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Disqualification of Judges for Campaign Support or Opposition

GERALD UELMEN*

Should a judge be disqualified from sitting on a case in which a substantial supporter or opponent of his or her election campaign is a litigant or a lawyer? Currently, the *Model Code of Judicial Conduct* (*Judicial Code*) would not require such disqualification. Although the Canons would require a justice who owned a single share of stock in Pennzoil or Texaco to disqualify himself from hearing a dispute between the corporations,¹ the contribution of \$387,700 by these two companies to the campaign coffers of five Texas Supreme Court Justices did not require the disqualification of any of these judges.²

The resistance to a rule requiring such disqualification reflects disconcerting reality; judges are dependent upon lawyers and potential litigants as the principal source of financing for election campaigns.³ Few lawyers would contribute to a judge's campaign if their contributions would require the judge to no longer hear their cases (others might gleefully offer a contribution for that very reason). If we continue to subject judges to the world of political campaigning, can we in fairness eliminate financial support from those in the best position to evaluate their performance? Would we not simply increase their reliance on special interest groups to provide the campaign funds they need?

These are sensitive questions, and we must provide sensitive answers. This article proposes a change in the *Judicial Code* to require disqualification in carefully defined circumstances. Those circumstances include the situations with greatest potential to embarrass the appearance of justice. It is not the intent of this proposal, however, to eliminate all lawyer support or opposition from judicial campaigns. I proceed on the premise that it would not only be an impractical and elusive goal, but it would have an undesirable impact

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1. The *Model Code of Judicial Conduct* requires a judge to disqualify himself when he "has a financial interest . . . in a party to the proceeding" MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1)(c) (1972) [hereinafter JUDICIAL CODE]. "Financial interest" is defined to include "ownership of a legal or equitable interest, however small . . ." JUDICIAL CODE, Canon 3C(3)(c).

2. Kaplan, *Justice for Sale*, COMMON CAUSE, May/June, 1987 at 29; Applebome, *Texas Court Fight Puts Focus on Elected Judges*, N.Y. Times, Jan. 22, 1988, at B4, col.3.

3. DuBois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?*, 70 JUDICATURE 8 (June/July, 1986).

upon judicial selection. The form that lawyer contributions take is an important consideration, however, if preserving the appearance of justice is our goal. A rule of disqualification can significantly impact the form that lawyer contributions take, and alleviate our concern for appearances. The problem of substance, in which large contributions by special interest groups continue to influence the selection of judges, is a problem that cannot be alleviated by a rule of disqualification. Thus, the proposal is not offered as the "clear, simple solution" to the problem of judicial campaign fundraising.⁴ It is offered in the hope that it can modestly improve an increasingly grim and grimy reality.

I. THE PROBLEM OF JUDICIAL CAMPAIGN CONTRIBUTIONS

At the trial level, elections have been the prevailing mode of selection in most states for many years. Only eleven states do not elect judges for courts of general jurisdiction.⁵ What is changing, however, is the rising cost of campaigns for these positions. A recent survey disclosed that the mean total campaign expenditure by candidates for contested Municipal Court seats in California increased from \$35,218 in 1978 to \$49,815 in 1982.⁶ In Cook County, Illinois, 76 candidates for Circuit Court positions at stake in the general election in 1984 raised a total of \$846,903. The average winner amassed a campaign treasury of \$23,506.⁷ In Maryland, candidates for the Circuit Court raised an average of \$22,525 in 1982, which doubled the average for 1980 races.⁸

The most dramatic changes, however, are occurring in appellate court races. Twenty-three states still utilize contested elections to select supreme court justices, and these races have taken on all the trappings of other statewide contests, including the need for large campaign treasuries. From 1983 to 1986, the average amount of campaign contributions collected by successful Texas Supreme Court candidates increased 219%, from \$272,189 to \$868,604. In the Ohio race for Chief Justice \$2.7 million was spent, compared to \$99,192 spent in 1980. In Kentucky \$183,000 was spent in one race for the Supreme Court, a 252% increase over the last race for the same seat in 1978. Montana's two candidates for Chief Justice spent \$247,342 in 1986,

4. "Simple solutions to the problems of judicial campaign financing would be perfect examples of the Mencken maxim: 'For every complex human problem, there is an answer that is clear, simple, and wrong.'" Schotland, *Elective Judges Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. L. & POL. 57, 121 (1985).

