

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

NEWSLETTER

No. 1 Winter 2015

Message from the Chair

Welcome to the Winter 2015 edition of the Judicial Conduct Board NEWSLETTER. In an article authored by Francis J. Puskas II, Deputy Chief Counsel of the Judicial Conduct Board, we explore the recent revision of the Rules Governing Standards of Conduct of Magisterial District Judges.

Magisterial District Judges occupy a unique position in Pennsylvania's unified judiciary. Often referred to as the "People's Court," Magisterial District Courts are most citizens first and only contact with the judicial system.

Magisterial District Judges conduct non-jury trials in summary matters, landlord tenant hearings, and civil cases of up to \$12,000 in controversy. These judges issue arrest warrants, search warrants and emergency Protection from Abuse orders. Additionally, Magisterial District Judges conduct preliminary arraignments, set bail and preside over preliminary hearings. Judges also perform weddings and administer oaths and affirmations. In 2013, there were more than 2.4 million cases filed before Magisterial District Judges.

This "first tier" of the judicial system is substantially different than other courts in a variety of ways; a large percentage of litigants appear *pro se*, judges personally supervise the collection of fines and costs, and Magisterial District Judges are candidates for reelection, as opposed to retention.

As the public face of the Pennsylvania judiciary, Magisterial District Judges are the most accessible and least insulated level of the judiciary. A citizen's open access to the Magisterial District Courts is a fundamental aspect of fair and equal access to justice. Magisterial District Judges maintain a very high level of personal interaction with the general public on a daily basis, and endeavor to maintain the public faith in our collective integrity.

Due to the fact that Magisterial District Judges run for reelection, as opposed to retention, we are regularly faced with decisions that require a delicate balance of ethical constraints and political viability. It is a fair assessment to state that the majority of Magisterial District Judges go to work each day with a thorough understanding that each choice carries a consequence, both professional and personal.

Magisterial District Judges consistently demonstrate a very keen understanding of ethical considerations and work diligently to perform in accordance with clearly stated ethical guidelines. A fact that is supported by a review of the records of the

Judicial Conduct Board, indicating a lower number of complaints, per capita, than other levels of the judiciary. (Judicial Conduct Board, Annual Report-2013, pp. 10, 11)

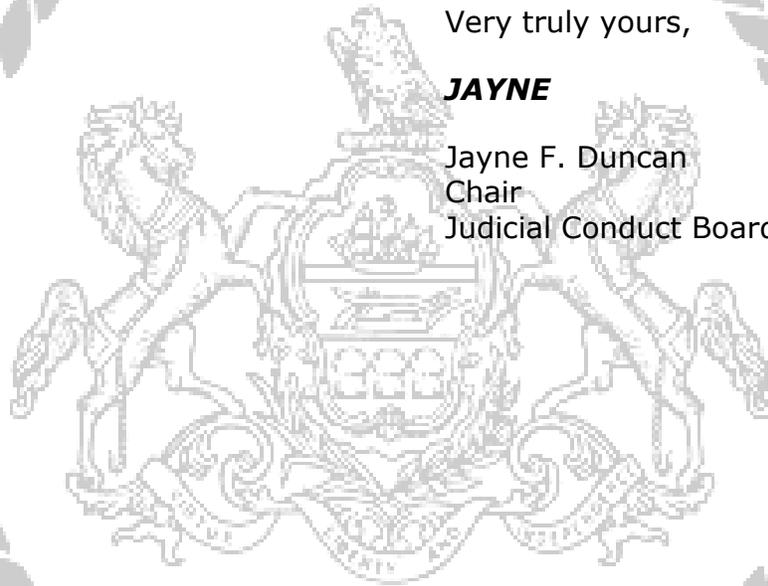
The mission of the Judicial Conduct Board is to preserve the honor, dignity, independence and integrity of the Pennsylvania Judiciary. To a great extent this mission is achieved through the fair and thorough investigation of every complaint of judicial misconduct. A correlative mission is also achieved through the diligent and conscientious work of the Judicial Conduct Board to enforce the standard for accountability expressed in the Rules Governing the Standards of Conduct of Magisterial District Judges and the Code of Judicial Conduct that allows the entire judiciary to perform its work, in an independent and impartial manner. This edition's exposition of the new Rules and their differences from the old is intended to assist in fulfilling that mission. I hope you find it helpful as we strive toward the same goal.

