

## **SUGGESTIONS FOR IMPROVEMENT OF THE CODE OF JUDICIAL CONDUCT**

**Presented by Alan B. Morrison, on Behalf of Public Citizen, December 5, 2003<sup>1</sup>**

Public Citizen is a nonprofit consumer advocacy organization, with 125,000 members nationwide. It is incorporated and headquartered in the District of Columbia, with offices in Austin, Texas and Oakland, California. Public Citizen is active before the United States Congress, the Texas legislature, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process.<sup>2</sup> It is submitting these comments to address two aspects of the Code of Judicial Conduct: (A) the need for recusal or disqualification based on substantial contributions made to a judge's campaign for elected office, and (B) 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.

### **A.**

#### **RECUSALS BASED ON SUBSTANTIAL CAMPAIGN CONTRIBUTIONS MADE DURING JUDICIAL ELECTIONS.**

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<sup>1</sup> These suggestions were authored by Allison M. Zieve and Alan B. Morrison, both lawyers at Public Citizen Litigation Group.

<sup>2</sup> See [www.citizen.org](http://www.citizen.org).

In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*. *Bomer* was brought in the United States District Court for the Northern District of Texas by five Texas lawyers and two non-profit organizations, on behalf of themselves, their clients, and their members who had litigated or would litigate in Texas courts.<sup>3</sup> The plaintiffs all believed that the current system of financing judicial elections creates the appearance, if not the reality, of partiality and impropriety of the judges in the Texas state courts, to the detriment of the legal profession, the lawyer-plaintiffs=law practices, and their clients=and/or members=interests. The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts to consider campaign contributions from a party or its lawyer to a judge on the case as a basis for recusal, is unconstitutional under the Due Process Clause of the Fourteenth Amendment, which would leave to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, a panel of the Fifth Circuit affirmed the dismissal of the case on the ground that the plaintiffs lacked standing.<sup>4</sup>

My comments on this issue will focus on the appearance of partiality inherent in a system in which judges receive campaign contributions from parties with interests before the

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<sup>3</sup> See [http://www.citizen.org/litigation/briefs/Election\\_Law/texasjcf/articles.cfm?ID=658](http://www.citizen.org/litigation/briefs/Election_Law/texasjcf/articles.cfm?ID=658).

<sup>4</sup> 274 F.3d 212 (5th Cir. 2001).

courts. While the problems inherent in such a system have been widely recognized, the potential cures are more controversial. Whether or not judicial elections are the best way to choose judges, 31 states still elect some or all of their judges. To provide guidance for the courts of those states, Public Citizen urges the Committee to recommend an amendment to Canon 3, subpart E of the Model Code of Judicial Conduct to address when campaign contributions warrant recusal.

I will focus on Texas, because Public Citizen has the most experience with the situation in that state. However, equally troubling stories can be found in other states, for example, in Ohio, Michigan, and Pennsylvania.

#### BACKGROUND

Under the Texas system of financing judicial elections, lawyers who regularly appear in court, and parties who are frequent litigants, routinely contribute thousands of dollars to the campaigns of judges who then preside over their cases. Contributions to supreme court candidates and candidates for the larger judicial districts are limited to \$5,000 person.<sup>5</sup> However, the contribution limits are calculated separately for each election, not for each election cycle. Thus, a contributor may give \$5,000 to a candidate for a seat on the supreme court for the primary election, \$5,000 for the general election, and \$5,000 for any runoff election.<sup>6</sup> To put that amount in perspective, \$5,000 is 22 times the amount that any

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<sup>5</sup> 15 *Tex. Elec. Code Ann.* ' 253.155

<sup>6</sup> *Tex. Ethics Comm'n Advisory Op. No. 302* (1996).

individual may contribute to a candidate for president of the United States, and five times the maximum amount permitted prior to November 6, 2002.<sup>7</sup>

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<sup>7</sup> See 2 U.S.C. ' 441a(1)(A).

