



Judicial Disqualification Based on Campaign Contributions

In 1999, the ABA amended the model code to add a new Canon 3(E)(1)(e) that provides a judge shall disqualify himself or herself from a case where “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 [[\$] for an individual or [\$] for an entity]] [is reasonable and appropriate for an individual or an entity]].”

The rule was retained in Rule 2.11(A)(4) of the 2007 model code, with a few minor changes: “The 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].”

Further, in 2009, reversing a decision of the West Virginia Supreme Court of Appeals, the United States Supreme Court held that, where campaign contributions from the principal of one of the parties “had a significant and disproportionate influence” on the election of one of the justices on the state court, the risk of actual bias was “sufficiently substantial” to require that justice’s disqualification under the Due Process Clause of the U.S. Constitution. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009). The \$2.5 million contributed to unseat the incumbent (directly to the challenger and to a § 527 political organization) “eclipsed” the total spent by the challenger’s campaign committee and “exceeded” by \$1 million the total spent by the campaign committees of both candidates combined.

- I. Only 3 states have adopted a version of the model rule.
 - A. Effective September 1, 2009, the **Arizona** Supreme Court adopted a new code that provides, in Rule 2.11(A)(4), that a judge shall disqualify when “the 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 four years made aggregate contributions to the judge’s campaign in an amount that is greater than the amounts permitted pursuant to

A.R.S. § 16-905.” (A.R.S. § 16-905 sets campaign contribution limits.)

- B. In 2010, the California legislature passed a statute that amends § 170.1 of the Code of Civil Procedure to provide that a judge is disqualified if:

(9)(A) The judge has received a contribution in excess of one thousand five hundred dollars (\$1500) from a party or lawyer in the proceeding, and either of the following applies: (i) The contribution was received in support of the judge’s last election, if the last election was within the last six years. (ii) The contribution was received in anticipation of an upcoming election.

The disqualification “may be waived by the party that did not make the contribution unless there are other circumstances that would prohibit a waiver” The amended rule further provides that a judge shall be disqualified based on a contribution under \$1500 if the judge believes his or her recusal would further the interests of justice, 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 that the judge would be able to be impartial. Finally, the amendment requires a judge to “disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 84211 of the Government Code, even if the amount would not require disqualification under this paragraph.”

- C. Effective April 1, 2010, the **Utah** Supreme Court adopted a new code that provides, in Rule 2.11(A)(4), that a judge shall disqualify when “the 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 three years made aggregate contributions to the judge’s retention in an amount that is greater than \$50.” (Utah appoints its judges and has only retention elections.)

- D. Statements that **Alabama** and **Mississippi** have adopted a rule similar to the model code provision are not accurate.

1. Although a 1975 **Alabama** statute requires disqualification when a judge as a candidate “received a substantial contribution from a party to the case, including attorneys for the party,” that statute has never been pre-cleared by the U.S. Department of Justice under the Voting Rights Act and is, therefore, not enforceable. *See Alabama Advisory Opinion 99-725*. A three-judge panel sitting in the U.S. District Court for the Middle District of Alabama dismissed for lack of standing and ripeness a challenge to the statute, finding that a 15-year “stalemate” between the Alabama Supreme Court and the Alabama Attorney General has meant that the statute has not been implemented or enforced, “not even once.” *Little v.*

Strange (June 21, 2011) (https://ecf.almd.uscourts.gov/cgi-bin/show_public_doc?2011cv0107-47). The Alabama Supreme Court has not adopted the rules required by the statute because it believes pre-clearance is necessary while the Alabama Attorney General has maintained that the statute does not need to be pre-cleared, although the U.S. Department of Justice disagrees.

2. The **Mississippi** code of judicial conduct has a rule providing that “a party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge.” A provision allowing a party to file a motion, however, falls far short of the ABA model rule requiring a judge to disqualify.

II. 2 state supreme courts have, even after the decision in *Caperton*, expressly rejected proposals to adopt a specific campaign contribution amount that would trigger disqualification.