With best personal and professional regards, I am

Very truly yours,

JAYNE

Jayne F. Duncan
Chair
Judicial Conduct Board



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MEET THE BOARD'S 2015 OFFICERS

At its regularly scheduled meeting on February 2, 2015, the Judicial Conduct Board elected its officers for 2015. By unanimously acclamation, the Board elected the Honorable Jayne F. Duncan as Chair, Mr. Kenneth E. Lawrence, Jr. as Vice-Chair, and Mr. Samuel J. Magaro as Secretary. With her Board term scheduled to expire in August, Superior Court Judge Anne E. Lazarus, who served as Board Chair since February of 2014, decided not to seek another term as Chair in order to allow for a smooth transition of the Board's leadership.

Judge Jayne F. Duncan is the Magisterial District Judge for District Court 02-3-09 in Elizabethtown, Lancaster County. She served as Chair of the Ethics and Professionalism Committee of the Special Court Judges Association and served as a member of that committee for many years. She is also a former member of the Pennsylvania Supreme Court's Criminal Procedural Rules Committee. She is the former President of the Lancaster County District Justice Association and also served as Vice President of the Lancaster County Bar Association.

Judge Duncan received her J.D. in 1982 from Dickinson School of Law and was a Deputy District Attorney in Dauphin County prior to being elected as a Magisterial District Judge. A former instructor for the Municipal Police Training Certification class, she has also lectured on the topic of Magisterial District Judge practice for the Lancaster Bar Association and the Pennsylvania Bar Institute. Judge Duncan formerly served as an adjunct professor at Elizabethtown College, and teaches Ethics for the Minor Judiciary Education Board "Supplemental Practicum." She was appointed to the Board by the Supreme Court to fill an unexpired term on March 14, 2012. She was re-appointed to fill the balance of the four-year term that the Constitution allows on August 30, 2013. Her term will expire on March 14, 2016.

Kenneth Lawrence, Jr. is the Senior Vice President for Government, Community and Public Affairs for Temple University. Prior to joining Temple, Ken was a successful entrepreneur as Founder and President of Public Affairs Strategies where he represented corporations and non-profit organizations. He worked for five years at Merck & Company, Inc. handling public, community, and media relations, and served as Public Policy Representative for the Greater Philadelphia Chamber of Commerce.

Ken is a graduate of Temple University with a degree in Political Science. He has a Master's degree of Governmental Administration from the Fels Center of Government at the University of Pennsylvania. He is involved with a wide variety of civic organizations, including: Avenue of the Arts, Inc., Big Brothers Big Sisters of Southeastern PA, the Committee of Seventy, Philadelphia Industrial Development Corporation (PIDC), the Southeastern Pennsylvania Transportation Authority (SEPTA) and the Valley Forge Convention and Visitors Bureau. He resides with his wife and their two sons in Plymouth Meeting, Pennsylvania. He was appointed to the Board by Governor Tom Corbett on September 3, 2013 to fill the unexpired term of a non-lawyer elector member.

The Governor re-appointed Ken to his Board position at the conclusion of that unexpired term. His current term runs through September 3, 2017.

Samuel J. Magaro, a United States Air Force veteran of the Korean War, served as a Magisterial District Judge in Lower Paxton Township and West Hanover Township, suburbs of Harrisburg, Dauphin County, from 1975 until 2002, and as a Senior Magisterial District Judge from 2004 through July 2007. He is a member of the American Judicature Society, Special Court Judges Association of Pennsylvania, American Legion, and Veterans of Foreign Wars. He served on the Minor Court Rules Committee from 1990 until 1993. In 1995, Judge Magaro was the first recipient of the John J. Jeffers Memorial Award by the Special Court Judges Association of Pennsylvania "in recognition of dedicated and unselfish service." He was appointed Judge of the Court of Judicial Discipline from 1994 until 1999. He served as President of the Special Court Judges Association of Pennsylvania in 2000. Judge Magaro served on the Minor Judiciary Education Board by Supreme Court appointment from August 31, 2011 until July 1, 2014.

Judge Magaro formerly served as the magisterial district judge member of the Judicial Conduct Board from 2001 until 2005, serving as Chair from 2004 until 2005. In 2007, he was re-appointed as a non-lawyer elector member of the Board and served until the end of that term in 2011. During his second term on the Board, his colleagues elected him to serve as Vice-Chair from February 7, 2011 until the end of that term on August 16, 2011. His re-appointment by the Supreme Court in 2012 as a non-lawyer elector member represents his third four-year term on the Board. His current term runs until September 24, 2016.