Texas law establishes separate limits for contributions from law firms and their members. The combined contributions of the firm's members to a single candidate for a single election is six times the limit imposed on individuals<sup>8</sup> for example, \$30,000 in the case of a statewide judicial office. Once the limit is reached, a candidate may not accept contributions of more than \$50 from other members of the firm for that election.<sup>8</sup>

Limitations on PAC contributions are also calculated differently. For example, in the case of an election for a statewide judicial office, for which the voluntary expenditure limit is \$2,000,000, one or more PACs may contribute a combined total of up to 15 % of that limit, or \$300,000 per candidate in such elections.<sup>9</sup>

Canon 5(C)(2) of the ABA Model Code of Judicial Conduct prohibits candidates from personally soliciting or accepting campaign funds and requires that a campaign committee perform those tasks. Texas, however, is one of four states in which judges may personally solicit campaign contributions.<sup>10</sup> In fact, Canon 4D(1) of the Texas Code of Judicial Conduct expressly permits judges and candidates for judicial office personally to solicit funds for their

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<sup>8</sup> 15 Tex. Elec. Code Ann. ' 253.157.

<sup>9</sup> *Id.* ' 253.160.

<sup>10</sup> ABA, Report and Recommendations of the Task Force on Lawyers=Political Contributions, Part Two at 40-41 n.73 (July 1998).

campaigns for judicial office, with no prohibition or limitation on soliciting from people who have current business before them or who are likely to come before them if they become judges.

Not surprisingly, individuals and groups with substantial interests in litigation including lawyers, businesses, and groups with members that have a significant number of cases pending before the courts regularly contribute large amounts of money to judges and candidates for judicial office. For example, the parties and lawyers involved in the nine cases heard by the Texas Supreme Court in April 2002 had contributed \$810,796 to the nine justices since 1993. The parties and lawyers involved in the ten cases heard in April 2003 had contributed \$1,717,652 to the justices.<sup>11</sup>

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<sup>11</sup> Texans For Public Justice, Dollar Dockets ##21 & 28 (May 22, 2002; May 1, 2003) (available at [www.tpj.org](http://www.tpj.org)).

The Texas system for financing judicial elections undermines Texans' respect for their judicial system. A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a very significant or somewhat significant influence on judges' decisions.<sup>12</sup> A national survey reported similar findings: A full 78 percent [of those surveyed] believe that elected judges are influenced by having to raise campaign funds.<sup>13</sup> And a Minnesota study found that 68% of respondents thought that elected judges are influenced by having to raise campaign funds.<sup>14</sup>

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<sup>12</sup> Judicial Campaign Finance Study, *supra*, at 4; see also Column, *Texas justice for sale? Judge it yourself*, Houston Chronicle, Sept. 13, 1992, Outlook at 2 (A fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.).

<sup>13</sup> National Center for State Courts, *How The Public Views The State Courts*, A 1999 National Survey at 3 (May 1999).

<sup>14</sup> Supreme Court of Minn., 1999-2000 Public Opinion of the Courts Study, Executive Summary at 5.

Lawyers also believe that contributions influence decision-making. In a 1999 survey prepared by the Supreme Court of Texas, in conjunction with the Texas State Bar and the Texas Office of Court Administration, 79 percent of Texas lawyers thought the influence is significant.<sup>15</sup> Only one percent thought that contributions do not affect decisionmaking at all.

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<sup>15</sup> The Courts and The Legal Profession in Texas, *supra*, at 54.

Because lawyers and political action committees whose constituents regularly appear before the courts are major contributors to Texas judicial campaigns, individuals are often forced to litigate before judges who have accepted contributions from the opposing side. Although Texas Rule of Civil Procedure 18b and Texas Rule of Appellate Procedure 15a require recusal when a judge's impartiality might reasonably be questioned, under Texas case law, a judge need not disqualify him or herself from a case where one party or its lawyer has been a contributor to the judge's election campaign, no matter how recent or large that person's contribution, alone or in combination with the contributions of others with similar interests in the outcome of the case. Indeed, motions to recuse a judge based on campaign contributions of an opposing party or counsel to the campaign of that judge have been uniformly unsuccessful.<sup>16</sup>

Other state high courts have reached different conclusions about when campaign contributions warrant recusal. For example, the Oklahoma Supreme Court recognizes that due process must include the right to a trial without the appearance of judge partiality

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<sup>16</sup> See *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal where judge received substantial political donations from counsel and from one of the parties); *Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . . has been rejected by the courts of this state); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (no recusal where judge solicited and lawyer contributed while case pending); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App. 1990) (no recusal where \$500 contributed to judge after verdict but before decision on motion jnov); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed \$10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee).

arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge.<sup>17</sup> Although in Oklahoma a lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him, due process may require disqualification in an individual case. *Id.* at 798 (disqualification required when a lawyer made maximum campaign contribution allowed by statute, member of lawyer's immediate family contributed, and lawyer solicited contributions for judge's campaign).<sup>18</sup>

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<sup>17</sup> *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001).