A. Although the **Nevada** Supreme Court adopted a new code of judicial conduct, effective January 19, 2010, the court did not adopt a provision recommended by its Commission on the Amendment to the Nevada Code of Judicial Conduct that would have required a judge to disqualify if the “judge has received financial or electoral campaign support within the previous 6 years from a party, or a party’s affiliated entities or constituents, or a party’s lawyer or the law firm of a party’s lawyer in an aggregate amount that exceeds \$50,000” or if “the judge has received aggregate campaign support exceeding 5% of the judge’s total financial or electoral backing within the previous 6 years from a party, or a party’s affiliated entities or constituents, or a party’s lawyer or the law firm of a party’s lawyer.”

B. In 2010, the **Wisconsin** Supreme Court rejected a petition by the League of Women Voters of Wisconsin to amend the code to require disqualification for contributions over \$1,000 within the preceding 2 years and a petition by a former justice of the court that proposed that a judge would be disqualified from a case based on a contribution over \$10,000.

Instead, the Court adopted new rules that provide:

60.04 (7) Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge’s campaign committee’s receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.¹

¹ Comments to the rule provide:

60.04 (8) Effect of Independent Communications. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an “independent communication”) by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.²

Wisconsin vigorously debated an elective judiciary during the formation and adoption of the Wisconsin Constitution in 1848. An elective judiciary was selected and has been part of the Wisconsin democratic tradition for more than 160 years.

Campaign contributions to judicial candidates are a fundamental component of judicial elections. Since 1974 the size of contributions has been limited by state statute. The limit on individual contributions to candidates for the supreme court was reduced from \$10,000 to \$1,000 in 2009 Wisconsin Act 89 after the 2009 supreme court election. The legislation also reduced the limit on contributions to supreme court candidates from political action committees, from \$8,625 to \$1,000.

The purpose of this rule is to make clear that the receipt of a lawful campaign contribution by a judicial candidate’s campaign committee does not, by itself, require the candidate to recuse himself or herself as a judge from a proceeding involving a contributor. An endorsement of the judge by a lawyer, other individual, or entity also does not, by itself, require a judge’s recusal from a proceeding involving the endorser. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.

Campaign contributions must be publicly reported. Disqualifying a judge from participating in a proceeding solely because the judge’s campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs the judge’s integrity. It would have the effect of discouraging “the broadest possible participation in financing campaigns by all citizens of the state” through voluntary contributions, see Wis. Stat. § 11.001, because it would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect.

Involuntary recusal of judges has greater policy implications in the supreme court than in the circuit court and court of appeals. Litigants have a broad right to substitution of a judge in circuit court. When a judge withdraws following the filing of a substitution request, a new judge will be assigned. When a judge on the court of appeals withdraws from a case, a new judge also is assigned. When a justice of the supreme court withdraws from a case, however, the justice is not replaced. Thus, the recusal of a supreme court justice alters the number of justices reviewing a case as well as the composition of the court. These recusals affect the interests of non-litigants as well as non-contributors, inasmuch as supreme court decisions almost invariably have repercussions beyond the parties.

² Comments to the rule provide:

Independent expenditures and issue advocacy communications are different from campaign contributions to a judge’s campaign committee. Contributions are regulated by statute. They are often solicited by a judge’s campaign committee, and they must be accepted by the judge’s campaign committee. Contributions that are accepted may be returned. By contrast, neither a judge nor the judge’s campaign committee has any control of an independent expenditure or issue advocacy communication because these expenditures or communications must be completely independent of the judge’s campaign, as required by law, to retain their First Amendment protection.

III. 9 state supreme courts have adopted new disqualification rules that do not have specific triggers like the ABA model, but that expressly or impliedly incorporate the decision in *Caperton*.

