No. 08-22

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

MASSEY COAL COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN

H. THOMAS WELLS, JR.
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000

Counsel for Amicus Curiae
American Bar Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Public Confidence In The Integrity of The Judicial System Is Threatened When Judges Fail To Recuse Themselves From Cases Brought By or Against Substantial Campaign Contributors. 4

II. ABA Standards Mandating Recusal In Cases Involving The Reasonable Appearance of Impropriety Often Depend On Self-Enforcement..... 9

A. ABA Standards Mandate Recusal In Cases Presenting An Appearance of Impropriety In Reasonable Minds.. . 9

B. Disqualification Standards Usually Depend on a Judge's Self-Enforcement 16

III. This Court Should Identify the Due Process Considerations That Govern Recusal When a Contributor Is A Party 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 20

Baker v. Carr,
369 U.S. 186 (1962) 4

Forest Coal Co. v. Doolittle,
54 W. Va. 210, 46 S.E. 238 (1903)..... 5

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003) 8

Oakley v. Aspinwall,
3 N.Y. 547 (1850) 5

Stern Bros., Inc. v. McClure,
160 W. Va. 567, 236 S.E.2d 222 (1977)..... 5

United States v. Mistretta,
488 U.S. 361 (1989) 4

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 20

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. xiv ..... *passim*

28 U.S.C. §455(a) 3, 13, 16

ALA. CODE §§ 12-24-1, 2 15

CAL. CIV. PROC. CODE § 170.1 (a)(6)(A)
(West 2005) 14

MICH. COURT RULES § 2.003 (2007) 14

MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(1) (2007) 14

MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2007) 16

MONTANA CANONS OF JUDICIAL ETHICS, Canon 13 (2007) 14

W. VA. CODE OF JUD'L CONDUCT, *available at* http://www.state.wv.us/wvsca/JIC/codejc.htm 10

WIS. SUP. CT. RULE 60.04(4) (2007) 14

OTHER AUTHORITIES

ABA CANONS OF PROFESSIONAL ETHICS (1908) 2, 9

ABA CODE OF JUDICIAL CONDUCT, Canon 2 (1972) 9

ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html 2

ABA MODEL CODE OF JUDICIAL CONDUCT ..... *passim*

ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003), *available at* http://www/abanet.org/barserv/library/n/judiciary 14

ABA STANDARDS RELATING TO COURT ORGANIZATION (rev. 1990) 2

ABA STANDARDS RELATING TO TRIAL COURTS (rev. 1992) 2

ABA STANDARDS RELATING TO APPELLATE COURTS (rev. 1994) 2

Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings,* N.Y. Times, Oct. 1, 2006, at A1 ..... 8, 18

ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2004) 15

Stephen G. Breyer, *Serving America's Best Interests,* DAEDALUS, Fall 2008, 139 5

Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007), *available at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf 7

Dee Hall, *Can Our Elected Judges Be Neutral? Campaign Contributions from Special Interest Groups Can Create an "Appearance of Conflict of Interest" Some Say,* Wis. St.J., April 9, 2007, at A1 18

Editorial, *Illinois Judges: Buying Justice?,* ST. LOUIS POST-DISPATCH, Dec. 20, 2005 18

Editorial, *Politics, Justice,* LAWRENCE JOURNAL-WORLD, Mar. 29, 2007 18

Elaine Silvestrini, *Public Thinks Campaign Cash Sways Judges,* TAMPA TRIBUNE, Nov. 4, 2006 18

Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire* (2001-2002) 5, *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf..... 8

HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 588 (tent. ed. 1958) 5

HERBERT JACOB, JUSTICE IN AMERICA (1972) 5

HOWARD JAMES, CRISIS IN THE COURTS (1967)..... 5

H.R. REP. NO. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351 13

J. Christopher Heagarty, *The Changing Face of Judicial Elections,* N.C. ST. B. J. 20 (Winter 2002)..... 6

John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation,* 37 HARV. J. ON LEGIS. 69, 87 (2003) 16-17

JUSTICE AT STAKE CAMPAIGN, 2008 SUPREME COURT ELECTIONS: MORE MONEY, MORE NASTINESS, *available at* http://temp.justiceatstake.org/node/63. 6

Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) 7

Lisa L. Milord, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992) 10

Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Court: Judicial Survey Results* (2007), *available at* http://www.appcpenn.org/Downloads/20071017_JudicialSurvey/ 6, 7

Michael J. Goodman & William C. Rempel, *Justice v. Justice,* L.A. TIMES, June 8, 2006, at A1 18

Mike Linn, *Group Wants Cobb Off Case,* MONTGOMERY ADVERTISER, Jan. 24, 2007 18

Recommendation and Report 112 to the ABA House of Delegates from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Lawyers' Responsibility for Client Protection, and the Judicial Division (August 1997) 11

Recommendation and Report 200 to the ABA House of Delegates from the ABA Joint

Commission to Evaluate the Model Code of Judicial Conduct (February 2007) 12

Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns,* 35 IND. L. REV. 819 (2002) 6

RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 9.44 (2d ed. 2007) 16

Sandra Day O'Connor, *Justice for Sale,* Wall St. J., Nov. 15, 2007, at A25..... 7

Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) 7

T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1A..... 7

Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001)*, available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm..... 7

INTEREST OF THE AMICUS[1]

Amicus curiae American Bar Association ("ABA") respectfully submits this brief in support of Petitioners and urges the Court to provide guidance concerning the requirements imposed by the Due Process Clause of the Fourteenth Amendment on a judicial recusal decision where a judge has received a substantial and proximate campaign contribution from a party in a case before the judge.

The ABA has been at the forefront in advancing legal and judicial ethics for over one hundred years. With approximately 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. ABA members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its membership includes lawyers in private practice, government service, corporate law departments, and public interest and other nonprofit organizations, as well as legislators, judges, law professors, law students, foreign lawyers and non-lawyer associates in related fields.[2]

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters or e-mails on file with the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor

One of the ABA's goals is "[t]o preserve the independence of the legal profession and the judiciary."[3] Since at least 1908, when the ABA adopted its first CANONS OF PROFESSIONAL ETHICS, the ABA has taken a leading policy-making role on issues involving judicial impartiality and disqualification, the ability of state courts to guarantee due process of law to all litigants, and the public's confidence in the integrity and impartiality of the judiciary. This work has been incorporated into the ABA's evolving Canons of judicial conduct which, as discussed below in the Argument section, have contained mandatory provisions since 1990 that would require recusal under the facts of this case.

In addition, the ABA has actively worked to promote public understanding of, and respect for, the judiciary through a variety of publications,[4] initiatives,[5] and programs.[6] Among others, the

---

was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *at* http://www.abanet.org/about/goals.html.

[4] For example, the ABA Committee on Standards of Judicial Administration has promulgated a multi-volume set of suggested standards of judicial administration, including STANDARDS RELATING TO COURT ORGANIZATION (rev. 1990), STANDARDS RELATING TO TRIAL COURTS (rev. 1992), and STANDARDS RELATING TO APPELLATE COURTS (rev. 1994).

[5] For example, the ABA's Commission on the 21st Century Judiciary, and those initiatives undertaken by its Standing Committee on Federal Judicial Improvements and by its Standing Committee on Judicial Independence.

Judicial Disqualification Project inaugurated in 2007 by the ABA's Standing Committee on Judicial Independence has researched disqualification rules around the country. The forthcoming final report will include a discussion of concerns regarding judicial proceedings involving large campaign donors.

Through these and other projects, the ABA has devoted over one hundred years to addressing the issues raised in this case and, specifically, the effects of the appearance of judicial impropriety on public confidence in the judiciary.

SUMMARY OF ARGUMENT

The integrity of the judicial process requires that judges avoid both actual bias and the reasonable appearance of bias so as to preserve confidence in the fairness and impartiality of judicial determinations. Few actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor to the judge's election campaign. The principle of an unbiased judiciary has been reflected in the ABA's Canons since at least 1908. Along with the federal counterpart, 28 U.S.C. § 455(a), the Canons focus on disqualification for both actual impropriety and the reasonable appearance of impropriety.

---

[6] For example, the ABA Coalition for Justice uses outreach programs to raise public awareness of, and confidence in, the judiciary and develops public/bar relationships with national organizations and federal agencies on justice system issues.

