

Rule 2.12E
Disqualification
Public Citizen
Alan B. Morrison
December 5, 2003

Public Citizen alerts the Commission to the need for recusal or disqualification based on substantial contributions made to a judge's campaign for elected office. Public Citizen believes that the appearance of partiality is inherent in a system in which judges receive campaign contributions from parties with interests before the courts. While using the Texas system of financing judicial elections to provide background information, Public Citizen notes that similar "troubling stories" can be found in Ohio, Michigan and Pennsylvania.

Public Citizen proposes the following amendment of current Canon 3E(1) to specify that campaign contributions from parties or lawyers appearing before a judge may constitute grounds for disqualification or recusal. (Additions underlined.)

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 has received a substantial campaign contribution from a party to the proceeding, or from a party's lawyers or law firm, or from an amicus curiae

Rule 2.12E, Comment
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Public Citizen proposes the following comment to accompany its proposed amendment of current Canon 3E(1) to specify that campaign contributions from parties or lawyers appearing before a judge may constitute grounds for disqualification or recusal. (Additions underlined.) Public Citizen hopes that an express acknowledgement by the American Bar Association of the harmful appearance created when a judge presides over matters in which large donors have a direct interest will encourage the courts in states where judges are elected to adopt stronger rules about recusal and alleviate the widely-held belief that justice is for sale in these states.

An appearance of partiality can arise when parties appear before judges to whom they have given substantial campaign contributions. The provision

instructs judges to consider disqualification or recusal when the parties or lawyers appearing before them have made substantial contributions, either personally or through their law firms or PACs. When assessing the size of contributions, judges should consider both the amount itself and as a percentage of the total contributions the judge received. Contributions from a party and its lawyer or law firm should be aggregated for purposes of making the assessment. Contributions by an amicus curiae should also be considered, although perhaps to a lesser extent than contributions by the parties and their lawyers. Recent contributions should weigh more heavily in favor of recusal than those made further in the past. Additional considerations would include, but not be limited to, whether the contributor held a special position in the judge's campaign and whether the judge personally solicited the contributor.

Rule 5.03
Judicial Speech
Public Citizen
Alan B. Morrison
December 5, 2003

Public Citizen alerts the Commission to the need to address the problem of what candidates for judicial office may properly say during an election campaign and to regulate candidates whose statements are not permitted by the rules.

Public Citizen suggests that the sanction for a judge's conduct that violates any rule that results from the holding of *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002) (striking down as overbroad a state judicial code of conduct's rule prohibiting candidates for judicial office from "announcing" their views on "disputed legal and political issues" that might come before them as judges) should be restricted to the potential of recusal for what was said during the campaign or at any other time before or after the election. Public Citizen proposes an amendment of the Code to add a provision under the category of recusals based on the appearance of impropriety that would apply to prior statements "that might reasonably call into question whether the judge can be impartial in deciding an issue that is likely to arise in a case pending before that judge." It suggests comments to such a rule that include: requiring the court to focus on when and under what circumstances the violative statement was made, the likelihood of the issues arising in litigation, the degree of firmness of the views expressed, and the degree of relationship of the views to issues in a case.

Public Citizen also proposes enforcement of judicial speech through the model of a Citizen's Election Commission that would handle complaints arising from and during judicial elections. Such a commission, comprised of former judges, lawyers and persons not connected with the legal profession, would issue "opinions" during the campaign about allegedly harmful speech and would operate to avoid the situation where misconduct is dealt with after an election is concluded.