

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

NEWSLETTER

No. 1 Fall 2016

Message from the Chair

Welcome to the Fall 2016 edition of the Judicial Conduct Board NEWSLETTER. In addition to an introduction of the Board's newest Members, Lisa Kronenfeld Steindel, Mustafa Rashed, Magisterial District Judge Elizabeth "Liesl" Beckley, and Wilmarie González, this edition includes two Statements of Policy adopted by the Board on issues of importance to the Board, the judiciary and the public. The first deals with the issue of disqualification of judges based on large campaign contributions. The second relates to judges' use of electronic communications.

As explained in the Statement of Policy regarding the rule requiring disqualification based on large campaign contributions, the Board has received inquiries from judges at all levels of Pennsylvania's judiciary regarding the operation, interpretation and enforcement of Rule 2.11(A)(4) as found in both the Code of Judicial Conduct and the Rules Governing Standards of Conduct of Magisterial District Judges. Similarly, as set forth in the Statement of Policy regarding electronic communications, many judges have asked questions relating to how the Board will investigate allegations of misconduct arising from a judge's alleged improper use of electronic communications technology and its implications under the Code, the Rules, and the Pennsylvania Constitution.

The Campaign Contributions policy statement further explains Rule 2.11(A)(4). Having been adopted as part of the revisions to the Code and Rules in 2014, Rule 2.11(A)(4) is relatively new. The 2017 judicial election cycle will be only the second time that its provisions will be applicable. The purpose of the Statement of Policy is to provide guidance to the Commonwealth's judges on the new rule's application and how the Board will interpret and enforce it. It does so by addressing a number of questions that have arisen since the rule was adopted.

The Electronic Communications investigation policy statement arises from the recent series of misconduct claims regarding the use of electronic communications and the Board's view that it is appropriate to provide guidance on the topic of judges' use of such communications technology. As described in the statement, this policy applies to all forms of "electronic communications" including "messages, their content, and any attached media distributed by electronic means from a person or persons utilizing a privately-owned or government-provided computer or other electronic device to one or more recipients *via* any network" and includes "emails, social media communications, postings on internet chatrooms, internet forums, and internet message boards, 'blogging,' communication by applications or 'apps,' text messages, and any other electronic communication disseminated by the use of a computer or other electronic device which, in whole or in part, requires a writing."

Like statements of policy issued by executive agencies, the Board's Statements of Policy explain that they are intended to provide guidance only. They do not have the force and effect of law and are binding on neither the members of the judiciary nor the Board.

In addition to being distributed in our NEWSLETTER, the Statements of Policy are being published in the *Pennsylvania Bulletin*. They will continue to be available for review and consultation on the Board's website.

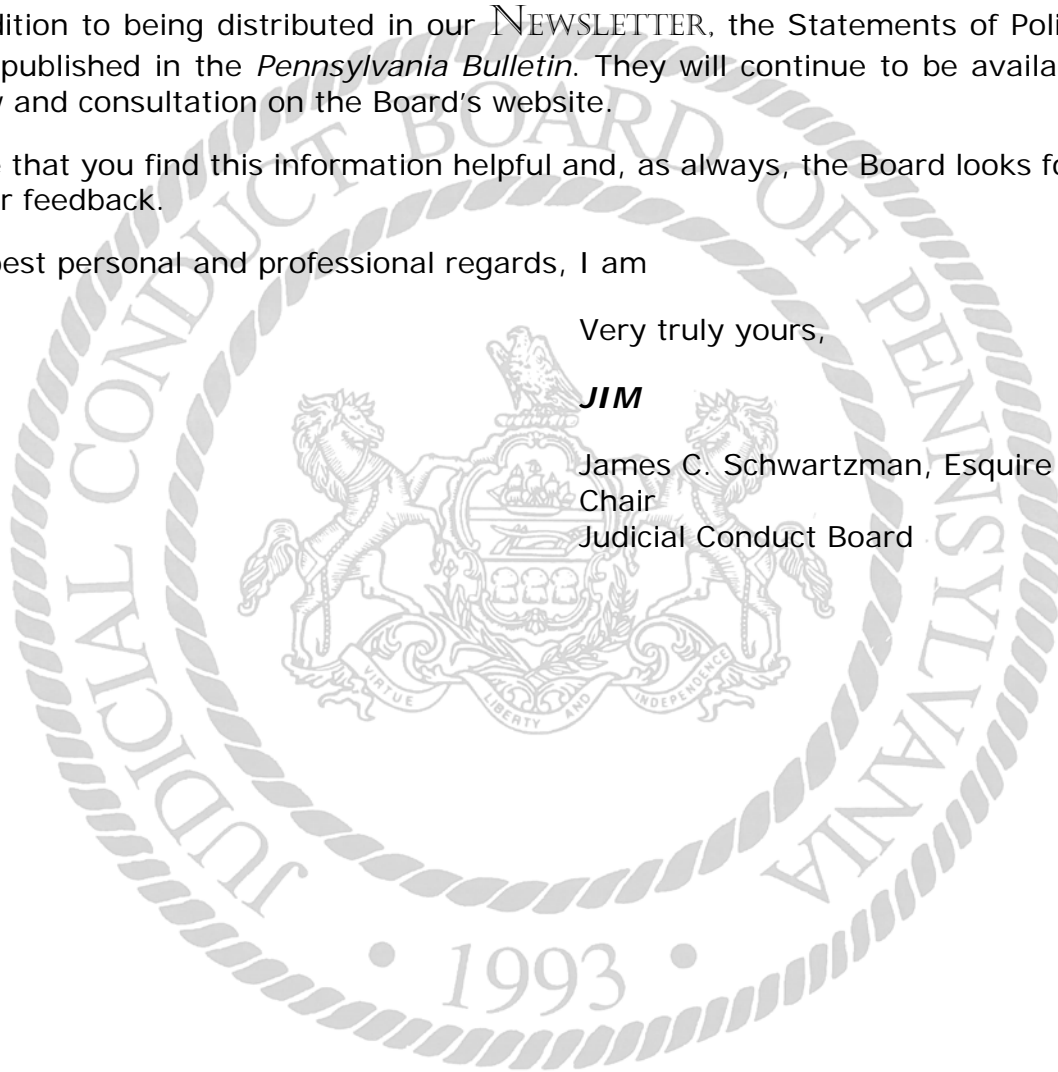
I hope that you find this information helpful and, as always, the Board looks forward to your feedback.