A. Effective September 8, 2011, the **Georgia** Supreme Court amended the code of judicial conduct to require that a judge is disqualified when:

[T]he judge has received or benefited from an aggregate amount of campaign contributions or support so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered:

- (i) amount of the contribution or support;
- (ii) timing of the contribution or support;
- (iii) relationship of contributor or supporter to the parties;
- (iv) impact of contribution or support;
- (v) nature of contributor's prior political activities or support and prior relationship with the judge;
- (vi) nature of case pending and its importance to the parties or counsel;
- (vii) contributions made independently in support of the judge over and above the maximum allowable contribution which may be contributed to the candidate; and
- (viii) any factor relevant to the issue of campaign contributions or support that causes the judge's impartiality to be questioned.

Commentary: A judge shall recuse when the judge knows or learns by means of a timely motion that a particular party, party's lawyer, or law firm of a party's lawyer has within the current or immediately preceding election cycle of a judicial campaign for public election made aggregate contributions in an amount that is greater than the maximum allowable contribution permitted by law.

There is a rebuttable presumption that there is no per se basis for disqualification where the aggregate contributions are equal to or less than the maximum allowable contribution permitted by law. However, because the presumption is rebuttable, a judge who knows or learns by means of a timely motion that a party, party's lawyer, or law firm of a party's lawyer has within the current or immediately preceding

A judge is not required to recuse himself or herself from a proceeding solely because an individual or entity involved in the proceeding has sponsored or donated to an independent communication. Any other result would permit the sponsor of an independent communication to dictate a judge's non-participation in a case, by sponsoring an independent communication. Automatically disqualifying a judge because of an independent communication would disrupt the judge's official duties and also have a chilling effect on protected speech.

election cycle of a judicial campaign for public election made aggregate contributions permitted by law, should weigh the considerations in subsection I (d) of Canon 3E in deciding whether recusal may be appropriate.

Where a motion to recuse is based upon campaign contributions to the judge and the aggregate of contributions alleged would result in a rebuttable presumption that there is no per se basis for disqualification under the provisions of this Canon, any affidavit, it required to be filed by court rule must specify additional factors demonstrating a basis for disqualification pursuant to the considerations set forth in subsection I (d) of Canon 3E. In the absence of such additional facts, the affidavit shall not be deemed legally sufficient to require assignment to another judge under applicable court rules.

In summary, Canon 3E provides that:

(1) If contributions made to a judicial candidate or to that candidate's campaign committee are permitted by the law and do not exceed the maximum allowable contribution, then there is no mandatory requirement that the judge recuse.

(2) If (a) a judicial candidate has knowledge of a contribution made to the candidate or the candidate's campaign committee that exceeds the maximum allowable contribution permitted by law, and, (b) after having such knowledge, the violation is not corrected in a timely manner (i.e., usually accomplished by returning the contribution), then the judge shall recuse.

(3) If a judge has knowledge of a pattern of contributions made by a particular party, party's lawyer, or law firm of a party's lawyer that include contributions (a) made to a judicial candidate or to that candidate's campaign committee and/or (b) made to a third party attempting to influence the election of the judicial candidate, then the judge should consider whether recusal is appropriate in accordance with the considerations in subsection I(d) of Canon 3E.

The amendments also provide that "the public filing of a 'Campaign contribution disclosure report' or 'Financial disclosure statement' shall be deemed a disclosure to all parties of the information contained therein." New terminology defines "aggregate" contributions as "not only contributions in cash or in kind made directly to a candidate or a candidate's campaign committee within the current or immediately preceding election cycle but also all contributions made indirectly or independently with the knowledge that they will be used to influence the election of the judge;" defines "support" "as non-monetary assistance to a candidate; and adopts the definitions of "campaign committee," "contribution," "campaign contribution disclosure report," "financial disclosure statement," and "election cycle" from the Georgia Government Transparency and Campaign Finance Act of 2010.