5. BERKSON, BELLER & GRIMALDI, *JUDICIAL SELECTION IN THE U.S., A COMPENDIUM OF PROVISIONS* (1981).

6. Schotland, *supra* note 4, at 134.

7. Nicholson & Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 JUDICATURE 17, 19 (June/July, 1986).

8. Schotland, *supra* note 4, at 137.

a 320% increase over the 1980 race.⁹

Even states which utilize retention elections are not immune from this trend. An all-time national record of \$10.7 million was spent on both sides of the 1986 California campaign resulting in the removal of Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso.¹⁰

Where is the money coming from to finance such massive campaigns? Contributions by lawyers and law firms represent the largest share of contributions to judicial campaign coffers. A study of the 1984 Cook County elections revealed that over 50% of the itemized contributions in both the primary and general elections came from attorneys and law firms.¹¹ Contributions were heaviest for sitting judges, whether or not they faced a significant threat of removal or not.

Thus the motive for giving would seem connected to the current role of the candidate as a sitting judge; this clearly raises the question whether the donor is seeking to influence the judge through the contribution.¹²

Of a total of 481 itemized contributions from attorneys and law firms, 88% were for less than \$499. Ten percent of such contributions were in the \$500-999 range, while 10 contributions (2%) were for \$1000 or more.¹³

A similar pattern emerges in a study of the 1980 judicial elections in California. Lawyers and law firms were found to have supplied 39.2% of the contributions over \$1000 in the primary election, and 32.4% of such contributions in the runoff elections.¹⁴ The proportion was significantly larger for incumbent judges, with 49.3% of contributions over \$100 to incumbent Superior Court judges coming from the legal profession.¹⁵ Of a total of 1,312 individual contributions from lawyers and law firms, approximately 95% were for \$499 or less, while 5% were for \$500 or more.¹⁶

The big-money races for State Supreme Court seats also rely heavily on lawyer contributions, and such contributions can reach sizeable proportions. Justice Joseph Grodin revealed that the principal source of campaign contributions for the 1986 California Supreme Court race was "lawyers and groups that had some interest, not to say stake, in the judicial process."¹⁷ Plaintiffs'

9. Kaplan, *supra* note 2, at 30.

10. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038 (1988).

11. Nicholson & Weiss, *supra* note 7, at 21. Other major contributors included non-attorney individuals, 27%; corporations, 11%; and labor unions, 4%. *Id.*

12. *Id.*

13. *Id.* at 19.

14. DuBois, *supra* note 3, at 12.

15. *Id.* at 14.

16. *Id.* at 12-13.

17. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 368 (April/May, 1987).

law firms and individual lawyers representing plaintiffs contributed at least \$425,000 with over \$160,000 coming from one law firm and its partners.¹⁸ In the 1986 Texas Supreme Court races, lawyers for Pennzoil contributed \$315,000 to five justices, while lawyers for Texaco contributed \$72,700 to the same five justices.¹⁹ In Ohio, after the newly elected Chief Justice disqualified himself from five hearings in which campaign contributors were lawyers, the State Bar President lamented: "The campaign was so expensive and so much money was raised that damn nearly every prominent lawyer in the State of Ohio gave to somebody."²⁰

II. THE CURRENT CODE OF JUDICIAL CONDUCT

The *Model Code of Judicial Conduct*, adopted by the American Bar Association in 1972, approaches judicial campaign contributions from a strategy of insulation and concealment. While it recognizes that lawyers will contribute to a judge's campaign coffers, it assumes that such contributions can be solicited and collected indirectly, without a judge's participation and knowledge. Thus, a judge is enjoined from personally soliciting or accepting campaign funds, but is permitted to establish "committees of responsible persons" to solicit campaign contributions.²¹ The Canon explicitly provides that "such committees are not prohibited from soliciting campaign contributions and public support from lawyers."²²