With best personal and professional regards, I am

Very truly yours,

JIM

James C. Schwartzman, Esquire
Chair
Judicial Conduct Board



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MEET THE BOARD'S NEW MEMBERS

Since January, four new Members have been appointed to the Judicial Conduct Board: Lisa Kronenfeld Steindel, Mustafa Rashed, Magisterial District Judge Elizabeth "Liesl" Beckley, and Wilmarie González.

Mrs. Steindel was appointed by the Supreme Court on January 20, 2016, and serves as a non-lawyer, lay elector of the twelve-member Board. She is registered in the Democratic Party. The Constitution specifies that no more than half of the appointees to the Board may be registered in the same political party.

Mrs. Steindel is a native of Erie, Pennsylvania and a 1970 graduate of Academy High School. She went on to receive a B.S. in Psychology from the University of Pittsburgh and a Masters of Education in Vocational Counseling. Following her certification in Vocational Rehabilitation Counseling, she was employed as a Career Counselor at the Career Development Center, assisting displaced workers, recent graduates, and homemakers returning to the work force. Mrs. Steindel went on to establish her own career counseling practice, What Should I Be, LLC. Through her practice, she was called to act as an expert witness in divorce cases.

Member Steindel is married to Rabbi Stephen Steindel, who serves as Rabbi Emeritus of Congregation Beth Shalom in Pittsburgh. During their 35 years in Pittsburgh, they have served two Congregations in the area. She was among the founders of the Solomon Schechter Day School of Greater Pittsburgh and was involved in the merger of that school with The Community Day School in 1988. She was on the Board of Directors of the Rainbow Kitchen in Homestead, and served as Chairman of its Capital Campaign in 1998. She was also instrumental in the establishment of the Squirrel Hill Kosher Pantry and served for three years as its Director. The Steindels have been married for 40 years and are the proud parents of four children and eight grandchildren.

From 2004 to 2009, Mrs. Steindel was the Executive Director of the Pittsburgh Chapter of the American Jewish Committee and worked to establish and maintain interfaith relations with the Catholic Diocese, the Hindu Sri Venkateswara Temple Community, and the Islamic Center of Pittsburgh. After retiring in 2009, she continues to teach in the Pittsburgh Catholic Diocese High Schools as part of the Catholic-Jewish Education Enrichment Program.

Mrs. Steindel is a Life Member of the National Council of Jewish Women, Hadassah, and Na'amat. She currently serves as President of the Pittsburgh Counsel of Na'amat, an organization dedicated to the support of all women and children in the State of Israel, across ethnic and religious lines.

Mrs. Steindel was appointed to fill the unexpired term of Samuel M. Magaro, who passed away in April 2015. Mrs. Steindel's term ran until September 24, 2016. Prior to the end of that interim term, the Court re-appointed Mrs. Steindel to a term ending January 20, 2020, the balance of her four-year term. The Constitution prohibits Board members from serving more than four consecutive years.

On February 26, 2016, the Supreme Court appointed Magisterial District Judge Elizabeth S. "Liesl" Beckley to the Board for a four-year term starting on March 14, 2016. She will serve as the magisterial district judge member of the twelve-member Board. She replaces Magisterial District Judge Jayne Frances Duncan whose four-year term ended on March 14. She is registered in the Republican Party.

Judge Beckley has served as a Magisterial District Judge in Cumberland County since January, 2012. She is also an attorney with the law firm of Beckley & Madden in Harrisburg, Pennsylvania, and continues to engage in private practice on a part-time basis.

