American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

August 9-10, 1999

Judicial Campaign Finance (Report No. 123)

RESOLVED, That the American Bar Association hereby affirms its commitment to the merit selection of judges, and urges all jurisdictions to enact constitutional provisions setting out procedures for the merit selection and either appointment or retention election of their judges; and

FURTHER RESOLVED, That in states and territories which merit selection and retention of judges have not been established by constitutional change or legislative enactment, state, local and territorial bar associations be encouraged to persuade the governors of their respective states and, territories to establish, on their own motion, judicial nominating commissions to advise them with respect to the filling of judicial vacancies, and to appoint only such judges as are recommended by the nominating commission; and

FURTHER RESOLVED, That the American Bar Association urges state, local and territorial bar associations to support and promote the development of educational initiatives to inform the public regarding the nature of judicial responsibilities, the importance of the independence of the judiciary, the qualifications of candidates for judicial office, and the proper operation of the nation's courts; and

FURTHER RESOLVED, That the ABA Code of Judicial Conduct (1990) be amended by adding the following new subsections:

ABA MODEL CODE OF JUDICIAL CONDUCT
CANON 3
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

C. ADMINISTRATIVE RESPONSIBILITIES

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than \$ \text{[}} \text{within the prior [} \text{years to the judge's election campaign, * or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless}

(a) the position is substantially uncompensated;
(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
(c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

* This provision is meant to be applicable wherever judges are subject to public election; specific amount and time limitations, to be determined based on circumstances within the jurisdiction, should be inserted in the brackets.

E. DISQUALIFICATION

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [ ] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than \$ \text{[} for an individual or \$ \text{[} for an entity]] \text{[is reasonable and appropriate for an individual or an entity]], *}

* This provision is meant to be applicable wherever judges are subject to public election. Jurisdictions that adopt specific dollar limits on contributions in section 5 (C)(3) should adopt the same limits in section 3 (E)(l)(e). Where specific dollar amounts determined by local circumstances are not used, the "reasonable and appropriate" language should be used.

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY
(C) JUDGES AND CANDIDATES SUBJECT TO PUBLIC ELECTION

(3) A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate *, $[ ] from an individual or $[ ] from an entity. This limitation is in addition to the limitations provided in Section 5C(2). ***

(4) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, campaign committees established by a candidate shall file with [ ]* a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee whose value in the aggregate: exceed [$ ] ****. The report must be filed within [ ] ****** days following the election.

Add with asterisks the following explanatory notes:

* Each jurisdiction should identify an appropriate depository for the information required under this provision, giving consideration to the public's need for convenient and timely access to the information. Electronic filing is to be preferred.

** In the Terminology Section of the Code:
"Aggregate" in relation to contributions for a candidate under Sections 3 E (l)(e) and 5 C (3) and (4) denotes not only contributions in cash or in kind made directly to a candidate's committee or treasurer, but also, except in retention elections, all contributions made indirectly with the understanding that they will be used to support the election of the candidate or to oppose the election of the candidate's opponent.

*** Jurisdictions wishing to adopt campaign contribution limits, which are lower than generally applicable campaign finance regulations provide, should adopt this provision, inserting appropriate dollar amounts where brackets appear.

**** Jurisdictions wishing to adopt campaign contribution disclosure levels, which are lower than those set in generally applicable campaign finance regulations, should adopt this provision, inserting appropriate dollar amounts where brackets appear.

***** A time period chosen by the adopting jurisdiction should appear in the bracketed space.
C. ADMINISTRATIVE RESPONSIBILITIES

(5) A judge shall not appoint a lawyer to a position if the judge either
knows that the lawyer has contributed more than \([\$ \text{ within the prior } \] \) years to the judge's election campaign, * or learns of such a
contribution by means of a timely motion by a party or other person
properly interested in the matter, unless

(a) the position is substantially uncompensated;
(b) the lawyer has been selected in rotation from a list of qualified and
available lawyers compiled without regard to their having made
political contributions; or
(c) the judge or another presiding or administrative judge affirmatively
finds that no other lawyer is willing, competent and able to accept
the position.

