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October 31, 2012

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Standing Committee on Professional Discipline
ABA Center for Profesional Responsibility
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Re: Comments of the Judicial Division to the 16th October 2012
Proposed Revisions to Section 2.11 of the Model Code of Judicial Conduct

Dear Ms. Frederick and Professor Lynk:

Thank you for the opportunity to comment on the “Revised Draft Amendments to Rule 2.11 of the Model Code of Judicial Conduct.” Upon receiving the latest 16 October 2012 draft I forwarded it to the Ad Hoc Committee that was established to review all proposed drafts submitted by the 2 Standing Committees. Please note that the Ad Hoc Committee was appointed by my predecessor, The Honorable Richard C. Goodwin, and reauthorized by me upon my assuming the position as Chair of the JD.

Although, time was short between October 17, 2012, the date we received the 16th October 2012, draft and October 31st, the Ad Hoc Committee worked hard to give due consideration to the proposed revisions to Section 2.11. However, despite the hard work, the Ad Hoc Committee concluded that it could not agree with the 16th October 2012, revised draft amendments to Rule 2.11 that was offered by the two Standing Committees. In determining that it could not agree with the 16th October, 2012,
revised draft amendment the Ad Hoc Committee submitted a two page report to the JD Leadership which was presented to the JD Council.

Before looking seriously at the revised draft that was received on October 17, 2012, I advised Professor Lynk that I was looking forward to the time when the JD and the Standing Committees could be in sync to the extent that maybe we could even sing Kumbaya; unfortunately, that has not occurred with the present revised draft. Therefore, based upon the points made by the Ad Hoc Committee and adopted by the Judicial Council, I am constrained to advise the Standing Committees that the Judicial Division cannot support the October 16th revised draft amendments to Rule 2.11 of the Model Code of Judicial Conduct. Although, this is the JD position no one should doubt our desire to find common ground with the Standing Committees and others regarding the language for 2.11. However, as much as I would appreciate the opportunity to move on and concentrate on other things, my constituents feel very strongly that they are confronted with wording that will cause more harm than good to those who must stand for elections within the various jurisdictions throughout America. And as the representative of those constituents, I support their view that further work needs to be done before the language to Rule 2.11 is presented to the HOD.

In requesting that further work be done, the Standing Committees are advised that Rule 2.11 had been scheduled for discussion by at least one of the conferences of the Judicial Division at its Fall Planning meeting, but after being informed that a presentation would not be made to the HOD until August 2013, that conference removed the issue from its agenda with the thought of discussing it fully doing the Midyear meeting. Moreover, the members of the Judicial Division Council also express concern about having to consider a very important issue within a matter of days when they thought the issue was placed on hold until the Annual Meeting. Suffice it to say, the Judicial Division is willing to work with the Standing Committees and others but we are not in the position to support the October 16th revised draft amendments to Rule 2.11.

Please understand that we take our position in good faith and not as an obstructionist. Therefore, we respectfully request that the standing committees move back to the position that was articulated at the time of the October 5th telephone conference and that is, that a draft proposal be presented to the House of Delegates in August 2013.

Respectfully submitted on behalf
Of the Judicial Division

[Signature]
William D. Missouri, Chair

Attachments
A. After consideration, our Committee recommends that you reject the Joint Committees’ proposed revision and instead recommend our prior September 15 amendments to Rule 2.11 for the following reasons:

1. Given the prior telephone contact between the Joint Committees and TIPS and JD leadership since September 15, this short time line does not allow the conferences and members of JD to adequately discuss these new changes. Given the significance of these new changes, state trial judges will be affected throughout the country and should be given time to consider such changes. As an example, NCSTJ had disqualification on their agenda for discussion at its Fall Planning Meeting, but, based on the prior contact, did not discuss the issue but deferred it to a later meeting. The prior September 15 amendments were previously approved by the executive committees of the conferences.