She received her law degree from the Thomas M. Cooley School of Law in Lansing, Michigan, where she was the winner of an American Jurisprudence Award for Excellence in Trial Advocacy. Judge Beckley received her B.A. in Criminal Justice from the American University, in Washington, D.C.

Judge Beckley is admitted to practice before the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the United States District Court for the Middle District of Pennsylvania. Until her appointment to the Board, she served as a Hearing Committee Member of the Disciplinary Board of the Supreme Court of Pennsylvania from 2011 until 2016. She also served as a volunteer Conference Officer for Dauphin County Domestic Relations in 2000.

Judge Beckley is a member of the American Bar Association and the Pennsylvania Bar Association and has served as a Member of the PBA House of Delegates since May, 2002. She is a Member of the Dauphin County Bar Association, of which she served as President in 2011, and a Social Member of the Cumberland County Bar Association.

Judge Beckley is a past member of the Camp Hill Borough Council, the Capital Region Council of Governments, and the West Shore Area Jaycees, having served as President from 1996 through 2002. She is currently a member of the Camp Hill Woman's Club, and served as President in 2012/2013.

On February 29, 2016, Governor Tom Wolf appointed Mustafa Rashed to the twelve-member Board. Like Mrs. Steindel, he will serve as a non-lawyer, lay elector of the twelve-member Board. He, too, is registered in the Democratic Party.

Mr. Rashed is the President and CEO of Bellevue Strategies, a Philadelphia based, minority-owned government relations, advocacy and strategic communications firm. He serves as the firm's manager of day-to-day operations and is responsible for operations, technology, human resources and vision.

Prior to this role, Mr. Rashed served as the vice president of media and brand strategy of the Bellevue Communications Group a public relations firm in Philadelphia. In addition to work for corporate clients he has also worked as an effective veteran intermediary on campaigns from political to non-profit advocacy.

A veteran of the United States Navy, Mr. Rashed served with distinction in Operation Desert Storm in Iraq and Operation Restore Hope in Somalia. Rising to the rank of Petty Officer Third Class, he received numerous commendations for achievement and leadership.

Mr. Rashed has also always been invested in the educational and entrepreneurial opportunities for youth and minorities. As such, he serves on the Board of Directors of the African American Museum in Philadelphia, on the Dean's Council at Temple University's School of Tourism & Hospitality Management, and as a member of the National Urban League's Philadelphia Chapter.

Mr. Rashed is an advocate of public education and a strong municipal public school system. He is a graduate of John Bartram High School of the Philadelphia school system and holds a Bachelor of Science Degree from Temple University.

Mr. Rashed was appointed to complete the unexpired term of former Board Member Thomas M. Tigue who passed away in February. The term will run through September 3, 2017. At that time, the Governor can appoint Mr. Rashed to the balance of a four-year term.

The Supreme Court appointed Wilmarie González to the Board on June 20, 2016. She, like Mrs. Steindel and Mr. Rashid, will serve as a non-lawyer, lay elector member of the twelve-member Board. She is registered in the Democratic Party.

Ms. González is the Director for the Bureau of Quality Management and Program Innovation of the Pennsylvania Department of Human Services, Office of Long-Term Living. She has held that position since August 2015. Her bureau is responsible for quality and performance measures for the statewide home- and community-based programs. She provides leadership for all performance improvement and quality assurance initiatives related to Office of Long-Term Living services, incorporating state of the art quality processes and measurements identified by the Centers for Medicaid Services.

Previously, Ms. González served for more than 10 years as Bureau Director and State Long-Term-Care Ombudsman at the Pennsylvania Department of Aging where she provided oversight in the statewide advocacy systems for the over 60 population on issues relating to elder abuse and protection and residents' rights. Among the accomplishments of that program were the passing of digital fingerprinting which expedited submission and processing of FBI background checks for employment applicants and the creation of local Elder Abuse Task Forces or Multidisciplinary Teams designed to address, among other issues, financial exploitation of the aging population. In this post, Ms. González worked closely with federal and state officials on regulatory, legislative and policy issues impacting the aging population.

Ms. González has participated in judicial proceedings in the Commonwealth's Orphans Courts and the federal Bankruptcy Courts representing the interests of consumers receiving long-term care or persons living in facilities. She has extensive experience in the legal profession working in the areas of product liability, maritime law and

litigation with a number of Philadelphia law firms. She has been involved with many organizations advocating for minorities and the elderly community and recently served as a member of the Pennsylvania Supreme Court's Elder Law Task Force.

Ms. González received her M.S. in Management from Rosemont College, and B.S. in Organizational Management from Eastern University. She lives in Harrisburg, Pennsylvania. Her four-year term will run through June 20, 2020.