* This provision is meant to be applicable wherever judges are subject to public
election; specific amount and time limitations, to be determined based on
circumstances within the jurisdiction, should be inserted in the brackets.

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limited to instances where:

(a) the judge knows or learns by means of a timely motion that a party
or a party's lawyer has within the previous \([\text{year[s]} made
aggregate** contributions to the judge's campaign in an amount that is
greater than \([\$ \text{ for an individual or } \$ \text{ for an entity}] \) \] is
reasonable and appropriate for an individual or an entity]. *

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election. Where specific dollar amounts determined by local circumstances
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A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate, $[ ] from an individual or $[ ] from an entity. This limitation is in addition to the limitations provided in Section 5C(2).

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Add with asterisks the following explanatory notes:

* Each jurisdiction should identify an appropriate depository for the information required under this provision, giving consideration to the public’s need for convenient and timely access to the information. Electronic filing is to be preferred.

** In the Terminology Section of the Code:

"Aggregate" in relation to contributions for a candidate under Sections 3 E (1)(e) and 5 C (3) and (4) denotes not only contributions in cash or in kind made directly to a candidate’s committee or treasurer, but also, except in retention elections, all contributions made indirectly with the understanding that they will be used to support the election of the candidate or to oppose the election of the candidate’s opponent.

*** Jurisdictions wishing to adopt campaign contribution limits that are lower than generally applicable campaign finance regulations provide should adopt this provision, inserting appropriate dollar amounts where brackets appear.

**** A time period chosen by the adopting jurisdiction should appear in the bracketed space.
In response to concern about the relationship between lawyers making political contributions and the award of engagements to perform legal services in a variety of contexts, the House of Delegates in August 1997 adopted a policy condemning the practice of lawyers making such contributions for the purpose of obtaining employment. As recommended by the House, former ABA President Shestack appointed the Task Force on Lawyers' Political Contributions. The charge of the Task Force was to examine lawyers' political contributions both to government officials and to judicial candidates before whom the lawyers may appear or by whom they may later be appointed to provide compensated legal services, and to make recommendations to the House regarding any further actions that the Association might take to address the condemned practice.

The Task Force presented its Report with Recommendations to the House at the 1998 Annual Meeting. Part II of the Task Force Report dealt with contributions to judges' election campaigns. Numerous recommendations were contained in the Report, urging, among other things, the adoption of amendments to the ABA Model Code of Judicial Conduct and the Model Rules of Professional Conduct.

After recommendations based on Part II of the Task Force Report were withdrawn, President Anderson created an Ad Hoc Committee on Judicial Campaign Finance ("the Committee") to review the recommendations contained in Part II of the Task Force Report and to recommend to the House of Delegates how the Task Force's objectives might best be given effect. The Committee, composed of representatives of the Judicial Division, the Special Committee on Judicial Independence, the Standing Committee on Ethics and Professional Responsibility, and the Task Force, met by teleconference monthly through May, 1999. The Committee carefully examined the issues and recommendations contained in the Task Force Report. In January, 1999 it circulated for comment an initial draft Report and Recommendation, and in February held a hearing in Los Angeles. Testimony and written comments from both individuals and groups have been considered in the Committee's further deliberations.

As was the case with the Task Force's Report and the Ad Hoc Committee's initial draft, the Recommendations filed with this Report are of two types. First, there are general recommendations for the adoption of broad policy relating to the judicial selection process. In some instances, these contemplate legislative, as opposed to
judicial enactments. Second, there are specific recommendations for amendments to the 1990 ABA Model Code of Judicial Conduct, upon which most state codes of judicial conduct are modeled. Relating specifically to judicial campaign contributions and their implications for both contributors and recipients, these proposals are based upon Task Force proposals, but have been reordered, made more specific, and drafted to comport more fully with the format and style of the original Code and Rules.