   It seems that these proposed revisions have been formulated by those, who have never been involved in judicial elections. Those, who actually deal with elections "on the ground," should be the voices that should be heard on any revision of the Rule. These revisions discourage the most honorable and ethical of potential candidates/incumbents from seeking/remaining in judicial office;

2. JD should not approve any proposed rule that: (a) contravenes the independence of the judiciary; (b) imposes absolute requirements upon judges that may not be in the best interests of all litigants; or (c) causes the courts to incur unreasonable costs to help judges comply with the proposed requirements. These proposed revisions inappropriately affect all three.

   In fact, these proposed revisions instead seem to encourage judges to “shy away” from making decisions, allowing them an easy out by disqualification;

3. The word, "knows," as defined in the Model Code, may have merit when describing contributions a judge receives in her/his own campaign committee. However, when one considers that "knowledge" also includes "inferred from the circumstances," that knowledge:

   (a) requires judges to investigate matters concerning which they have no prior knowledge and over which they have no control, thus increasing their exposure to facts that may impact the decisions that they have to make. Some jurisdictions have imposed procedures to insulate judges from such a scenario, but others have not;

   (b) is not limited by the public record (which is enough of a problem) but may also include information gleaned from the Internet. Therefore, it becomes difficult to determine what can be inferred from the circumstances. While some states do not allow a judge to access any information concerning contributions (by establishing a "firewall" that does not allow a judge to know who or what firms have contributed to any campaign), in other states, judges are expected to access that information by filing their own reports and are allowed full access to other reports.
Some information may even be learned by just watching the advertisements on television. Therefore, lumping all contributions (other than to the judge’s own campaign) and independent expenditures together to be “inferred from the circumstances” is unacceptable;

(c) causes judges and the courts (in which they serve) to incur additional time and costs to comply with the requirements to investigate information beyond their own campaign committees, which time and costs will be considerable and will be incurred at a time when court budgets are being slashed (creating a funding crisis in the courts); and

(d) some of the information necessary to make these determinations is not available in enough time to make an adequate decision regarding disqualification;

In response, we adopted another approach for contributions (other than those given to the judge’s own campaign committee). Such approach mandates actual bias, determined by considering the suggested factors in our proposal. We believe that is what Caperton and due process require.

4. The proposed revision’s definition of aggregate contributions includes all contributions (a) to the judge’s own campaign, (b) to one or more organizations that support or oppose the campaign, and (c) independent expenditures, yet there is only one limit as to the amount that can be contributed/expended. The judge has no control over such contributions or expenditures (other than those of his own campaign committee). The aggregate contributions level can be exceeded by actions the judge did not even encourage;

5. The proposed revisions do not address the situation where one has contributed to both sides of the election campaign. Many law firms and lawyers give to a number of candidates to “cover their bets.” Does that mean whatever successful candidate wins the judicial election must disqualify in every instance that firm or lawyer participates?

6. The whole exercise of determining aggregate contributions becomes an unacceptable math problem because of the organizations included in the calculation. For example, political party initiatives to help judges in general of which Judge X may be one. E.g., in Dallas in 2006, both major parties had countywide “judicial initiatives” to which contributions were made and then get-out-the-vote efforts were made on a partisan basis. Even in states with non-partisan elections, Minnesota v. White supports the argument that political parties can be involved in judicial elections. Are contributions to such an initiative by a lawyer or party included in the calculation? Further, this math problem does not answer the question of what about a small contribution to a 527 that plays a large role or a large contribution to a 527 that plays a small role? Finally, what about “501 (c)(4)” organizations that raise money and then contribute to 527s; is that another permutation that could be involved with a rule like the currently proposed one?

7. The Committees’ revisions do not eliminate the problems caused by those who would use them to their own advantage (judge shopping), causing mischief and mandating that a judge recuse. Therefore, a waiver of the disqualification should be permitted by the non-contributing party;

We understand that the Joint Committees have “come a long ways from where they were, when they began.” We compliment them for their work. However, we believe these points demonstrate that the revisions do not solve the problems we have always sought to resolve.

B. If you instead think that we need to submit an alternative proposal, we suggest the following one. While it adopts some of the language of the Joint Committees’ proposed revision, it adds language which would make it acceptable to our Ad Hoc Committee.