JUDICIAL CONDUCT BOARD STATEMENT OF POLICY REGARDING DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS UNDER RULE 2.11(A)(4)

The Code of Judicial Conduct (Code) and the Rules Governing Standards of Conduct of Magisterial District Judges (Rules) were adopted by the Supreme Court in 2014. With the 2017 judicial election cycle approaching, the Board thought it appropriate to provide guidance on the topic of campaign contributions and the issue of disqualification as addressed in Rule 2.11(A)(4) of the Code and Rules. Many judicial officers at all levels of Pennsylvania's judiciary have asked questions relating to the operation of this rule and how the Board will interpret and enforce it. For these reasons, the Board has adopted this "Statement of Policy" which sets forth the Board's tentative intention with respect to how it will interpret and enforce this rule in the future. While the Board seeks to provide guidance with the issuance of this Statement of Policy, it is noted that it does not have the force and effect of law and is binding on neither the members of the judiciary nor the Board.

Executive Summary

- When faced with a question of recusal or disqualification under Rule 2.11(A)(4), the nature of the inquiry is an objective one involving the public perception of large contributions and their effect on the judge's ability to be impartial. If the amount of a contribution to a judicial candidate's campaign raises a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the contributor, disqualification is required.
- The focus of any inquiry under Rule 2.11(A)(4) is the contributions received by the campaign of the judge whose ability to preside is questioned.
- There is no amount specified in Rule 2.11(A)(4) over which disqualification is required.
- Regardless of proportional relationship to other contributions or the total amount raised, large contributions will raise reasonable concerns about the judge's fairness based on the size alone and will trigger the assessment required under Rule 2.11(a)(4) and the Board will look unfavorably upon a judge's strained views of the public perception of such large contributions.
- Disqualification under Rule 2.11(A)(4) is subject to informed waiver by the parties and their attorneys.
- A contribution of several thousand dollars will almost always require an analysis of whether disqualification is warranted; but such analysis may be avoided if the contribution is disclosed and the parties and their attorneys waive disqualification.
- Judges are not required to review their campaign finance reports to determine if they are disqualified, but that may be the prudent practice as judges may not remain purposely ignorant of campaign contributions in order to avoid compliance with Rule 2.11(A)(4).

- While there is no specific look-back period in Rule 2.11(A)(4), the effect of contributions will generally dissipate over time. The larger the contribution, the longer it will take to dissipate.
- Disqualification is not required under Rule 2.11(A)(4) simply because the amount of a contribution exceeds the amount that must be reported as a gift on the judge's statement of financial interests.
- Contributions from several lawyers from the same law firm must be aggregated when conducting the assessment required by Rule 2.11(A)(4).

General Principles and Observations

Rule 2.11, relating to disqualification, provides, in pertinent part:

(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).

As drafted, the overriding emphasis of the rule is the appearance that the amount of a campaign contribution might raise a concern about the judge's impartiality. That this is the preeminent concern of the rule is evidenced by the fact that the word "impartiality" or "impartial" appears three times in the rule. As used in the Code and Rules, *"impartial" or "impartiality" means "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."* Code of Judicial Conduct, Terminology, Impartial, impartiality, impartially; Rules Governing Standards of Conduct of Magisterial District Judges, Terminology, Impartial, impartiality, impartially.

The rule starts with the imperative that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Legal commentators have suggested that a simple application of this

principle would dictate the proper result in most cases of disqualification occasioned by campaign contributions, noting that whether “impartiality ‘might reasonably be questioned’ ... turn[s] on whether [a judge’s] participation would create the appearance of partiality in the mind of a reasonable, fully informed, objective observer.” Geyh, Alfini, Lubet and Shaman, *Judicial Conduct and Ethics (Fifth Ed.)*, § 4.16 Campaign Contributions, 4-73 (LexisNexis 2013).

The directive that a judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned is then followed by a non-exhaustive list of “circumstances” requiring disqualification, including the circumstance listed in subsection (A)(4) where “[t]he 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.” This specific example where disqualification is required necessitates the judge’s attention to campaign contributions from parties, their lawyers and their law firms of which the judge learns or has knowledge and a determination of whether the size of the contribution “would raise a reasonable concern about the fairness or impartiality of the judge’s consideration of” a case involving the contributing party, lawyer or law firm. Like the introductory language discussed above, this language emphasizes the objective nature of the inquiry, namely: does the contribution raise a reasonable concern about the judge’s impartiality? In making this determination, the rule says that the judge “should consider the public perception regarding such contributions and their effect on the judge’s ability to be fair and impartial.”

The focus of the inquiry required by this rule is the contributions received by the campaign or made in support of the judge whose ability to preside is questioned. The amount of direct contributions to or indirect expenditures in support of all of the candidates for a particular judgeship is not a factor in the determination of whether a contribution raises a reasonable concern about the fairness or impartiality of a judge’s consideration of a case involving a contributor. As originally drafted, the provision that would become Rule 2.11(A)(4) required inquiry into “direct or indirect contribution(s) in relation to an election in which the judge is a candidate.” The drafters of this provision suggested that a judge who was faced with a disqualification decision based on campaign contributions should consider, among other factors, “[t]he 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.” Report of the Ad Hoc Committee on the Revisions to the Code of Judicial Conduct, Canon 2, Rule 2.11, Comment [7], p. 26. However, the original language was revised to its current form which directs the inquiry into “direct or indirect contribution(s) to the judge’s campaign.” 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). This substitution obviates the need for an examination into all the money contributed to or expended on behalf of or in opposition to all of the candidates who stood for election when the judge whose participation is under consideration was elected. The inquiry is simply: does the amount of the direct and indirect contributions to the judge’s campaign raise a reasonable concern about the

fairness or impartiality of the judge's consideration of a case involving the contributor who is either a party, the party's lawyer, or the law firm of the party's lawyer? If the answer is "yes," the judge is disqualified and may not sit on the case absent an informed waiver. See Code of Judicial Conduct, Canon 2, Rule 2.11(C); Rules Governing Standards of Conduct of Magisterial District Judges, Canon 2, Rule 2.11(C).