The Committee’s Recommendations

1. Judicial Selection Procedures:

The Task Force Report pointed out that “the United States is all but unique in having judges stand for election,” with the only other places electing their judiciary being Russia and Switzerland. Task Force Report at 4. The specific recommendations of the Committee to amend the Code of Judicial Conduct are made in recognition of the facts that 42 U.S. jurisdictions have judges at some level stand for election and that such elections often of necessity involve significant fund-raising efforts. The Committee nevertheless urges the Association to reemphasize, as a first order of priority, its strong support for the concept of merit selection of judges.

This record of the Association’s policy supporting merit selection procedures has stood for over a half-century, having first been adopted in 1937. A key consideration in the long history of support for merit selection has been the array of problems that inevitably arise when judicial candidates are obligated to raise funds for their campaigns. Significant among these problems is the likelihood that the public may have cause to question the impartiality of judges whose election to office is too closely tied to their economic reliance on either parties or lawyers who appear before them. Therefore efforts should be made to encourage states to develop and adopt judicial merit selection procedures to the fullest extent feasible in the jurisdiction.

The organized bar should be urged to support efforts to educate the public about the desirability of merit selection procedures and to support and promote legislative initiatives to create such procedures where they do not exist. In the meantime, it should also support the development and implementation of educational programs that inform the public more specifically about the nature of judicial responsibilities and the critical importance of judges retaining their independence while discharging those responsibilities.

2. Appointments by Judges:

The first of the recommendations for amendment of the ABA Model Code of Judicial Conduct is to add a new black-letter section 3C(5) that would limit judges’ appointments of lawyers who have contributed to their campaigns.
Information gathered by the Task Force concerning the extent of the practice of judges appointing campaign contributors appears in the Task Force Report at pages 44-46.

Wishing to address the concerns of the task force as well as the perception that those who contribute larger amounts may receive a disproportionate share of appointments, the Committee recommends that the Model Code of Judicial Conduct contain a provision that allows jurisdictions to adopt a specific dollar limit on the amount a judge may accept from a lawyer in a judicial campaign without being prohibited from subsequently appointing the lawyer to perform legal services as a receiver, guardian ad litem, special master, referee or other compensated position. The effect of the limitation would be to establish a "safe harbor" for lawyers who make political contributions to judges. The provision that is recommended also would allow jurisdictions to establish a time limitation on the proscription, i.e., to identify how long the ban on such appointments should last, appropriate in the community.

Recognizing, as did the Task Force, that there are legitimate circumstances in which a lawyer who makes a significant contribution to a judge's campaign also may be the appropriate lawyer to appoint to a specific task, the Committee recommendation provides three exceptions to the prohibition on appointments. Appointments would be permitted where the lawyer will be serving pro bono, where the judge has selected the lawyer on a rotational basis when the lawyer's name comes up on a list of available counsel, and where the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and available to accept the position. It is the Committee's view that in these circumstances there is no opportunity for the judge to make a disproportionate number of appointments to the contributing lawyer, and the need for an absolute prohibition does not apply.

The Committee also considered, and supports, a recommendation for amendment of the ABA Model Rules of Professional Conduct, being offered concurrently by the Standing Committee on Ethics and Professional Responsibility, to address the subject of lawyers contributing to or soliciting contributions for judges who appoint the contributors to receiverships or other fee-paying positions.

3. Disqualification:

The Committee agrees with the Task Force recommendation (Task Force Report at 35) that the Model Code should contain an explicit provision relating to the situation in which a lawyer appears before a judge to whom he or she has made a campaign contribution in excess of a jurisdiction's limits, or one that would otherwise cause a reasonable person to question the judge's ability to render an impartial decision.
The recommended provision would appear in Canon 3 ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"), Section E, ("Disqualification") as a new subsection (1)(e). As with the provision relating to appointments, this amendment provides that each jurisdiction should determine what period of time would apply with respect to contributions by a lawyer or a party. In recognition that contributions may be made in a variety of forms, or be made indirectly rather than directly, the amendment also provides that the aggregate of all contributions by a lawyer or party must be considered, including indirect ones. To aid in the interpretation and application of this concept, the Terminology section of the Code would be amended to add a definition of the term "aggregate" applicable to this provision.

