

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

NEWSLETTER

ALERT

No. 2015-1

January 29, 2015

Given that the election season is in full swing, the Board concluded that it would be appropriate to issue such an **ALERT** at this time in relation to campaign contributions and their relationship to the issue of disqualification under Canon 2, Rule 2.11(A)(4). As adopted by the Supreme Court, Rule 2.11(A)(4) is identical in the Code and the Rules, so all judges and judicial candidates are subject to the same rule.

Rule 2.11(A)(4) states:

- (A) 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 the following circumstances:

...

- (4) The judge knows or learns that a party, a party's lawyer, or the law firm of a party's lawyer has made a direct or indirect contribution(s) to the judge's campaign in an amount that would raise a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the party, the party's lawyer, or the law firm of the party's lawyer. In doing so, the judge should consider the public perception regarding such contributions and their effect on the judge's ability to be fair and impartial. There shall be a rebuttable presumption that recusal or disqualification is not warranted when a contribution or reimbursement for transportation, lodging, hospitality or other expenses is equal to or less than the amount required to be reported as a gift on a judge's Statement of Financial Interest.

Code of Judicial Conduct, Canon 2, Rule 2.11(A)(4); Rules Governing Standards of Conduct of Magisterial District Judges, Canon 2, Rule 2.11(A)(4).

Question: Must a judge review his or her campaign finance reports from the years in which he or she was elected or retained in order to determine if he or she is disqualified from sitting on a case?

Staff Response: Not necessarily. Like all candidates for elective office, judicial candidates and their campaign committees are required to file periodic campaign finance reports throughout their campaigns and after the conclusion of the campaigns. Those reports are available to the public, including lawyers and litigants. The obligation to

disqualify is based on what the judge “knows or learns.” Many judges do not know the identities of the people who contributed to their campaigns or the amounts contributed, having properly left that responsibility to their campaign committees. (It is noted that while the judge may seek to insulate him or herself in this regard in order to maintain the appearance of impartiality, the judge (or judicial candidate) is ultimately responsible for the actions of his or her committee, including compliance with the Code or Rules and the applicable campaign finance laws. *See* Rule 4.4(A) and Comment [2]. The Code and Rules encourage judicial candidates to instruct their committees “to be especially cautious on connection with ... contributions [from lawyers and others who might appear before a successful candidate], so that they do not create grounds for disqualification or recusal if the candidate is elected to judicial office. *See* Rule 2.11.”)

Of course, a party or a party’s lawyer may access the judge’s campaign finance reports and discover that the party’s opponent or the opponent’s lawyer or law firm contributed to the judge during the judge’s election campaign. If that information is brought to the judge’s attention in a motion for recusal or disqualification or otherwise, the judge must then assess the situation because the judge has “learned” that the lawyer, law firm or party was a contributor. The judge would then be obliged under Rule 2.11(A)(4) to determine if the contribution involved “an amount that would raise a reasonable concern about the fairness or impartiality of the judge’s consideration of a case involving the party, the party’s lawyer, or the law firm of the party’s lawyer.” *See* Rule 2.11(A)(4).

The Comment to Rule 2.11 explains that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Rule 2.11, Comment [5]. Such an obligation would arise if the judge knows of a contribution “in an amount that would raise a reasonable concern.” It does not require the judge to search out the information in the first instance. Accordingly, the judge is not necessarily required to review his or her campaign finance reports from the years in which he or she was elected or retained in order to determine if he or she is disqualified from sitting on a case.

A different situation presents itself in relation to contributions made to a sitting judge standing for retention, reelection or election to a higher court. As noted above, campaign contributions are reported periodically during the campaign and after its conclusion. If a judge’s committee receives a contribution from a lawyer, law firm or litigant in a proceeding before the judge at a time before the filing of the campaign finance report on which the contribution is required to be listed, the judge may have a disclosure obligation if the judge knows of a contribution in an amount that would raise a reasonable concern about the fairness or impartiality of the judge’s consideration of the case in which the litigant, lawyer or law firm is involved.

Question: Is there a specific “look-back” period on campaign contributions when a judge is assessing a request for disqualification or recusal based on the size of a contribution?

Staff Response: Though Rule 2.13 relating to administrative appointments by judges establishes a two-year period after a judge’s campaign during which a judge is generally prohibited from appointing a lawyer to a position if the lawyer, the lawyer’s spouse or domestic partner, has contributed as a major donor to the judge’s election campaign, Rule 2.11(A)(4) contains no specific time period. However, it is clear that the drafters of Rule 2.11 intended a limited look-back period when a judge is required to determine if he or she is disqualified because of a campaign contribution. The proposal that became Rule 2.11(A)(4) was recommended by the Ad Hoc Committee appointed by the Supreme Court to make recommendations for the revision of the Code of Judicial Conduct. In a comment to that proposal, the Ad Hoc Committee explained:

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. However, campaign contributions or support a 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 (or opponent) 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.

Report of the Ad Hoc Committee on the Revisions to the Code of Judicial Conduct, Canon 2, Rule 2.11, Comment [7], p. 16 (emphasis supplied). Though this Comment was not adopted by the Supreme Court, statements by the drafters may be consulted in the construction or application of the Rule. *See* 1 Pa.C.S. § 1939 (relating to use of comments and reports in statutory construction). This Comment makes it clear that the drafters of Rule 2.11(A)(4) intended a reasonable look-back period when a judge’s

impartiality is called into question as a result of a campaign contribution. Generally speaking, the effect of such a contribution on a judge's impartiality, just like a judge's prior association with a law firm or governmental entity which appears before the judge, must be presumed to dissipate over time.