The timing of contributions and requests for disqualification have also been the subject of questions. Some have asked if there is a look-back period for campaign contributions. Different from Rule 2.13 which prohibits the appointment of a lawyer by a judge if the judge either knows or learns that the lawyer, or the lawyer's spouse or domestic partner, has contributed as a major donor to the judge's election campaign within the prior two years before the appointment, Rule 2.11(A)(4) omits any temporal limitation. Compare 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), with Code of Judicial Conduct, Canon 2, Rule 2.13(B); Rules Governing Standards of Conduct of Magisterial District Judges, Canon 2, Rule 2.13(B). However, the drafters of Rule 2.11(A)(4) suggested that "[t]he timing of the support or contributions in relation to the case for which recusal or disqualification is sought" is among the factors to consider when addressing questions under this rule. Report of the Ad Hoc Committee on the Revisions to the Code of Judicial Conduct, Canon 2, Rule 2.11, Comment [7], p. 27. Accordingly, for most campaign contributions or independent expenditures, the effects of such contribution or expenditures on a judge's impartiality, just like a judge's prior association with a law firm or governmental entity whose lawyers appear before the judge, must be presumed to dissipate over time.

However, there could be a contribution or expenditure, either directly to a judicial candidate's committee or indirectly for the benefit of the candidate, which is so large and 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). There, the Court found that due process required recusal where 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. In such a case, the judge should never sit in judgment on a case involving that supporter or his company, in the absence of an informed waiver by the parties and their counsel as provided in Rule 2.11(C).

Finally, it must be noted that, in adopting Rule 2.11(A)(4), the Supreme Court rejected the suggestion of the Model Code of Judicial Conduct that the rule establish a definite amount over which disqualification would be required. The Model Code suggests the following language: "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: ... 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." Relying on this suggestion, the Pennsylvania Bar Association Task Force on the Code of Judicial Conduct proposed the following rule to the Supreme Court: "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: ... The judge knows or learns that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous two years made aggregate contributions in support of or in opposition to the judge's campaign in an amount that is greater than \$2,500 from an individual or \$5,000 for an entity or organization." Pennsylvania Bar Association, *Report of the Task Force on the Code of Judicial Conduct, Canon 2, Rule 2.11(A)(4)*, 19 (2013). The Court rejected this language in favor of the language found in the current version of Rule 2.11(A)(4) quoted above.

In light of this history, while the Board has the responsibility to interpret and apply the provisions of the Code in the first instance and in the absence of any definitive decisions of the Court of Judicial Discipline or the Supreme Court, it is not at liberty to adopt an interpretation that would establish a fixed amount which, if exceeded, would require disqualification. While such a rule would be easier to apply (and would be the easiest with which judges could comply), the Supreme Court eschewed any such fixed rule, so the Board must try to establish standards by which to apply the rule as adopted.

Interpretation and Application

Like all of the rules found in the Code of Judicial Conduct and the Rules Governing Standards of Conduct of Magisterial District Judges, Rule 2.11(A)(4) must be given a reasonable interpretation. This premise is dictated by the Code and Rules themselves. As explained in the Preambles to both sets of rules,

[t]he Rules of this Code of Conduct are rules of reason that should be applied consistently with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

...

Moreover, it is not intended that disciplinary action would be appropriate for every violation of the Code's provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

Code of Judicial Conduct, Preamble [5] and [6]; Rules Governing Standards of Conduct of Magisterial District Judges, Preamble [5] and [6]. By adopting these guidelines, the Board hopes to apply Rule 2.11(A)(4) consistently through a reasonable application of its text.

1. Amount of Contribution Requiring Disqualification

As noted above, there is no fixed amount for contributions that will automatically require a judge's disqualification. Nevertheless, there are guidelines which judge's may follow and which will focus any inquiry by the Board when faced with a campaign contribution/disqualification issue.

When a judge knows or learns that a party or the party's lawyer or law firm has contributed to the judge's campaign, the judge must make a reasonable effort to determine the amount of the contribution or contributions (as where both a party and the party's lawyer have made contributions). The judge must also determine if other members of the party's law firm or its political action committee have made contributions.

