided to take a more streamlined approach to the issue. The Committees concluded that only minor changes were necessary to fulfill the charge of the House of Delegates pursuant to Resolution 107 and provide necessary enhanced guidance to judges.

The Standing Committees’ proposal keeps current Rule 2.11 primarily intact except for minor language added to paragraph (A)(4) and the addition of new Comment [7]. The added language to paragraph (A)(4) -- “in support of or in opposition to” -- follows “aggregate contributions,” a term already contained in the existing rule and defined in the Terminology section of the Code. The addition of this language was prompted by the Standing Committees’ consideration of helpful comments from many, including the Judicial Division, the Standing Committee on Judicial Independence, the Brennan Center, and the ABA Tort, Trial and Insurance Practice Section, that contributions made both in support of and in opposition to a judge’s election or retention election campaign may impact a judge’s impartiality.

New Comment [7] addresses “aggregate contribution” in the context of Rule 2.11, identifying the persons and entities to whom it applies, and the ways in which it may be applied in regard to the rule on disqualification, in addition to the factors outlined in the Terminology.
The Standing Committees recognize that election environments, circumstances of contributions and identity of donors will differ in each judicial election from state to state and often within a state. Therefore, the Standing Committees decided to retain the provisions in the original rule that offered each state the flexibility to craft a rule to suit their individual circumstance. Thus, the proposed Rule 2.11 will continue to allow each state 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. The Standing Committees believe that the proposed amendments to Rule 2.11 offer a model that will assist individual states in setting the standards for judicial disqualification for all elected judges.

The Standing Committees intend to submit the proposed amendments to Rule 2.11 to the House of Delegates at the ABA 2013 Mid-year meeting. In the meantime, written comments may be submitted to Natalia Vera, Center for Professional Responsibility Senior Paralegal, at Natalia.Vera@americanbar.org, by October 30, 2012.