Concerns were raised by some Committee members and commentators on the Discussion Draft that the addition of specific contribution limits triggering disqualification (unless remitted) could result in lawyers or parties contributing to a judge's campaign solely in order to disqualify that judge. Proposals to prohibit this practice considered by the Committee were found unworkable because of the structure of the Disqualification and Remittal of Disqualification provisions in the Code. As soon as a judge has knowledge gained from any source that an excessive contribution by a lawyer or party has been made, the provisions become applicable. Jurisdictions adopting this provisions are cautioned to consider this problem.

4. Contribution Limits:

The Committee also concurs with the Task Force's recommendation (Task Force Report at 23) that a provision should be added to the Model Code as a new Section 5C(3), for adoption in jurisdictions desiring such a limitation, that sets specific dollar limits on the amount of contributions to judicial campaigns (from any source), thereby creating a safe harbor for appropriate contributions. We do not, however, suggest specific dollar amounts: experiences and circumstances may vary from one jurisdiction to another. For example, a jurisdiction must consider the cost of judicial campaigns, the size of the electorate, the availability of alternative sources of funding (such as partial public funding), or the duration and potentially controversial nature of the judicial race involved, before it determines what specific dollar limitations it will set, and whether different limitations are appropriate for different types of elections. In addition, different dollar limits are suggested for individuals and for entities, to be set by each jurisdiction. The Committee notes further that constitutional concerns need also be taken into consideration with respect to any attempt to identify appropriate limits on campaign contributions. Such limits have been variously upheld and struck down. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and subsequent related cases should be consulted.
5. Campaign Contribution Reporting/Disclosure:

Although all states have some election reporting requirements that are applicable to judicial campaign contributions, the Model Code of Judicial Conduct at present refers to reporting requirements only in the Comment to section 5C(2), in which the concerns arising from lawyer contributions are addressed. The Committee agrees with the Task Force's recommendation (Task Force Report at 19-23) that it is desirable for the Model Code to add a provision for disclosure of contributions and their sources for adoption in jurisdictions desiring this additional disclosure requirement.

The Committee recommends this addition be a new subsection (4) within Section 5C, requiring disclosure of contributions in excess of whatever each jurisdiction considers an appropriate amount. Calling for the identification of the contributor, his or her address, occupation and employer (if any), the provision is applicable to contributions from any source, not just those made by lawyers. The recommended amendment includes a requirement not contained in the Task Force's proposal that, in addition to complying with all applicable statutory requirements for disclosure of campaign contributions, a judge's campaign committee shall file such a report within a specified time period following an election. The Committee also recommends a footnote in the Code that encourages jurisdictions to require the centralized electronic filing of all such reports.

Provisions Requiring Further Consideration

A. Public Campaign Financing of Judicial Elections:

The Committee believes that until merit selection of judges has become the rule rather than the exception, the Association must continue to urge that the funding of judicial election campaigns proceed with the least practical likelihood of harm to the integrity and independence of judicial candidates and judges. The Committee notes that the Task Force urged consideration of public funding and found a very strong case for extending such funding to judicial campaigns in states that already provide funding for other offices. Further, the Task Force urged that States that have retention-only elections might consider the special appropriateness of public funding for judges who face such election.

The Committee agrees that carefully designed and effective programs for the financing of election campaigns — both judicial and other — through public funding should be explored. The Committee also notes that in the November 1998 elections, voters in Massachusetts and Arizona approved initiatives that authorize public funding support for candidates for certain (non-judicial) elections if the candidates voluntarily agree not to accept private funds. Because there are difficult issues that require further study in connection with public funding of judicial election campaigns, however, the Committee recommends that the
questions regarding public funding of judicial elections be considered by the Special Committee on Judicial Independence and the Judicial Division, among other interested Association entities.