Once the amount of the contribution or contributions is known, the judge must determine if the total amount would raise a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the contributor, giving due consideration to the public perception regarding the contribution and the effect on the judge's ability to be fair and impartial. In assessing the "public perception" of the amount of the contribution, the judge should consider the amount of the contribution(s) in relation to the total amount of contributions received by the judge in the election cycle in which the contribution(s) at issue was made and decide if the amount was in line with other amounts contributed by others during the same election cycle. In some instances, the amount will be recognizably large and so disproportionate from other contributions that the size alone will raise a reasonable concern about the judge's fairness and impartiality in presiding over the matter.

In making this assessment, among the factors that the judge should consider are the office being sought when the contribution was made. For example, a judge elected as a magisterial district judge in a rural area of the Commonwealth would not be expected to raise the same amount as a judge elected to and serving on one of the Commonwealth's appellate courts. Contributions of \$2,000 might be commonplace for appellate court candidates but highly unusual in common pleas and magisterial district court campaigns. Contributions of \$1,000 might not be unusual in campaigns for common pleas candidates. Smaller contributions in the several hundred-dollar range might be the norm in contested races for magisterial district judge. The differences in the races would most likely result in a different public perception relating to the size of contributions, it being reasonably understood that a statewide appellate court campaign would attract larger contributions than a race for magisterial district judge. Generally, the Board will view contributions beyond these amounts as triggering the rule's obligations. Such contributions in the Board's view will require an analysis under the rule by the judge and may require disqualification.

In determining the objective "public perception" of the amount of the contribution, the Board will apply a reasonable person standard and will not be guided by what some might consider reasonable by those regularly involved in political campaigns. A judge's strained view of the public perception of a sizable contribution

when faced with a disqualification issue will not be considered favorably by the Board. In the Board's view, regardless of the office held by the judge, a contribution of several thousand dollars will almost always require an analysis of whether disqualification is warranted because of the public perception resulting from such a large contributions and its effect on the judge's ability to be fair and impartial. Under Rule 2.11(C), discussed below, such analysis may be avoided if the contribution is disclosed and the parties and their attorneys waive disqualification.

2. Judge's Knowledge of Contributions

Judges are not necessarily required to review their campaign finance reports from the years in which they were elected, reelected or retained in order to determine if they are disqualified from sitting on cases. 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 election. Those reports are available to the public, including to lawyers and litigants. The obligation to disqualify is based on what the judge "knows or learns." What a judge "knows" according to the Code and Rules is "[a]ctual knowledge of the fact in question." Code of Judicial Conduct, Terminology; Rules Governing Standards of Conduct of Magisterial District Judges, Terminology. The Code and Rules further provide, however, that "[a] person's knowledge may be inferred from the circumstances." *Id.*

Many judges do not know the identities of the people who contributed to their campaigns or the amounts contributed, having left that responsibility to their campaign committees. While judges may seek to insulate themselves in this regard in order to maintain the appearance of impartiality, they are ultimately responsible for the actions of their committees, including compliance with the Code or Rules and the applicable campaign finance laws. See Canon 4, Rule 4.4(A) and Comment [2]. The Code and Rules encourage judges to instruct their committees "to be especially cautious in 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." See Canon 4, Rule 4.4, Comment [3].

Judges may not remain purposely ignorant of campaign contributions in order to avoid compliance with Rule 2.11(A)(4). They are required to sign the campaign finance reports listing all of the contributions to their campaign committees and the Board will presume that they know the amounts reported on them when confronted with claims arising under this rule. A judge's professed ignorance of a contribution from a party, the party's lawyer, or the lawyer's firm will not absolve the judge of potential liability for an infraction of this rule, particularly where the contribution or sum of the contributions is in an amount that would clearly trigger the evaluation demanded by the rule. While there is no fixed amount that triggers this obligation, judges should consider the public perception when making this determination. If the amount is large by any standard, the judge must act.

Judges should keep in mind that different from a request for recusal that may be waived if not raised in a timely fashion, issues that arise under the Code and Rules are not subject to strict pleading rules. Even in the absence of a motion to recuse, if

a judge sits on a case in which one of the parties or one of the lawyers or law firms involved gave a contribution in an amount that warranted analysis under this rule and that information is brought to the Board's attention after the fact, the judge may face a disciplinary inquiry and possible disciplinary action for not having conducted the proper analysis under the rule and for not having disqualified from the case. The issue at that stage is not the resolution of the case, but the public perception created by the judge sitting on the case at all because of the size of the contribution.

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." Canon 2, Rule 2.11, Comment [5]. Such a disclosure obligation would arise if the judge knows of a contribution "in an amount that would raise a reasonable concern." Any large contribution would raise a reasonable concern and, while the judge is not necessarily required to review his or her campaign finance reports from the years in which he or she was elected, reelected or retained in order to determine if he or she is disqualified from sitting on a case, that may be the better and more prudent practice. The Board will look favorably upon those situations where judges made appropriate disclosures even though the judges ultimately decided that disqualification was not required.

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, reelection or retention 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 to conduct the analysis discussed above.

A different situation presents itself in relation to contributions made to a sitting judge standing for retention or 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 and failure to do so could result in disciplinary action.

3. Look-back Period

As noted above, different from Rule 2.13 relating to administrative appointments which 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.