Yet recusal motions rarely succeed in state court cases where contributors appear as litigants, because judges typically self-enforce the governing disqualification standards. Where a judge's decision to remain on a case has been met with widespread public disagreement, the negative effects on the courts have been real and immediate, as shown by the present case. The ABA therefore suggests that this Court should identify those considerations that govern recusal on due process grounds when a contributor to the judge's election campaign is a party. Based on its research and the experiences of its members in this field, the ABA suggests some of the factors that it believes are relevant to this issue.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE INTEGRITY OF THE JUDICIAL SYSTEM IS THREATENED WHEN JUDGES FAIL TO RECUSE THEMSELVES FROM CASES BROUGHT BY OR AGAINST SUBSTANTIAL CAMPAIGN CONTRIBUTORS.

It has long been recognized that public confidence in the integrity of the judiciary is vital to our system of justice. Because courts possess "neither the purse nor the sword," *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), their authority depends ultimately on public acceptance of their legitimacy. That acceptance depends, in turn, on the public's faith in the impersonal and reasoned foundation of judicial decisions. *See, e.g., United States v. Mistretta,* 488 U.S. 361, 407 (1989) ("The

legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); Stephen Breyer, *Serving America's Best Interests,* DAEDALUS, Fall 2008, 139, 139 ("[T]he judiciary is, at least in some measure, dependent on the public's acceptance of its legitimacy").[7] Both litigants and government bodies depend upon courts remaining "free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind." *Oakley v. Aspinwall*, 3 N.Y. 547, 552 (1850).[8]

As the instant case reflects, few actions jeopardize the public's trust in the judicial process

---

[7] *See also* CODE OF PROFESSIONAL ETHICS Preamble (1908), ("In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed * * * and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration."), *at* http://www.abanet.org /cpr/1908-code.pdf. S*ee generally* HOWARD JAMES, CRISIS IN THE COURTS (1967); HERBERT JACOB, JUSTICE IN AMERICA (1972); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 588 (tent. ed. 1958).

[8] *See, e.g., Stern Bros., Inc. v. McClure,* 160 W. Va. 567, 577, 236 S.E.2d 222, 229 (1977) (citing this language with approval); *Forest Coal Co. v. Doolittle,* 54 W. Va. 210, 227, 46 S.E. 238 (1903) (same).

more than a judge's failure to recuse in a case involving a substantial contributor to the judge's election campaign. Historically, state judicial elections were "low key affairs," in which the merits of special legal disputes were not discussed and advertising was modest. *See* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns,* 35 IND. L. REV. 819, 819 (2002). Recent years, however, have seen a marked increase in efforts by political donors to fund judicial elections that may benefit their agendas.[9] In 2008, spending on television advertising in state high court elections alone was up 24% over the figure for 2006 election campaigns. Much of the funding for these campaigns came from special interests seeking to achieve specific policy outcomes.[10]

Polling data demonstrates that large and concentrated contributions to judicial officers have a negative effect on public confidence in the integrity of the courts. Surveys conducted at national[11] and

---

[9] As an Ohio AFL-CIO official candidly acknowledged: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." J. Christopher Heagarty, *The Changing Face of Judicial Elections,* 7 N.C. St. B. J. 20, 21 (Winter 2002).

[10] *See* Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness, *at* http://justiceatstake.org/node/63 (Nov. 5, 2008).

[11] Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Courts: Annenberg Public Policy Judicial Survey Results* (2007) (finding that 69% of the public "thinks that raising money for elections affects a judge's

state[12] levels show that a substantial majority of the

---

rulings to a moderate or great extent."), *at* http://www.appcpenn.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf; Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007), (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions," and more than 80% of African-Americans express this view, including 51% believing that judicial election contributions carry a "great deal" of influence), *at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf.

[12] **Texas:** Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) (finding that 83% of Texans believe money has an impact on judicial decisions); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court,* 8 (2001) (finding Texas Supreme Court 750% more likely to grant discretionary petitions for review filed by contributors of at least $100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of $250,000 or more) *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm.

Pennsylvania: Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) (finding that 90% of voters believe judicial decisions were influenced by large campaign contributions); *see also* Sandra Day O'Connor, *Justice for Sale,* Wall St. J., Nov. 15, 2007, at A25 (noting that statistic).