**THE RULES GOVERNING STANDARDS OF CONDUCT OF
MAGISTERIAL DISTRICT JUDGES OF 2014**

By

Francis J. Puskas II, Deputy Chief Counsel, Judicial Conduct Board

By Order dated September 18, 2014, the Pennsylvania Supreme Court rescinded Rules 1-15 and 23 of the Old Rules Governing Standards of Conduct of Magisterial District Judges and adopted New Rules with corresponding Canons and Rules. The New Rules were made effective, with minor exceptions, on December 1, 2014.

Our recent Newsletter discussing the revisions to the Code of Judicial Conduct, which the New Rules follow in content and pattern with its four-Canon construct with accompanying Rules, provides a comprehensive analysis of the new provisions and should be consulted for a more detailed and academic analysis that also traces historical references for language used in different provisions. See Judicial Conduct Board Newsletter. No. 2 Spring 2014, "The Code of Judicial Conduct of 2014," pp. 4-30. The focus of this article, however, will be to provide a general overview of the revisions made in the New Rules and highlight what are the more prominent additions and changes under each Canon.

INTRODUCTORY MATTERS AND STRUCTURE

At first glance, a comparison of the Old Rules with the New Rules gives the impression of increased complexity. The Old Rules consisted of twenty-three Rules. The New Rules consist of four Canons containing a combined thirty-nine Rules. Added to this are un-rescinded old Rules 16-21.¹ Currently, magisterial district judges must familiarize themselves with a total of forty-five rules. Arguably, the simplicity of the Old Rules sacrificed clarity in understanding how they were to be interpreted and applied. While the New Rules have expanded in some respects, much of what was part of the Old Rules has simply been carried over with a concerted effort to address ambiguities about their meaning as well as the meaning of newly added Rules.

Contrasting with the Old Rules, the New Rules provide more clarity and exactness by including a Preamble and opening sections addressing "Terminology" and "Application." It should be noted the New Rules also include extensive Comments, though the Supreme Court did not adopt the Comments as it did the canons and rules. Therefore, the Comments, while providing explanatory examples and guidance, are not on the same footing with the Canons and Rules.

The Preamble makes clear that the New Rules constitute the "canon of ... judicial ethics" referenced in Article V, Section 17(b) of the Pennsylvania

¹ Rules 15-21 which were not rescinded by the Supreme Court's Order adopting the New Rules deal primarily with judicial administration matters and not rules of ethical conduct. All magisterial district judges should be familiar with them as they are still in effect, but they would not generally be the basis for discipline.

Constitution.² That section provides in relevant part that magisterial district judges “shall be governed by rules or canons which shall be prescribed by the Supreme Court.”³

A significant aspect of the Preamble is the guidance it provides on how to interpret the use of permissive terms, such as “may” or “should,” when they are used to describe conduct. Unlike the Old Code of Judicial Conduct applicable to common pleas and appellate court judges, the Old Rules rarely used permissive terms in describing conduct. The Preamble instructs, however, that when such terms are used in the New Rules, “the conduct being addressed is committed to the personal and professional discretion of the magisterial district judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.”⁴ Therefore, a magisterial district judge cannot be charged with violating a provision that is described in permissive terms.

The necessary corollary to this is that if conduct is described using an imperative term, such as the word “shall,” it implies an obligation to engage or not engage in certain conduct, which, if a magisterial district judge violates such proscription, may subject the magisterial district judge to disciplinary action.

Importantly, the Preamble sets forth that the New Rules are “not designed or intended as a basis for civil or criminal liability” or for litigants “to seek collateral remedies against each other or to obtain tactical advantages” in court matters.⁵

As with the Old Rules, the New Rules continue to designate the Ethics Committee of the Pennsylvania Conference of State Trial Judges and the Special Court Judges Association of Pennsylvania as the approved bodies to render advisory opinions regarding ethical concerns involving magisterial district judges and judicial candidates subject to the New Rules for purposes of the so-called “Rule of Reliance.” While the advisory opinions are not binding, the Rule of Reliance requires the Judicial Conduct Board, the Court of Judicial Discipline, and the Supreme Court of Pennsylvania, to take into account when a judge has sought guidance on an ethical question and acted in reliance on an advisory opinion in determining whether discipline should be recommended or imposed.⁶

For the first time, the New Rules include a “Terminology” section that defines terms and phrases used in its provisions, including impropriety, judicial candidate, member of a magisterial district judge’s family, personally solicit, political organization, and third degree of relationship. These definitions give specific guidance in understanding how the terms and phrases are to be construed in terms of the requirements and expectations for judicial conduct.

² New Rules, Preamble [1].

³ Pa. Const. art. V, §17(b).

⁴ New Rules, Preamble [6].