In enforcing this rule, the Board will presume that the effect of a contribution on a judge's impartiality will dissipate over time. However, since the alternative language proposed by the PBA Task Force would have included a two-year look-back period and that language was rejected by the Supreme Court in favor of the current verbiage in Rule 2.11(A)(4), it would be inappropriate for the Board to adopt a strict time limit. Generally speaking, however, the Board will expect judges to conduct the analysis required by this rule whenever a campaign contribution-related disqualification issue is raised in any proceeding within two years of the end of the election in which the campaign contribution was made. In examining complaints under this rule, the Board will look to the amounts of the contributions and the timing of the contributions in relation to when the matter comes before the judge.

The size of the contribution will play a role in any determination under this rule. The larger the contribution, the longer the period in which the judge will be required to consider the issue of disqualification under this rule. Concomitantly, the smaller the contribution, the shorter the period. Some contributions could be so large that the effect of the contribution on public perception will never dissipate and the judge should never sit on that contributor's cases absent an informed waiver under Rule 2.11(C).

4. Contributions in Excess of "Gift" Reporting Requirement

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. For 2016, 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 exceeded the amount triggering the reporting requirement. Nor does it necessarily impose any obligation on the part of the judge to disclose all contributions that exceed that amount or to conduct the analysis required by the rule.

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 the gift amount. 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 the gift amount requires a determination of whether the size of the contribution "would raise a reasonable concern about the fairness or impartiality of the judge's consideration of" a case involving the contributor. As explained above, this is an objective inquiry into whether the contribution raises a reasonable concern about the judge's impartiality considering the public perception regarding such contributions and their effect on the judge's ability to be fair and impartial. 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." As is explained below, disqualification may be avoided by informed waiver by the parties and their attorneys.

Of course, if the judge's campaign committee only raised a small amount of money, a contribution in an amount less than or equal to the amount that must be reported on a Statement of Financial Interests as a gift might require closer examination by the judge. Like all rules of general application, the particular circumstances might change the equation and the result.

5. Contributions by Several Lawyers from the Same Law Firm

Rule 2.11(A)(4) clearly applies to contributions by the individual lawyer representing the party in court 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 event 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 amounts of the contributions from all of the lawyers in the firm. If the firm has multiple offices, the judge will have to determine the contributions from 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 of the lawyer at the time that the issue of disqualification arises. 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 (which could include money expended to defeat the judge's opponent). In cases involving protracted litigation, the issue of disqualification based on campaign contributions to the judge may arise whenever a new lawyer enters an appearance in the case or whenever a lawyer for a party changes firms.

6. Waivers

Any disqualification under Rule 2.11(A)(4) is subject to a waiver. Rule 2.11(C) provides:

A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Canon 2, Rule 2.11(C). The rule is virtually identical for magisterial district judges, except for the last sentence which states: "The agreement, in writing and signed by

all parties and their lawyers, shall be attached to the record copy of the complaint form.”

As noted previously, 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,” and the Board will look favorably upon those situations where judges have made appropriate disclosures even though the judges ultimately decided that disqualification was not required. In addressing possible waivers under this provisions, judges must be careful to not to ambush litigants and their lawyers. The judge should make the proper disclosure as soon as the judge becomes aware of a possible problem and must then afford the parties and their lawyers sufficient time, without involvement by the judge or court personnel, to reasonably consider the situation and decide if waiver is appropriate. For judges covered by the Code of Judicial Conduct, any agreement to waive the disqualification must be incorporated into the record of the proceeding. This may be accomplished by stating the agreement on the stenographic or other official record and having the parties and their lawyers express their assent. For those judges bound by the Rules Governing Standards of Conduct of Magisterial District Judges, since theirs are not courts of record, the agreement must be reduced to a writing signed by all the parties and their lawyers and attached to the record copy of the complaint form. If properly done before any court, such a record will ward off any future appellate challenge and will insulate the judge from disciplinary action for an alleged violation of Rule 2.11.

JUDICIAL CONDUCT BOARD STATEMENT OF POLICY REGARDING ELECTRONIC COMMUNICATIONS

The Code of Judicial Conduct (Code) and the Rules Governing Standards of Conduct of Magisterial District Judges (Rules) were adopted by the Supreme Court in 2014. With the recent series of misconduct claims against judges regarding their use of electronic communications, the Board thought it appropriate to provide guidance on the topic of a judicial officer's use of electronic communications technology and its implications under the Code, the Rules, and the Pennsylvania Constitution. Many judicial officers at all levels of Pennsylvania's judiciary have asked questions relating to the Board's investigation of alleged judicial misconduct related to the use of electronic communications. For this reason, the Board adopted this "Statement of Policy" which sets forth the Board's tentative intention with respect to how it will interpret and enforce the Code, the Rules, and the Constitution with respect to allegations of judicial misconduct stemming from the use of electronic communications in the future. While the Board seeks to provide guidance with the issuance of this Statement of Policy, it is noted that the Statement of Policy does not have the force and effect of law and is binding on neither the members of the judiciary nor the Board.