- B. Effective May 3, 2010, the **Iowa** Supreme Court approved a new code that provides, in Rule 51:2.11(A)(4), that a judge is disqualified when:

The judge knows or learns by means of disclosure mandated by law or a timely motion that the judge's participation in a matter or proceeding would violate due process of law as a result of: (a) Campaign contributions made by donors associated or affiliated with a party or counsel appearing before the court; or (b) Independent campaign expenditures by a person other than a judge's campaign committee, whose donors to the independent campaign are associated or affiliated with a party or counsel appearing before the court.

- C. In November 2009, the **Michigan** Supreme Court amended court rules regarding disqualification to provide, in Rule 2.003(C)(1)(b):

Disqualification of a judge is warranted for reasons that include . . . the judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*, ___ US __; 129 S. Ct. 2252; 173 L. 2d. 2d 1208 (2009); or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

- D. In February 2010, the **Missouri** Supreme Court revised the code of judicial conduct to add a comment that states:

A candidate for judicial office should consider whether his or her conduct may create grounds for recusal for actual bias or a probability of bias pursuant to *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___ (2009), or whether the conduct otherwise may create grounds for recusal under this Rule 2 if the candidate is elected to or retained in judicial office.

- E. Effective January 1, 2012, the **New Mexico** Supreme Court adopted a new code that states in comments to the disqualification rule:

[6] In *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009), the United States Supreme Court held that the failure of a state supreme court justice to recuse when a party had made extraordinary and disproportionate contributions in support of the justice's candidacy in the previous election violated the opposing party's due process rights. The Court applied an objective standard and stated "that there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate

influence in placing the judge on the case by raising or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64. The Court recognized that states may, in their codes of judicial conduct, set more stringent standards for disqualification than imposed by the due process clause. *Id.* at 2267. A judge's impartiality might reasonably be questioned under Paragraph (A) of this rule as a result of campaign contributions even though they are not so extraordinary and disproportionate as to violate a person's due process rights. The intent of the Code of Judicial Conduct is to insulate judges from this type of bias; Rules 21-402(D) and 21-403 NMRA contemplate that a judge or judicial candidate not solicit or be informed of campaign contributions from attorneys and litigants. Despite these prohibitions, a judge may become aware of contributions made on behalf of the judge's campaign.

[7] Excessive contributions to a judge's campaign by a party or a party's attorney may also undermine the public's confidence in a fair and impartial judiciary. An appearance of impropriety may result when attorneys or parties appearing before a judge generate large amounts of money for a campaign, either by contributing directly to the campaign, by contributing to political action committees supporting the judge, or by organizing large fund raisers. However, contributions made by attorneys to the campaigns of judicial candidates would not require a judge's disqualification in the absence of extraordinary circumstances.

- F. Effective July 1, 2012, the North Dakota Supreme Court adopted a new code of judicial conduct that includes a comment that states:

[4] The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or publicly supported the judge in the judge's election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge's impartiality under paragraph (A). See Rule 4.6.

- G. In December 2010, the **Oklahoma** Supreme Court adopted a new code of judicial conduct, effective April 15, 2011, that includes a rule requiring disqualification when:

The 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 four (4) years made aggregate contributions to the judge's campaign in an amount that a reasonable person would believe could affect the fairness of the judge's consideration of a case involving the party, the party's lawyer or the law firm of the party's lawyer. The judge should consider what the public perception would be as to such contributions affecting the judge's ability to be fair to the parties. Contributions

within the limits allowed by the Oklahoma Ethics Commission will not normally require disqualification unless other factors are present.

- H. Effective July 1, 2012, the **Tennessee** Supreme Court adopted a new code of judicial conduct that includes a provision requiring disqualification when:

(4) The 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 made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned.

Comment [7]

The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or supported the judge in his or her election does not of itself disqualify the judge. Absent other facts, campaign contributions within the limits of the "Campaign Contributions Limits Act of 1995," Tennessee Code Annotated Title 2, Chapter 10, Part 3, or similar law should not result in disqualification. However, campaign contributions or support judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned. In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others:

- (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct and 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 or independent 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.