Ohio: T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER (CLEVELAND), Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90% of respondents believed

public – reported to be as high as 90% in two states – believes that campaign contributions influence judicial decisions. Many state court judges hold the same view: A 2002 national survey of elected state judges showed that 26% of them believe that campaign contributions have at least *some* influence on judges' decisions, and another 9% believe such contributions have a *great deal* of influence.[13]

In short, the growing role of private money in judicial elections has been seen to have created a perception that, as this Court stated concerning campaigns for federal offices, "large donors call the tune." *Compare McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 143-44 (2003) (discussing importance of government interest in "combating the appearance or perception of corruption engendered by large campaign contributions [to candidates for federal offices]").

---

campaign contributions influenced judicial decisions). *See also* Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings,* N.Y. TIMES, Oct. 1, 2006, at A1 (finding that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs," and "voted in favor of contributors 70 percent of the time.")

[13] Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire,* 5 (2001-2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf

II. ABA STANDARDS MANDATING RECUSAL IN CASES INVOLVING THE REASONABLE APPEARANCE OF IMPROPRIETY OFTEN DEPEND ON SELF-ENFORCEMENT.

A. ABA Standards Mandate Recusal In Cases Presenting An Appearance of Impropriety In Reasonable Minds.

Since at least 1908, when the ABA adopted the first CANONS OF PROFESSIONAL ETHICS, the ABA has recognized the importance of a judiciary that will forego "other employments, whether of business, political or other character, which may embarrass their free and fair consideration of questions before them for decision."[14] In 1924, Canon 4 of the ABA's first CANONS OF JUDICIAL ETHICS recognized that judicial conduct "should be free from impropriety and the appearance of impropriety."[15] In 1972, in the first reformulation of the Canons as the CODE OF JUDICIAL CONDUCT, this principle was stated more forcefully as Canon 2: "A judge should avoid impropriety and the appearance of impropriety in all his activities."[16]

When the Code was revised in 1990 and retitled the MODEL CODE OF JUDICIAL CONDUCT ("1990 MODEL

---

[14] CANONS OF PROFESSIONAL ETHICS Canon 2 (1908), *at* http://www.abanet.org/cpr/1908-code.pdf.

[15] CANONS OF JUDICIAL ETHICS Canon 4 (1924), *at* http://www.abanet.org/cpr/jclr/1924-canons.pdf.

[16] CODE OF JUDICIAL CONDUCT Canon 2 (1972) *available from* ABA Archives.

CODE"), "should" was replaced by "shall" in Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[17] A test for the appearance of impartiality was also added to the 1990 MODEL CODE, which was "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[18] This mandate, accordingly, has been recognized since at least 1990.[19]

In 1997, Commentary was added to Canon 5 that specifically addressed judicial campaign fund-

---

[17] MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990), *at* http://www.abanet.org/cpr/mcjc/canon-2.html. According to the Reporter's Notes, this change was not intended to effect a substantive change but rather, to "more accurately indicate the nature of mandatory standards expressed in terms of 'should' in the 1972 Code." LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 12 (1992).

[18] 1990 MODEL CODE Canon 2 Commentary, *supra* note 17. According to the Reporter's Notes, this test was added "[b]ecause the danger caused by the appearance of impropriety consists in damaging public confidence in the judiciary." MILORD, *supra* note 17, at 13.

[19] West Virginia's current CODE OF JUDICIAL CONDUCT appears to be the same as the ABA's 1990 MODEL CODE as to Canon 2, Rule 2(A) ("A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), and as to the Commentary to Rule 2(A), which includes the same test for appearance of impropriety. W. VA. CODE OF JUDICIAL CONDUCT, *at* http://www.state.wv.us/wvsca/JIC/codejc.htm.

raising.[20] This resulted from "a survey of ethics opinions, judicial disqualification cases, and news articles from the general media" that convinced the ABA's Standing Committee on Ethics and Professional Responsibility that although permissible from a legal standpoint, "the fund-raising that accompanies judicial campaigns frequently gives rise to conflicts of interest that may reflect adversely upon the impartiality of the judiciary."[21] The added Commentary stated:

> There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. * * * Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for

---

[20] MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1997 amendments), a*vailable from* ABA Archives. Canon 5 stated: "A judge or judicial candidate shall refrain from inappropriate political activity."