SECTION I – DEFINITIONS

"Board counsel." Chief Counsel, Deputy Chief Counsel, deputy counsel, assistant counsel, and any special counsel retained by the Board. The term also encompasses any investigator assigned by counsel to investigate a particular case.

"Electronic Communications." Messages, their content, and any attached media distributed by electronic means from a person or persons utilizing a privately-owned or government-provided computer or other electronic device to one or more recipients *via* any network. As used by this Policy, the term includes, but is not limited to, emails, social media communications, postings in internet chatrooms, internet forums, and internet message boards, "blogging," communication by applications or "apps," text messages, and any other electronic communication disseminated by the use of a computer or other electronic device which, in whole or in part, requires a writing. The term does not include two-way aural communication.

"Illegal." The term includes all activity prohibited by the criminal or civil laws of the Commonwealth of Pennsylvania or the United States. The term includes, but is not limited to, instances where such conduct has resulted in an investigation of a judicial officer or judicial candidate by another agency, a criminal conviction, a finding of civil liability, or any other adjudication.

"Inappropriate." Material that is offensive to a viewer of ordinary and reasonable sensibilities. The term includes, but is not limited to, material that constitutes: legal pornography; sexually-suggestive content, including suggestive depictions of nudity short of pornography; stereotypical depictions of gender, including misogynistic material and material that relates to domestic violence, gender identity or expression, religion, sexual orientation, socioeconomic status, race or ethnicity.

"Misconduct perpetrated by electronic communications." *Prima facie* misconduct that is supported by sufficient evidence such that the Board may conclude that there is probable cause of judicial misconduct committed by a judge through his or her use of electronic communications.

"*Prima facie* misconduct." Conduct that, if true, would, on its face, constitute a violation of the Pennsylvania Constitution, Code of Judicial Conduct, Rules Governing Standards of Conduct of Magisterial District Judges, or an Order of the Supreme Court. The term includes, but is not limited to, improper *ex parte* communications, illegal conduct, improper partisan political activity, improper judicial comment on pending cases, membership in discriminatory organizations, and manifestations of bias.

SECTION II - GENERAL OVERVIEW

A. Investigation Scope and Limitations Period:

1. Generally, the scope of board counsel's investigation will comply strictly with Judicial Conduct Board Rule of Procedure 15.¹
2. Board counsel will investigate a complaint about a judge's electronic communications activity if it occurred while the individual was a judge or while the individual was a candidate for judge.
3. If the electronic communications activity pre-dated the individual being a judge or a candidate for judge, board counsel will investigate the complaint only if the alleged electronic communications activity relates to the honesty, trustworthiness, integrity, or fitness of the individual to serve as a judge.

B. Disposition:

When determining the appropriate disposition for a complaint, the Board will consider the following factors:

1. Whether the *prima facie* misconduct alleged constitutes misconduct perpetrated by electronic communications.

¹ Judicial Conduct Board Rule of Procedure 15, entitled "Time Limitations," states the following:

Except where the Board determines otherwise for good cause, the Board shall not consider complaints arising from acts or omissions occurring more than four years prior to the date of the complaint, provided however, that when the last episode of an alleged pattern of recurring judicial misconduct arises within the four-year period, the Board may consider all prior acts or omissions related to such an alleged pattern of conduct.

2. Whether the electronic communications constitute illegal conduct.
3. The degree of the judge's knowledge of and participation in electronic communications containing inappropriate or illegal content or misconduct perpetrated by electronic communications, and the judge's response, if any, to receiving such electronic communications. Relevant considerations include, but are not limited to the following:
 - a. Whether the judge was a sender, forwarder, or had exchanged, *i.e.*, sent and received, and/or forwarded, illegal or inappropriate electronic communications, or misconduct perpetrated by electronic communications;
 - b. Whether the judge was only a recipient of illegal or inappropriate electronic communications, or misconduct perpetrated by electronic communications;
 - c. Giving weight to the relevant facts and circumstances in a particular case, whether the judge took any reasonable steps in response to receiving inappropriate or illegal electronic communications or misconduct perpetrated by electronic communications; and
 - d. If necessary, whether the judge reported inappropriate or illegal electronic communications or misconduct perpetrated by electronic communications to any appropriate criminal, investigatory, or administrative authority.
4. The frequency of any inappropriate or illegal electronic communications, and the frequency of any misconduct perpetrated by electronic communications.
5. The degree of offensiveness of the electronic communications to a viewer of ordinary and reasonable sensibilities, and its potential effects on the independence, integrity, and impartiality of the judiciary, and the public's confidence in the judiciary.
6. The nature of the illegality of any electronic communications, and its potential effects on the independence, integrity, and impartiality of the judiciary, and the public's confidence in the judiciary.
7. The nature of any misconduct perpetrated by electronic communication, and its potential effects on the independence, integrity, and impartiality of the judiciary, and the public's confidence in the judiciary.

8. Any other factor relevant to the Board's disposition discussed in Board OP 8.01.