The prohibition of direct solicitation by judges has produced some interpretations that can only be characterized as bizarre. It has been suggested that a judge may not personally attend a fundraising function given on his behalf, for example, because he would discover identities of his contributors.²³ An exception has been recognized to permit a judge to directly solicit his relatives, since he would have to disqualify himself in any event if the same relatives appeared before him in a case.²⁴

If this was ever a realistic approach to regulating campaign fundraising by judges, its continuing vitality was seriously compromised by widespread enactment of campaign disclosure laws during the 1970s. Each of the 50 states and the District of Columbia now require the reporting of all campaign contributions, requiring disclosure of the identity of the donor for contributions exceeding a specified amount.²⁵ Ordinarily the disclosure statement must be

18. Thompson, *supra* note 10, at 2038.

19. Kaplan, *supra* note 2, at 29.

20. *Id.* at 31.

21. JUDICIAL CODE, Canon 7B(2).

22. *Id.*

23. Georgia Jud. Qualifications Comm'n, Op. No. 22 (1978).

24. New York State Bar Ass'n, Formal Op. No. 289 (1973).

25. Statutes are collected in Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributions*, 40 STAN. L. REV. 449, 471 n.122 (1988).

personally verified and signed by the candidate. Thus, it is no longer possible to insulate a judge from knowing the identity of the donors. This problem was recognized in a commentary to the Canon: "Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate."²⁶

III. CURRENT USE OF JUDICIAL DISQUALIFICATION

In most jurisdictions today, a judge can be disqualified for bias, and a showing of bias requires only a showing that "a reasonable person" would doubt the judge's ability to decide the case impartially.²⁷ Frequently, such motions allege that support or opposition in an election campaign gives rise to a reasonable appearance of bias. There appears to be substantial uncertainty, however, over what kind of support or opposition will be deemed sufficient to require recusal. In Florida, disqualification has been required where an attorney for one party was co-chairing the judge's current reelection campaign,²⁸ but not where an attorney complied with a request for an "endorsement" in the judge's current campaign.²⁹ In Alabama, a judge who owed his appointment to the bench to the governor who was party to a divorce proceeding was required to recuse himself,³⁰ while a judge whose principal opponent for appointment was actively supported by one party to a divorce was not.³¹

In Texas, disqualification has been limited to cases of direct interest in the outcome or relationship to the parties, as specified in the state constitution.³² Thus, motions for disqualification are routinely denied even where a party has made substantial contributions to a judge's campaign fund.³³

The lack of clear guidelines as to what kind of contributions or political activity will require disqualification creates substantial uncertainty for lawyers, litigants and judges. It also invites "judge-shopping," in which support or opposition may be calculated to eliminate a particular judge from future cases, rather than to curry his or her favor. Finally, the lack of any "automatic" disqualification eliminates any obligation to disclose possible

26. JUDICIAL CODE, Canon 7B(2) commentary.

27. JUDICIAL CODE, Canon 3C(1) provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ."

28. *Caleffe v. Vitale*, 488 So. 2d 627 (Fla. Dist. Ct. App. 1986). *Cf. Melnick v. Melnick*, 118 A.D.2d 902, 499 N.Y.S.2d 470 (N.Y. App. Div. 1986).

29. *Marexcelso v. Florida Nat'l Bank*, 533 So. 2d 805 (Fla. Dist. Ct. App. 1988).

30. *Wallace v. Wallace*, 352 So. 2d 1376 (Ala. Civ. App. 1977).

31. *Miller v. Miller*, 385 So. 2d 54 (Ala. Civ. App. 1980).

32. Texas Const., Art. 5, Sec. 11. *See Calvert, Disqualification of Judges*, 47 Tex. Bar J. 1330 (Dec. 1984).

33. *River Road Neighborhood Assoc. v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. Ct. App. 1984); *Texaco v. Pennzoil*, 729 S.W.2d 768, 842 (Tex. Ct. App. 1987); *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. Ct. App. 1983).

grounds.³⁴ In many cases, grounds for disqualification may be waived simply because a lawyer or litigant was unaware of the political relationship between the judge and the opposing lawyer or party.³⁵

The current *Judicial Code* contains explicit requirements for disqualification where a relative is a party, a lawyer, a witness, or is otherwise interested in the outcome of a proceeding before a judge.³⁶ These provisions should be amended to include a "substantial contributor" to a campaign in which the judge was a candidate for judicial office within the preceding two years. A draft of such an amendment is included in the appendix to this article.