[21] Recommendation and Report 112 to the ABA House of Delegates from the Standing Committee on Ethics and Professional Responsibility, Standing Committee on Lawyers' Responsibility for Client Protection, and the Judicial Division, August 1997, at 1, *available from* ABA Archives.

disqualification as provided under Section 3(E).[22]

Most recently, in 2007, after a comprehensive review of the ABA standards, the MODEL CODE OF JUDICIAL CONDUCT (2007) ("2007 MODEL CODE") was adopted. Canons 1 and 2 were combined as Canon 1, which now states, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[23] The mandatory "shall" was retained and the drafters decided to place the "injunction to avoid impropriety and its appearance" in "the very first Canon."[24]

In addition, the test for the appearance of impropriety was amended and is now "whether the conduct would create in reasonable minds a

---

[22] MODEL CODE OF JUDICIAL CONDUCT Canon 5 Commentary (1997 amendments), a*vailable from* ABA Archives. Canon 3 stated: "A judge shall perform the duties of judicial office impartially and diligently." *Id.* Canon 3(E) dealt with disqualification, of which 3(E)(1) stated, "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 [listing circumstances]." *Id.*

[23] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007), *at* http://www.abanet.org/judicialethics/ABA-MCJC-approved.pdf. Canon 2 now states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." *Id.*

[24] Recommendation and Report 200 to the ABA House of Delegates from the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, February 2007, at 5, *available from* ABA Archives.

perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[25]

The 2007 MODEL CODE thus continues to focus – as does its federal counterpart, 28 U.S.C. § 455(a)[26] -- on concern for both actual impropriety and the appearance of impropriety. Further, for both Canon 1 of the 2007 MODEL CODE and Section 455(a), the test is whether the judge's impartiality might reasonably be questioned.[27] The ABA's concern with the appearance of impropriety is based on its conclusion that "[a]ppearances matter because the public's perception of how the courts are performing

---

[25] 2007 MODEL CODE Canon 1 Rule 1.2, cmt [5], *supra* note 23. Rule 1.2 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." *Id.*

[26] 28 U.S.C. § 455(a) provides that a judge "shall" disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." The objectivity of this standard, which was adapted from the 1972 version of the ABA's MODEL CODE, replaced an earlier statute that included the subjective phrase "in his opinion." The amended version, according to the report of the House Judiciary Committee, was designed to promote public confidence in the impartiality and integrity of the judicial process by making recusal mandatory if any reasonable factual basis for doubting the judge's impartiality exists. H.R. REP. NO. 93-1453 at 5, *reprinted in* 1974 U.S. C.C.A.N. 6351, 6354-55.

[27] *Compare* 28 U.S.C. § 455(a) *with* 2007 MODEL CODE, Canon 1, Rule 1.2, cmt [5], *supra* note 25.

affects the extent of its confidence in the judicial system." ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, 10 (2003).

Rule 2.11(A), which is the 2007 MODEL CODE's general disqualification rule,[28] has been adopted in some form in virtually every state.[29] In 1999, in

---

[28] Rule 2.11(A) was formerly Canon 3E(1) in the 1990 MODEL CODE. Rule 2.11(A) states "A judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [listed circumstances (A) (1) – (A)(6)]".

[29] Rule 2.11(A)'s requirement of disqualification if a judge's impartiality might reasonably be questioned has been adopted in 45 states, and with variations in California, Mississippi and Wisconsin. *See* CAL. CIV. PROC. CODE § 170.1 (a)(6)(A) (West 2005) (requiring disqualification if the judge "believes there is a substantial doubt as to his or her capacity to be impartial" or if "a person aware of the facts might reasonably entertain a doubt" as to the judge's partiality); MISS. CODE OF JUDICIAL CONDUCT Canon 3E(1) (2007) (requiring disqualification when a judge's "impartiality might reasonably be questioned by a reasonable person knowing all the circumstances"); WIS. SUP. CT. RULE 60.04(4) (2007) (requiring disqualification when "well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial"). The remaining two states have adopted differing language. MONTANA CANONS OF JUDICIAL ETHICS Canon 13 (2007) (a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor"); MICH. COURT RULES § 2.003 (2007) ("a judge is disqualified when the judge cannot impartially hear a case"). As stated *supra* note 19, West Virginia's Code of Judicial Conduct includes the 1990 MODEL CODE's test for the appearance of impropriety, which is "whether the conduct would create in reasonable minds a perception that

recognition of the growing importance of campaign funding on judicial elections, the ABA added what is now Rule 2.11(A)(4), requiring disqualification when a judge has received campaign contributions above a certain level (which the state is free to establish for itself) from parties or lawyers involved in a case.[30] The Rule requires disqualification when:

> [t]he judge knows or learns by means of a timely motion that a party, a party's lawyer or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $ [insert amount] for an individual or $ [insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].[31]

At least two states have adopted Rule 2.11(A)(4),[32] and this rule was reaffirmed by the ABA House of Delegates in 2007.

---

the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

[30] Rule 2.11(A)(4) was originally added as Canon 3E(1)(e) in the 1999 amendments to the 1990 MODEL CODE, based on the work of the ABA Ad Hoc Committee on Judicial Campaign Finance.

[31] Where specific dollar amounts are not used, the "reasonable and appropriate" language should be used. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2004) at 245.

[32] Alabama and Mississippi have adopted versions of Rule 2.11(A)(4). *See* ALA. CODE §§ 12-24-1, 2 (incorporating specific dollar amount); MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2)

B. Disqualification Standards Usually Depend on a Judge's Self-Enforcement.

The 2007 MODEL CODE – like its federal counterpart, 28 U.S.C. § 455(a) – requires disqualification for both actual impropriety and the appearance of impropriety. Since disqualification motions are usually addressed to the judge in question, however, the standard often goes unenforced, especially in cases involving the appearance of impropriety.

If a challenge presents a reasonable basis for doubt about the judge's personal stake or interest in the outcome, then the judge should grant the recusal motion. If the judge does not do so, at least at the trial or intermediate court level, factual issues relating to the motion may be determined by another judge, or possibly by an appellate court. When the judge sits on a state's highest court, of course, no appeal based on state law issues exists.

The reality is that recusal motions have "repeatedly been rejected by appellate courts in a number of states where judges are elected." RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 9.44 (2d ed. 2007) (collecting cases). When they involve issues related to campaign financing, such motions "hardly ever succeed." John Copeland Nagle, *The Recusal*

(incorporating reasonable and appropriate rather than a specific dollar amount).

Alternative to Campaign Finance Legislation, 37 HARV. J. ON LEGIS. 69, 87 (2003).

There are many possible explanations for these results. Judges take an oath to be impartial and may honestly believe that they can decide the case fairly, regardless of the source of campaign contributions. They may be concerned that disqualifying themselves could be interpreted as validating public suspicion that elected judges are beholden to their contributors. Indeed, one reason for not forbidding a judge from hearing matters in which a litigant has contributed to the judge's campaign is to prevent unscrupulous parties or counsel from making contributions to, and thereby disqualifying, judges whose views on the law may be unsympathetic to their own.[33]

The appearance of impropriety, however, is not dispelled by a judge's belief in his or her impartiality,

---

[33] On the other hand, requiring recusal based on campaign contributions could make campaign fundraising more difficult. Accordingly, the ABA does not assert that recusal is required in the face of *any* campaign contribution by a party or lawyer appearing before the recipient judge. Many elected judges, particularly those in more remote areas, still rely on relatively small, individual contributions from the local bar, and the MODEL CODE has long had a *de minimis* exception with respect to disqualification for economic interests in Rule 2.11(A)(3) and in the Terminology section definition of "*de minimis*" as "an insignificant interest that could not raise a question regarding the judge's impartiality." Furthermore, an absolute bar on such contributions would be counterproductive, for it would likely prevent the judge from hearing virtually any case in that jurisdiction, and would likely raise significant First Amendment concerns as well.

no matter how legitimate. Where a judge's decision to remain on a case has been met with widespread public disagreement, the negative effects on the courts have been real and immediate, as demonstrated by the many press accounts of the instant case, as well as those in Alabama, Florida, Illinois, Kansas, Nevada, Ohio, Texas, and Wisconsin.[34]