<sup>18</sup> *Cf. In re Disqualification of Ney*, 657 N.E.2d 1367, 1368 (Ohio 1995) (disqualification involving campaign issues is decided on a case-by-case basis).

The Florida Supreme Court has held that receipt of legal campaign contributions from parties or their lawyers does not itself require disqualification, although disqualification may be warranted if an additional factor is present, such as the party's lawyer serving as chair of the judge's campaign.<sup>19</sup> Similarly, in Washington, North Dakota, and West Virginia, [a]lthough campaign contributions of which a judge has knowledge are not prohibited, these contributions may be relevant to recusal.<sup>20</sup>

In Nevada, the Supreme Court has held open the possibility that contributions could warrant disqualification: In the context of campaign contributions . . . a contribution to a presiding judge by a party or an attorney does not *ordinarily* constitute grounds for disqualification.<sup>21</sup> However, the Nevada court also held that disqualification was not only

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<sup>19</sup> *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 & n.5 (Fla. 1990) (\$500 contribution to judicial campaign of judge's spouse does not warrant disqualification).

<sup>20</sup> Wash. Code of Jud. Conduct, comment to Canon 7(b)(2); N.D. Code of Jud. Conduct, comment to Canon 5(C)(2); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2).

<sup>21</sup> *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nev. 2000) (emphasis added, citation omitted).

not required but *improper* when parties on one side of a case gave four donations to the presiding judge, ranging from \$150 to \$2,000.<sup>22</sup>

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<sup>22</sup> *Id.*; *see also* Nevada Code of Jud. Conduct, comment to Canon 3(e)(1) (A mere receipt of a campaign contribution from a witness, litigant, or lawyer involved with a proceeding is not grounds for disqualification@).

In Alabama, recusal is required where judicial campaign contributions create an Appearance of impropriety. There, parties and lawyers are required to submit disclosure certificates stating the amount of their contributions to the assigned judge within 28 days of the filing of a notice of assignment of a judge or notice of appeal. Recusal is required on the request of a party if the opposing party or opposing counsel contributed more than \$4,000 (not aggregated) to a supreme court justice or a court of appeals judge, or more than \$2,000 to the assigned circuit court judge.<sup>23</sup>

### OUR PROPOSAL

Our proposal is along the lines of Alabama's law, but goes further. We propose an amendment to Canon 3, subpart E of the ABA Model Code of Judicial Conduct, which lists grounds for disqualification. Under our proposal, the Canon would specify that campaign contributions from the parties or lawyers appearing before a judge may constitute grounds for disqualification or recusal. Specifically, Canon 3 would be amended to provide:

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.**

(existing text in regular type face, proposal in bold).

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<sup>23</sup> Ala. Stat. ' 12-24-1. *See also* Ala. Stat. ' 12-24-2(a), (b).

The Commentary would explain:

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.

Our hope is that an express acknowledgment by the ABA 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 stand for election to adopt stronger rules about recusal and thereby to alleviate the widely-held belief that justice is for sale in those states.

## **B.**

### **THE PROBLEM OF REGULATING SPEECH DURING JUDICIAL ELECTIONS.**

In *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), the Supreme Court struck down as overbroad the rule prohibiting candidates for judicial office from announcing their views on disputed legal and political issues that might come before them as judges. For reasons explained at greater length in my article, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 *Indiana Law Rev.* 719 (2003), I agree with that decision, not only under the First Amendment, which dictated the outcome to the 5-justice majority, but also as a matter of public policy. I will not repeat the policy arguments here, but will instead focus on two proposals in the article that I would support even if the case had come out the other way.