- I. The **Washington** Supreme Court adopted a new code of judicial conduct, effective January 1, 2011, that provides in Rule 2.11(D):

A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge's judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider: (1) the total amount of

financial support provided by the party relative to the total amount of the financial support for the judge's election, (2) the timing between the financial support and the pendency of the matter, and (3) any additional circumstances pertaining to disqualification.

IV. Effective July 15, 2011, the Chief Administrative Judge of the **New York** State Unified Court System adopted an assignment rule (§ 151.1) for cases involving contributors to judicial campaigns (www.nycourts.gov/rules/chiefadmin/151.shtml#section151_1):

(A) (1) No matter shall be assigned to a judge, other than in an emergency, or as dictated by the rule of necessity, or when the interests of justice otherwise require, if such assignment would give rise to a campaign contribution conflict as defined in section (B) of this Part.

(2) An assignment in derogation of this Part, due to administrative error or oversight, shall not (a) diminish the authority of the assigned judge; (b) give rise to any right, claim or cause of action; (c) impose any additional ethical obligation upon the assigned judge; or (d) diminish the assigned judge's obligation to consider recusal in light of campaign contributions.

(3) Nothing in this Part shall abridge the right of a party to move for recusal of an assigned judge at any time, or limit the arguments or evidence that may be marshaled for or against such recusal motion (see, e.g., §§ C[1] and D of this Part).

(B) (1) Individual Contributions: For purposes of this Part, a campaign contribution conflict shall exist when –

(a) an attorney appearing as counsel of record in a matter before a judge, or appearing in the matter as co-counsel or special counsel to such counsel of record, or

(b) such attorneys' law firm or firms, or

(c) a party in the matter –

individually has contributed \$2,500 or more to such judge's campaign for elective office during the window period defined in Part 100.0(Q) of these Rules.

(2) Collective Contributions: For purposes of this Part, a campaign contribution conflict shall exist when the sum of all contributions to a judge's campaign for elective office made during the window period defined in Part 100.0(Q) of these Rules by –

(a) an attorney appearing as counsel of record in a matter before such judge, and attorneys appearing in the matter as co-counsel or special counsel to such counsel of record, and

(b) each such attorneys' law firm or firms, and

(c) each client of each such attorney in the matter – totals \$3,500 or more.

(3) Term of Conflict (Conflict Period):

(a) A contribution shall be considered for conflicts purposes under this Part for a period of two years commencing on the day that the State Board of Elections first publishes the report of such contribution; provided, that if the candidate receiving such contribution is

not a judge at the time of such report, then such two-year period shall commence on the day that he or she first assumes judicial office.

(b) If a person or entity makes more than one contribution to a candidate during such candidate's window period, as defined in Part 100.0(Q) of these Rules, then for conflicts purposes hereunder such contributions shall be totaled and treated as if made as a single contribution. In such cases, the conflict period for such contributions shall be extended to two years following the day on which the State Board of Elections publishes the report of the last of such contributions (unless paragraph (a) of this subsection requires a later date, in which case such later date shall govern).

(C) The Chief Administrator of the Courts shall:

(1) publish periodically a listing or database of contributions and contributors to judicial candidates, as disclosed by public filings, in a manner designed to assist the identification of campaign contribution conflicts under this Part, as well as contributions which, while not causing a campaign contribution conflict under this Part, may be pertinent to a motion to recuse;

(2) establish a procedure whereby parties may waive application of this Rule and permit assignment of a judge affected by a campaign contribution conflict;

(3) provide for local administrative resolution of issues arising under this Part by local court clerks and administrative judges, with minimal involvement by assigned judges; and

(4) with advice and consent of the Administrative Board of the Courts, take such further steps as may be necessary to give effect to this Part.

(D) Notwithstanding any provision of this Part, a judge shall be mindful of the ethical responsibility to consider the propriety of recusal in any proceeding in which the judge's impartiality reasonably might be questioned in consequence of campaign contributions.

(E) This Part shall take effect on July 15, 2011, and shall apply to all campaign contributions first reported as received on or after such date.

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