(See attached file: Disqualification 10-25-12.wpd)  (See attached file: Disqualification 10-25-12.pdf)

We understand the necessity to compromise and the necessity to try to work out an acceptable procedure for disqualification to which everyone can agree. That process allows the ABA to adopt a model rule which would promote stability in this area of disqualification. However, we definitely feel that the Committees’ proposed revisions do not accomplish these goals.

NRS for the Ad Hoc Committee
November 30, 2012

Paula J. Frederick, Chair, Standing Comm. on Ethics & Professional Responsibility
Myles V. Lynk, Chair, Standing Comm. on Professional Discipline
ABA Center for Professional Responsibility
321 N Clark St., 17th Floor
Chicago, IL 60654

Re: Comments of Justice at Stake and the Brennan Center for Justice on
Proposed Revisions to Section 2.11 of the Model Code of Judicial Conduct

Dear Ms. Frederick and Mr. Lynk:

Justice at Stake\(^1\) and the Brennan Center for Justice at N.Y.U. School of Law\(^2\) appreciate the opportunity to offer comments on proposed revisions to Section 2.11 of the Model Code of Judicial Conduct dated October 16, 2012. We commend the American Bar Association’s Standing Committees on Ethics and Professional Responsibility and Professional Discipline for their important leadership on strengthening judicial disqualification rules in light of *Caperton v. A.T. Massey Coal*

\(^1\) Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom – so judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

\(^2\) The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country’s constitutional democracy. Its research, public education, and advocacy in this area focuses on improving 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.
Co.\textsuperscript{3} and \textit{Citizens United v. Federal Election Comm’n},\textsuperscript{4} and in light of Resolution 107, passed by the ABA House of Delegates last year.

Strengthening state judicial disqualification standards combats growing threats to public confidence in the impartiality of our courts. Candidates in state supreme court elections raised $206.9 million between 2000 and 2009, more than double the $83.3 million raised between 1990 and 1999.\textsuperscript{5} Of the 22 states that hold competitive elections for their high courts, 20 set all-time spending records between 2000 and 2009.\textsuperscript{6} In 2012, at least $27.8 million was spent on television advertising in judicial races, setting a new all-time record, and close to 57 percent of this spending – an all-time high – came in the form of spending by outside, non-candidate groups.\textsuperscript{7}

The 2012 North Carolina Supreme Court election illustrates this movement. This year, outside spenders accounted for 84 percent of the total spending on television advertisements. They spent $2.7 million on television advertisements, compared with just $525,000 spent by the two candidates.\textsuperscript{8}

These dramatic spending increases and the outsized role played by special interest groups have had disastrous effects on public confidence in the impartiality of our courts. In a 2001 national survey, 76 percent thought that campaign contributions to judges had at least some influence on their decisions.\textsuperscript{9} By 2011, that number had grown to 83 percent.\textsuperscript{10} When asked in 2011 whether a judge

\begin{thebibliography}{10}
\bibitem{note1} 129 S. Ct. 2252 (2009).
\bibitem{note2} 130 S. Ct. 876 (2010).
\bibitem{note4} Id.
\end{thebibliography}
should step aside when one of the two opposing parties had spent a significant amount to support the judge’s campaign, 93 percent said yes. The perception that campaign spending is influencing judges’ decisions is growing, and recusal reform is needed to ensure that judges remain independent and courts impartial.

Resolution 107 sends a strong signal to state courts that robust recusal rules are critical to shoring up public confidence in the courts. The work of the Committees in proposing revisions to Rule 2.11 governing disqualification is an important step in providing guidance to state courts as they revise their rules. With that in mind, we offer the following comments to the proposed revisions to Rule 2.11.