B. Surplus Campaign Funds:

The Task Force and some Committee members recommended an amendment to the Model Code of Judicial Conduct to require that unspent campaign funds contributed to judges be returned to the contributors pro rata or turned over to other public or charitable entities to be identified at the discretion of each jurisdiction. (Task Force Report at 49). Other Committee members believe that because use of surplus funds raised in campaigns for non-judicial office also must be prohibited for use in judicial campaigns, the matter should be limited by legislation, rather than by the Model Rules.

Because of the importance of this issue, the Committee recommends that means of curtailment be considered by the Special Committee on Judicial Independence and the Judicial Division, among other interested Association entities.

Respectfully submitted,

M. Peter Moser, Chair
Ad Hoc Committee on Judicial Campaign Financing and
Standing Committee on Ethics and Professional Responsibility
Frederic B. Rodgers, Chair
Judicial Division
Alfred P. Carlton, Jr., Chair
Special Committee on Judicial Independence

August, 1999
1. **Summary of Recommendation(s):**

The recommendations first urge that the Association affirm its commitment to the merit selection of judges; that state and local bars encourage the creation of judicial nominating commissions in jurisdictions where merit selection procedures do not exist; and that educational initiatives be developed to inform the public on the operation of the nation's courts and the importance of the independence of the judiciary.

Charged specifically with the task of reviewing the recommendations relating to judicial campaign contributions of the Task Force on Lawyers' Political Contributions (second part of the Task Force Report) the Ad Hoc Committee recommendations next address the issue of setting a specific dollar limit on judicial campaign contributions by a lawyer the judge appoints to a position and disclosing all judicial campaign contributions from an individual or entity in excess of the specified amount. The campaign contribution cap serves as a 'safe harbor' to obviate the need for the judge to recuse him or herself when contributions are below the 'safe harbor' amount. Notwithstanding the problem of judges providing appointments to lawyers who make contributions to the judges' campaigns (i.e., in proceedings in surrogate court and eminent domain and seizure, and appointment of special masters, guardians, mediators, receivers and criminal defense counsel) the exceptions allow selection in rotation from a list, but, recognizing the need for flexibility, allow a judge to appoint contributors above the limit who may have special expertise in an area or are the only qualified counsel for a particular type of matter.

2. **Approval by Submitting Entity:**

This Recommendation was approved by the Ad Hoc Committee on Judicial Campaign Finance on May 5, 1999.
3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

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

Canon 3 of the 1990 Revised Code of Judicial Conduct presently addresses the recusal of judges and Canon 5, in its treatment of judges' political activity, discusses the ethical danger of judicial candidates' acceptance of campaign contributions from lawyers and parties who may appear before them and its potential for bringing about a judge's disqualification. The Ad Hoc Committee, the Standing Committee on Ethics and Professional Responsibility, the Judicial Division and the Special Committee on Judicial Independence (which are cosponsoring this proposal) believe that the Code should address both recusal and appointments by judges as each relates to judicial campaign contributions above specified amounts.

5. What urgency exists which requires action at this meeting of the House?

Approval of this Recommendation and Report by the House of Delegates at this meeting is needed because the issues set forth in the Recommendation arise daily throughout every United States jurisdiction in which judges are obliged to raise campaign funds to participate in judicial races.

6. Status of Legislation. (If applicable.)

Not applicable.

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

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

A Discussion Draft of the Report and Recommendation was disseminated in January 1999 to members of the House of Delegates, presidents and executive directors of state and local bar associations represented in the House, chief justices of state supreme courts, state judicial and lawyer
disciplinary agencies, the Association of Bond Lawyers, and chairs and staff liaison or directors of ABA Sections, Divisions, Forums and Standing and Special Committees, Commissions, Task Forces and Working Groups; it was also posted on the Center for Professional Responsibility's website, www.abanet.org/cprrev/cic2.html. Written comments were solicited and submitted until March 31, 1999. Oral comments on the Draft were taken at a public hearing at the Doubletree Hotel on Saturday afternoon February 6, 1999 during the Midyear Meeting in Los Angeles.

10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present the report to the House.)

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