---

[34] *E.g.,* Mike Linn, *Group Wants Cobb Off Case*, MONTGOMERY ADVERTISER, Jan. 24, 2007 (reporting claim that Alabama Chief Justice "is not fit in this case to dispense justice" because she accepted contributions from a lawyer in the case); Elaine Silvestrini, *Public Thinks Campaign Cash Sways Judges,* TAMPA TRIBUNE, Nov. 4, 2006 (reporting on judicial campaign contributions from lawyers and public perception that these influence judges); Editorial, *Illinois Judges: Buying Justice?,* ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8 (discussing insurance company's campaign contribution to Illinois Supreme Court Justice who later voted to overturn $1 billion damage verdict against the insurer); Editorial, *Politics, Justice,* LAWRENCE JOURNAL-WORLD, Mar. 29, 2007 (discussing appearance problem where judge dismissed criminal charges against an abortionist after accepting campaign contributions from the defense lawyers); Michael J. Goodman & William C. Rempel, *Justice v. Justice,* L.A. TIMES, June 8, 2006, at A1 (reporting on Nevada judges who "routinely rule in cases involving friends, former clients and business associates," and in favor of lawyers who "fill their campaign coffers"); Liptak & Roberts, *supra* note 12; Dee Hall, *Can Our Elected Judges Be Neutral? Campaign Contributions from Special Interest Groups Can Create an "Appearance of Conflict of Interest" Some Say,* WIS. ST. J., April 9, 2007, at A1 (reporting on revelation that pro-school-choice group had campaigned aggressively to elect justice who cast deciding vote upholding constitutionality of school voucher plan).

III. THIS COURT SHOULD IDENTIFY THE DUE PROCESS CONSIDERATIONS THAT GOVERN RECUSAL WHEN A CONTRIBUTOR IS A PARTY.

The ABA believes that guidance is needed from the Court as to the due process considerations that should be made by a judge in determining whether recusal is constitutionally required when a campaign contributor is a party to a case before that judge.

The ABA does not presume to suggest hard and fast rules for determining when the failure to recuse constitutes a due process violation. However, based on its research and the experiences of its members in this field, the ABA has developed factors that it believes are relevant in campaign contribution cases. These include the size and importance of the contribution since, as the amount increases, so does the perception of influence and the risk that the judge's impartiality might be reasonably questioned. A contribution that is unusually large in absolute or relative terms, or that results in an appearance of dependence on the contributor, should weigh heavily in favor of recusal. However, an appropriate dollar limit may depend on the costs of judicial campaigns in a jurisdiction, recognizing that they vary with the size of the electorate and with whether the election is contested, has a large or small field, or is long in duration, and with whether public or alternative funding sources are available.

The timing of the contribution should also be considered. When a case was pending at the time the

contribution was made or in relative proximity to that time, a perception that the contribution was made to influence the judicial decision is more likely.

Finally, the relationship between the contributor and the case is of paramount importance. A contribution from a party will inevitably give rise to a greater appearance of impropriety than a contribution from an interested observer.

As this Court stated, "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986) (internal quotations marks and citations omitted). The ABA suggests that, as in *Aetna*, the constitutional question here is not whether Justice Benjamin was actually biased, but only whether his refusal to recuse himself was a violation of Petitioners' due process rights: it is whether his participation in the case "would offer a possible temptation to the average * * * judge to * * * lead him not to hold the balance nice, clear and true." *Id.* at 822, quoting *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972) (ellipses original to *Aetna*).

The magnitude and timing of the contributions to Justice Benjamin's campaign invite the Court to delineate the considerations that a judge should make in determining whether recusal is required by the Due Process Clause when a campaign contributor is a party in a case before the judge. This guidance is

especially needed today, when increased judicial campaign contributions pose a greater threat than ever to public confidence in the integrity of the judiciary.

CONCLUSION

The ABA urges the Court to provide guidance on the scope of the Due Process Clause's limits on a judge's authority to adjudicate matters in which he has received a substantial and proximate campaign contribution from a party, and to reverse and remand this matter for consideration consistent with that guidance.

Respectfully submitted,

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN

H. THOMAS WELLS, JR.
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000

Counsel for Amicus Curiae
American Bar Association

January 5, 2009