First, we appreciate the inclusion of independent expenditures under the revised Rule 2.11(A)(4). As noted, in 2012, over half of the spending on television advertisements in state supreme court races came from independent expenditures, up from approximately 30 percent in 2010. In the wake of Citizens United and Speechnow.org v. Federal Election Comm’n, this trend will only likely continue. To avoid confusion, however, we recommend that references to independent expenditures be featured prominently in the text of the rule, rather than in the comments. Simply amending the rule to read “aggregate contributions or independent expenditures” would suffice.

We further appreciate the restoration of language, which had been removed in a previous draft of Rule 2.11(A)(4), that allows a party to file a motion bringing to the judge’s attention contributions that create cause for recusal. In several states, rules are in place to insulate judges from knowing who their campaign donors are, and this allows states to retain those walls. Additionally, this saves states the administrative burden of implementing mechanisms to ensure that judges are aware of who has donated to, or spent on behalf of, their campaigns.

Although the latest proposal has many strong features, we do see room for improvement and offer three constructive suggestions. First, without a waiver provision, Rule 2.11(A)(4) leaves open the possibility of gamesmanship or forum shopping, where litigants might use disqualifying contributions or expenditures to ensure a favorable judge presides over their case. To prevent gaming of the system, we recommend that a party whose opposition donated to, or made expenditures in

\[11\] Id.

\[12\] Press Release, Justice at Stake and Brennan Center, supra note 7.

\[13\] 599 F.3d 686 (2010).

\[14\] It may remain helpful to define independent expenditures – whether in the comments or elsewhere in the rules – to cover both independent expenditures made directly and contributions to other organizations that make these expenditures.
support of, the judge’s campaign be offered an opportunity to waive disqualification. California, for example, provides that: “The disqualification required under this paragraph may be waived by the party that did not make the contribution.”

We would also urge the Committees to eschew per se limits on contributions and independent expenditures in favor of a totality-of-circumstances approach. Rules recently adopted in Tennessee and Georgia are instructive and could serve as helpful examples. In Tennessee, for example, judges must disqualify themselves when they have received campaign contributions or other support such that “the judge’s impartiality might reasonably be questioned.”

With the ever-changing landscape of judicial elections, we fear a per se rule could be rendered obsolete in relatively short order. For many states, pinpointing a precisely correct threshold may prove insurmountable, and freeze the state from adopting any amendments to its recusal rules. Meanwhile, a multi-factor balancing test like Tennessee’s, which draws from considerations raised in Caperton and factors outlined by the Conference of Chief Justices in their amicus brief in that case, is more resilient to continuing changes in the landscape of judicial elections.

Finally, we would urge the Committees to consider the value of making positive recommendations regarding the procedures used to manage recusal requests. 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. We

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16 Tenn. Code of Judicial Conduct R. 2.11(A)(4) (2012). A comment to the rule also outlines factors a judge should consider when deciding whether campaign contributions or other support raise reasonable questions of partiality:

(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.

would therefore recommend rules requiring written orders on recusal motions that state the reasons for the ruling, and providing a process for litigants to seek \textit{de novo} review of recusal requests that have been denied.

We do recognize that recommendations involving waiver, written decisions, and \textit{de novo} review may be viewed as procedural rules governing how courts handle recusal requests, rather than provisions appropriate to a code of conduct governing judicial ethics. But in light of the rapidly escalating pressure on impartial justice, and the crisis of public confidence it has engendered, we respectfully suggest that the distinction between substance and process – which is narrow and blurry to begin with – should not impede the ABA’s effort to craft the most effective possible model rule – one that includes a full menu of changes states may draw from as they reform their rules.

* * *

We thank the Committees again for their thoughtful work and leadership on these issues of vital importance to ensuring fair and impartial courts and the opportunity to provide what we hope are helpful comments. We would happily make ourselves available to answer questions or provide additional assistance as requested. Thank you for your time and consideration.

Respectfully submitted,

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cc: Peter Bennett, Chair, Standing Committee on Judicial Independence
October 20, 2012

Center for Professional Responsibility
American Bar Association
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Re: Comments on Proposed Judicial Disqualification Amendments
Dallas; February 2013

Dear Colleagues:

I write to damn with faint praise the most recent proposal to amend Rule 2.11(a)(4) of the Model Code of Judicial Conduct and the proposed new Comment [7]. These provisions are of course intended to conform the CJC to the Supreme Court’s untutored and unscientific frolic and detour, in *Caperton v. A.T. Massey Coal Co.*, into “psychological tendencies and human weakness.”