IV. DEFINING "SUBSTANTIAL CONTRIBUTOR"

This amendment would not require disqualification of a judge for all campaign contributions, only "substantial" ones. A "substantial" contribution would include any contribution of \$500 or more, or service as a campaign director, treasurer or chairperson.

This would give a clear warning to lawyers and litigants that they risk disqualification of the judge if campaign contributions exceed \$500, or if they assume a leadership role in the judge's campaign. The risk would also extend to members of the same firm, whose individual contributions to litigants would be aggregated for purpose of the \$500 limit. If the contributions of a firm or any of its members exceeded the limit, disqualification would be required if any member of the firm appeared in a case before the judge.

The rule would put the onus on the judge to disqualify himself or herself, without requiring a motion of either party. Thus, the problem of requiring disclosure of contributions would be avoided. The provision for remittal of disqualification in Canon 3D would permit the disqualification to be waived by other parties and lawyers. This would effectively prevent a lawyer from contributing to a judge's campaign to eliminate the judge from sitting on his future cases.

The most obvious loopholes in this proposal are that it offers no protection for litigants or lawyers who have contributed to a judge's opponent or actively opposed a judge's election, and it invites evasion by the simple expedient of funneling contributions through an intermediary, such as a PAC or other organization.

A lawyer or litigant who has actively opposed a judge's campaign may have just as valid a claim for judicial disqualification as one whose opponent

34. L.A. County Bar Ass'n Formal Op. No. 387 (Feb. 10, 1981), advises that a lawyer need not disclose to opponent that campaign contributions have been made to the judge, since such contributions "become a matter of public record."

35. *Adair v. Adair*, 670 P.2d 1002 (Okla. Ct. App. 1983).

36. JUDICIAL CODE, *supra* note 27.

has supported the judge's campaign. Many states recognize this as legitimate grounds for a disqualification motion.³⁷ The amendment to Canon 3C would not preclude disqualification on this ground, since it still requires disqualification where a judge's impartiality might "reasonably be questioned," and would provide that disqualification is "not limited to" substantial contributors on behalf of the judge. There is reason not to extend the *automatic* provisions of 3C to campaign opponents, however. First, there is no danger that the lawyer or party at risk would not know of the grounds for a disqualification motion, since the motion would be based on his or her own activity. Second, the risk is substantial that campaign opposition would be artificially motivated by an assurance that the judge opposed would be disqualified from future cases. While Machiavellian contributors who want to disqualify the judge can be controlled by permitting the opposing party to waive the disqualification, such a remedy makes no sense where the disqualification is sought by the one whose campaign activity created the problem in the first place. Finally, the level of support for a judge's opponent will be limited by the risk that contributions in excess of \$500 will require disqualification of the opponent if he or she is elected.

The risk of evasion by funneling contributions through PACs really raises an entirely different problem of judicial campaign finances. The use of an intermediary avoids the problem of the judge's being aware that the lawyer or litigant before him or her was a contributor to his or her campaign. That is the most immediate threat to the appearance of justice. The lawyer or litigant who contributes through a PAC may be seeking the election of a judge who is sympathetic to certain positions, but that is very different from seeking the election of a judge who is personally indebted to the individual lawyer or litigant.

The regulation of PAC contributions can be addressed more directly in the broader context of election contests in general.³⁸ Such contributions create no greater risks in judicial contests than they do in other political contests.

Setting the limit at \$500 is an obvious compromise, to permit the vast majority of lawyer contributions without consequence, while requiring disqualification only for the most significant contributions. Such a limit can be expected to operate much as a contribution limitation. As Professor DuBois notes:

On the other hand, a contribution limitation is not necessarily unwise simply because, in the aggregate, it affects few contributors. It may nevertheless perform a useful function by preventing the donation of large sums

37. *McDermott v. Grossman*, 429 So. 2d 393 (Fla. Dist. Ct. App. 1983). *Cf. In re Epperson*, case No. 19 (Ala. Ct. of Judiciary 1987) (a judge was disciplined for posting a list of lawyers who contributed to his opponent's campaign near the door in his office).