While it is expected to be the very unusual situation, there could be a contribution, either directly to a judicial candidate's committee or indirectly for the benefit of the judicial candidate, which is so disproportionate to the amount of money otherwise raised by the judge's campaign or the total amount of money raised and spent in the election, that any taint would never truly dissipate. This situation is exemplified by the facts of *Caperton v. Massey Coal Company*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)(finding that due process required recusal). There, the CEO of a coal company which was involved in an appeal of an adverse \$50 million verdict, spent \$3 million in what would be considered indirect contributions for the benefit of a candidate for the West Virginia Supreme Court where the appeal was pending. That amount was more than 60% of the entire amount spent to support that candidate's campaign. In such a case, the judge should never sit in judgment on a case involving that contributor or his company.

Question: Must a judge recuse from any case involving a lawyer, law firm or litigant who contributed more than \$250 dollars to the judge's campaign?

Staff Response: No. Rule 2.11(A)(4) clearly states that there is a rebuttable presumption that disqualification or recusal is *not* required if the amount of a contribution is less than the amount that a judge has to report as a gift on the judge's annual statement of financial interests. Presently, that amount is \$250. This presumption does not equate to an obligation to recuse or disqualify any time the judge knows or learns of a contribution that exceeds \$250. Nor does it necessarily impose any obligation on the part of the judge to disclose all contributions that exceed that threshold. That a judge "should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification," as explained in the Comment to Rule 2.11, does not necessarily require that the judge disclose every contribution in excess of \$250. Such an obligation arises only if the information might "reasonably" give rise to a motion for recusal or disqualification. In assessing whether or not disclosure or disqualification is required for a contribution of more than \$250 will entail an examination of the factors identified by the Ad Hoc Committee as described above. Disqualification is only mandated when the amount of the contribution raises "a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the party, the party's lawyer, or the law firm of the party's lawyer." This is to be an objective standard. Such a view is consistent with the Preamble to the Code and the Rules which explains that the Rules found in the Code of Judicial Conduct and

the Rules Governing Standards of Conduct of Magisterial District Judges are “rules of reason.” *See* Code of Judicial Conduct, Preamble [5]; Rules Governing Standards of Conduct of Magisterial District Judges, Preamble [5]. Moreover, the Rules “are not intended to be the basis for litigants ... to obtain tactical advantages in proceedings before a court.” *See* Code of Judicial Conduct, Preamble [7]; Rules Governing Standards of Conduct of Magisterial District Judges, Preamble [7]. The timing of a request for recusal or disqualification might legitimately permit a judge to deny such a motion if it were to appear that it was filed in order to gain such an advantage.

Question: If the judge is faced with a recusal or disqualification motion because of contributions to the judge’s campaign committee by members of a law firm representing a party before the judge, does it matter that the lawyer actually handling the case and appearing in court before the judge did not personally make any contribution?

Staff Response: No. The rule clearly applies to contributions by the individual lawyer and those by the lawyers in the firm with which the lawyer is affiliated. It is possible that a judge might “know” of contributions by the lawyers in a law firm (even if the judge did not know the specific amounts), if the law firm hosted a fund-raising reception for the judge during the judge’s candidacy. On the other hand, the judge could “learn” of such law firm-related contributions if a party or lawyer raised the issue in a motion. In either of those circumstances, the judge would have to assess the situation under the standards set forth above, considering the amount of the contributions from the lawyers from all of the firm’s offices. This results from the language of Rule 2.11(A)(4) itself and the definition of “aggregate” contained in the “Terminology” section of the New Code and Rules. To the extent possible, the judge must try to determine the total contributions from all of the lawyers in the firm. This review must include direct contributions to the judge’s campaign committee (including “in-kind” contributions) and indirect contributions (where the contribution is not to the judge’s campaign committee, but is made with the understanding that it will be used to support the judge’s election or to oppose the election of the judge’s opponent).

It is the hope of the Board that this ALERT, like the Board’s Newsletter, provides helpful and timely information to the Commonwealth’s judicial officers. This ALERT is intended to provide guidance, but should not be construed as specific legal advice or binding authority. As was noted in the Board’s Fall 2014 Newsletter, in adopting the new Code and Rules, the Supreme Court continued the designation of the Ethics Committee of the Pennsylvania Conference of State Trial Judges and the Ethics and Professionalism Committee of the Special Court Judges Association of Pennsylvania as the approved bodies to render advisory opinions regarding ethical concerns involving judges, magisterial district judges and judicial candidates subject to the Code and the Rules. Although opinions by these respective committees are not, *per se*, binding upon the Board, the Court of Judicial Discipline or the Supreme Court, action taken in reliance on their opinions must be taken into account in determining whether discipline should be recommended by the Board or imposed by the Court. Any judicial officer or candidate for judicial office is well-advised to seek an opinion from the appropriate committee if there is any question as to the propriety of any anticipated action as this provides a level of protection, the so-called “Rule of Reliance,” that is not otherwise generally available.