It would be preferable simply to remove Rule 2.11(a)(4), on the ground that the government should not be permitted—unless the Due Process Clause is first repealed—to threaten the reputation and professional status of judges with such a vague mandatory rule of discipline. However, the current iteration is now sufficiently toothless that it can safely be added to the CJC, where it will promptly be ignored, as has been the current text of paragraph (a)(4) and its predecessors.

Still, there are systemic costs to adopting even a “less bad” rule, which is why eliminating Rule 2.11(a)(4) altogether is preferable. First, the Supreme Court’s supposedly “objective” standard, as set out in *Caperton*, is in reality an appeal to the subjective “appearance of impropriety” standard, and it is triggered by a mere “probability of bias” to boot. Moreover, invocation of the usual
"whose impartiality might reasonably be questioned" language doesn’t help, because so much depends upon what questions are regarded as "reasonable," and by whom. (As you are probably aware, the Joint Commission that generated the 2007 overhaul of the CJC, which I served as one of its Co-Reporters, struggled with this conundrum several times, but was unable to solve it.)

Second, if it was obvious that Justice Brent Benjamin was so deeply in thrall to the psychological need to repay his "debt of gratitude" to Massey CEO Don Blankenship that he was powerless to resist, why did he vote against Massey Coal in several other, much higher-dollar cases, as Professor Ron Rotunda and other scholars have pointed out? Why did not the Attorney General of West Virginia, representing the State against Massey Coal, "reasonably question" Justice Benjamin’s impartiality, especially in light of the fact that General McGraw was the brother of the candidate Benjamin defeated? Perhaps it was Hugh Caperton who was not being reasonable in sling his questioning arrows.

Third, although we are of course all bound by the Supreme Court’s application of the Due Process Clause in the Caperton case, we are not required to extend that approach to judicial discipline, where the stakes are higher for the judge in the cross-hairs. There is no doubt that Justice Benjamin’s reputation took a large hit in the public square—he will forever be known as "the judge that Massey Coal invested $3 million in to win a $50 million case." But he suffered no actual punishment at the hands of the government, and, as some have argued, he had no "right" to sit on the particular case from which he was ousted.

The same could not be said if Rule 2.11(a)(4) was sought to be applied to Justice Benjamin under the new language that codifies the Caperton memes. The lead-in to Rule 2.11 requires judges, on pain of discipline, to disqualify themselves whenever their impartiality "might reasonably be questioned," and then defines learning about "aggregate contributions" (including independent expenditures) of greater than "an appropriate amount" to be such an occurrence.
As I noted in an earlier submission, moreover, a judge not only faces the Scylla of guessing incorrectly and being punished because a party’s aggregate contributions over a period of time were higher than “appropriate,” but also the Charybdis of stepping aside when it was not required, thus violating Rule 2.7 instead, which commands that judges must hear and decide all matters assigned to them unless they are required by Rule 2.11 not to.

In the end, the chief systemic cost of adopting a bad rule that will immediately enter desuetude, merely to satisfy public clamor and the editorial board of the New York Times, is that it weakens the moral authority of the rule-maker. It is my understanding that while essentially every jurisdiction has a provision that requires self-disqualification when a judge’s impartiality “might reasonably be questioned,” essentially no jurisdiction has defined the receipt of contributions or support above a certain dollar amount or in an “inappropriate” amount, to be an occasion for such self-disqualification, without more.

The ABA, of course respond that it is in the business of commending “model” codes to the states, and using that as one of many vehicles for leadership. But when Bar and judicial leaders who share the ABA’s broad goal of improving the quality and integrity of the justice system uniformly refuse to follow—and for years before the 2007 revision—it is prudent to wonder if the ABA is the one that is out of step on this issue.

Yours,

W. William Hodes