38. *See F.E.C. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

which, by contemporary standards, would raise significant community concern about the ability of judges to remain impartial in cases involving the interests of campaign contributors. The difficult issue is in determining the dollar amount of such a limitation so that it does not unduly restrict the ability of candidates to raise the funds necessary to conduct meaningful campaigns.³⁹

A limitation of two years is imposed, to avoid virtually permanent disqualification where judges are elected to lengthy terms. While even a two-year lapse would not eliminate the problem of an appearance of impropriety where a contribution is extremely large, a party would not be precluded from seeking disqualification under such circumstances even after the two-year limit. The limit applies only to the automatic disqualification requirement.

V. PRACTICAL IMPACT ON JUDICIAL CAMPAIGNS

A requirement of automatic disqualification where a lawyer or litigant was a "substantial contributor" to a judge's campaign would motivate the vast majority of lawyers and potential litigants to avoid becoming "substantial" contributors to any judge's campaign. By limiting their contributions to less than \$500, and not assuming visible roles of campaign leadership, any future problem can be avoided. Most important, of course, a judge can simply impose a limit on the amount of contributions to be accepted from lawyers. Keeping that limit below \$500 will largely avoid the problem of future disqualification. An onus will fall on law firms to closely monitor the contributions of their individual members, and the substantial risks created will motivate serious attention to this situation by even the largest law firms.

As a practical matter, less than 10% of the contributions currently coming from lawyers and law firms would qualify as "substantial." Thus, this reform would not dramatically change the role of lawyers in financing most judicial election campaigns.

Where the rule is likely to have the most impact is on the major contests for Supreme Court seats, where hundreds of thousands of dollars are now routinely raised. Eliminating lawyers and potential litigants from the ranks of "substantial contributors" will increase reliance on special interest groups and PACs for major campaign support. It is disingenuous to suggest, however, that the remedy for special interest contributions is to encourage lawyers and litigants to cough up larger contributions. A way must be found to limit the contributions of PACs and special interests too, but judicial disqualification is not the remedy for that evil. As already noted, this proposal does not prevent lawyers and litigants who would otherwise become substantial

39. DuBois, *supra* note 3.

contributors from funneling their own contributions through PACs and special interest groups.

Where judicial elections are contested, both sides will labor under the same limitation. Contributions to either an incumbent judge or the challenger will create the same risk for the winner. The rule may operate most unfairly in the context of retention elections, however, where there is active opposition to a judge. Lawyers and potential litigants will face no restraints in contributing to the removal campaign, while the campaign in support of the judge will have to contend with the problem of potential disqualification. Retention states may want to seriously consider an outright limitation of all individual contributions to campaigns involving judicial retention.

APPENDIX

PROPOSED AMENDMENT TO CANON 3 OF THE *Model Code of Judicial Conduct*

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY.

* * *

C. DISQUALIFICATION

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

* * *

- (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person, *or a substantial contributor to a campaign in which the judge was a candidate for judicial office within the preceding two years,*
- (i) is a party to the proceeding, or an officer, director or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

* * *

- (3) for the purposes of this section:

* * *

- (d) "*substantial contributor*" includes:
- (i) *one who served as a campaign chairperson, director, treasurer or in a similar capacity, and any members of a law firm with which such a person is affiliated;*

- (ii) *one who contributed \$500 or more to the campaign, any member of a law firm making such a contribution either directly or indirectly through individual contributions of its members, and any officer, director or trustee of a corporation or other entity making such a contribution.*

D. REMITTAL OF DISQUALIFICATION

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. *If disqualification pursuant to Canon 3C(1)(d) is because a substantial contributor is a party, or an officer, director or trustee of a party, or acting as a lawyer in the proceeding, only the agreement of other parties and lawyers is necessary to waive the disqualification.*