First, the no announce rule, like other election-related rules in judicial codes, operates prospectively, in the sense that it forbids certain statements that might be seen to suggest that a judicial candidate who engages in certain conduct or makes certain statements might be less than fully impartial in future cases or on certain issues that might arise in future cases. A judge can be sanctioned for stepping over the line even if the issue never comes before the judge, or if the judge recuses himself if such a case appears on his docket. And a lawyer who runs for judicial office, but loses, can still be sanctioned as a lawyer even if she will never have the opportunity to judge a case in which the outcome might be altered by that lawyer's prior views. As the article suggests, the effect of that and similar rules is to limit what judicial candidates can say and what the voters can hear, with no necessary benefit to the adversary process. The approach is also inconsistent with general First Amendment

principles under which people are punished for what they say only if what was said is shown to be harmful.

Thus, our first suggestion is that, if a judge steps over whatever lines are enacted after *White*, the only penalty—if it can be called that—would be that the judge might be called on to recuse him or herself for what was said during a campaign, or for that matter at any other time, either before or after the election. Whether recusal would be appropriate would depend on what was said, in what context, and how it related to the pending litigation (among other factors), but for present purposes, the important change is in the remedy. The change should result in judicial candidates being less inhibited in their speech since they cannot lose their jobs as judges or the licenses as lawyers for overstepping a particular rule. It would also result in determinations about the impact of speech being made in the context of concrete cases, rather than with respect to *possible* lawsuits, where the issue is how a statement might affect the judge's ability both to appear to be, and actually to be, impartial in some abstract case at some indefinite time in the future. Indeed, it is entirely possible that, if the only sanction that might result from a violation of a campaign speech rule is that a judge (but never a lawyer who is not elected) may not sit on a particular case, the First Amendment may not come into play at all.

If such an approach were taken, the appropriate judicial code, and perhaps the relevant statutes and/or court rules, would be amended to add a provision under the category of recusals based on the appearance of impropriety. It 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. Comments to that rule could usefully flesh out the standard, such as requiring the court to focus on when and under what circumstances the statement was made, how likely the issue was to arise in litigation, how firm (or tentative) the views expressed were, and how closely they are related to the issues in that case. The standard would inevitably be flexible, but that is true of almost all recusals, especially those based on the appearance of impropriety. But unlike other areas affecting speech, the uncertainty should not be a problem because the only penalty for violating a rule would be that the judge could not sit on a particular case. The appearance of impropriety standard is already the law with respect to prior statements or opinions held by a judge, *see Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J. mem.), and the change would be mainly designed to make clear that prior campaign statements are included in the more general rule and to eliminate other enforcement methods for these rules.

### **OTHER MEANS OF POLICING STATEMENTS DURING JUDICIAL ELECTIONS**

The current means by which rules that prohibit certain statements made during judicial election campaigns are enforced both inhibits free speech and has no effect until after the election is concluded. By that time, the offender may have been elected to office, perhaps on the strength of inappropriate statements, and the remedies available may be ill-suited to the offense. Other problems with this system are discussed in the final section of my article, but there is one change that would lessen these problems and perhaps provide a means to augment compliance with whatever rules are enacted to replace those struck down in *White*.

The basic idea is to take enforcement out of the hands of the state and to place it into private hands, hopefully in a way that eliminates most if not all of the First Amendment problems that the current law must overcome. As the article explains, the model is one of a Citizens Election Commission that would entertain complaints arising from judicial elections (such as those involved in *White*). After allowing the candidate a reasonable opportunity to respond, the Commission could issue opinions during the campaign, which would be given wide dissemination, either agreeing or disagreeing with the complaining party and explaining why. Thus, as with other types of allegedly harmful speech, for which the best remedy is more speech, improper speech during a campaign would be promptly met by an opinion of an impartial group of citizens (including, perhaps, former judges, lawyers, and persons not connected with the law). Adequate funding would have to be assured so that the inquiries would be prompt and thorough, and many details would have to be worked out. But the principle of eliminating the mechanism of the state would both lessen (if not eliminate) First Amendment problems and hold out the possibility that complaints about misconduct during judicial elections could be dealt with before the election was concluded.