⁵ New Rules, Preamble [7].

⁶ New Rules, Preamble [8].

Finally, the New Rules also provide an “Application” section that specifically directs that the New Rules apply to magisterial district judges, which it defines as “a magisterial district judge, whether or not a lawyer; a judge of the Philadelphia Municipal Court, Traffic Division; and all senior judges as set forth in [3] *infra*.”⁷ For senior magisterial district judges, the New Rules govern their conduct if they are “active or eligible for recall to judicial service;” however, they may accept extra-judicial appointments otherwise prohibited under New Rule 3.4 (Appointments to Governmental Positions and Other Organizations) so long as they refrain from judicial service during the period of such appointment.⁸

CANON 1

Canon 1 is a hybrid of Old Rules 1 and 2, which are now broken down into three provisions, namely Rules 1.1, 1.2, and 1.3.

Until the Supreme Court’s decision in *In re Carney* in 2013, the directive of Old Rule 2A that a magisterial district judge “shall respect and comply with the law” was interpreted as only applying to misconduct that implicated the judicial decision-making process.⁹ The New Rule separates this directive into a rule unto itself¹⁰, clearly following the Supreme Court’s decision in *Carney* and subjecting a magisterial district judge to discipline for any violation of the law, regardless of whether such violation implicates the judicial decision-making process.

The other important addition to Canon 1 is Rule 1.2, which now subjects a magisterial district judge to discipline if there is a failure to “avoid impropriety and the appearance of impropriety.”¹¹ While many other jurisdictions have long made “impropriety and the appearance of impropriety” a chargeable ethical violation, until now Pennsylvania did not. The Terminology section defines impropriety as including “conduct that violates the law, court rules, or provisions of these Conduct Rules, and conduct that undermines a magisterial district judge’s independence, integrity, or impartiality.”¹² Further, Comment [5] provides an objective test to determine whether there has been an appearance of impropriety: “whether the conduct would create in reasonable minds a perception that the magisterial district judge violated these Conduct Rules or engaged in other conduct that reflects adversely on the magisterial district judge’s honesty, impartiality, temperament, or fitness to serve as a magisterial district judge.”¹³

CANON 2

Canon 2 incorporates parts of Old Rules 3 – 9 in combination with entirely new provisions to create one canon that offers, through sixteen rules and

⁷ New Rules, Preamble [2].

⁸ New Rules, Preamble [3].

⁹ *In re Cicchetti*, 743 A.2d 441 (Pa. 2000); *In re Carney*, 79 A.3d 490, 507 (2013).

¹⁰ New Rules, Canon 1, Rule 1.1.

¹¹ New Rules, Canon 1, Rule 1.2

¹² New Rules, Terminology, “Impropriety.”

¹³ New Rules, Canon 1, Rule 1.2 cmt. [5].

accompanying Comments, a more comprehensive guide for magisterial district judges to follow in carrying out their judicial duties. Canon 2 gives more concrete direction on what conduct will (or will not) lead to a magisterial district judge being subject to discipline.

While the Old Rules only referred to bias and prejudice when discussing a magisterial district judge's duty to disqualify, the New Rules impose a direct responsibility to perform duties "without bias or prejudice."¹⁴ Rule 2.3(B) prohibits a magisterial district judges, their staff, court officials, and others subject to their direction and control, through words or conduct, from manifesting "bias or prejudice, or engag[ing] in harassment. . .based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."

Comment [2] provides examples of "bias or prejudice" as including "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; and irrelevant references to personal characteristics." Comment [2] further includes non-verbal cues of bias and prejudice, such as facial expressions and body language.¹⁵ In Comments [4] and [5], further nuance is given to the definition of "harassment," which is described as conduct (based on race, sex, gender, etc.) that includes "verbal or physical conduct that denigrates or shows hostility or aversion toward a person" and sexual harassment (*i.e.* "sexual advances, requests for favors, and other verbal or physical conduct of a sexual nature that is unwelcome)."¹⁶ Therefore, magisterial district judges who make irreverent or off-color remarks, racial slurs, or facial expressions showing hostility or aversion toward persons, while performing judicial duties, risk violating New Rule 2.3.

While the Old Code did not cover the issue, New Rule 2.6(B) directly addresses a magisterial district judge's involvement in settlements. Now, a magisterial district judge is expressly permitted to encourage settlement so long as the judge does not "act in a manner that coerces any party into settlement."¹⁷

While it is indisputable that a basic part of magisterial district judge's job is to hear and decide cases, New Rule 2.7 now enshrines this as a duty to decide matters assigned, except where a magisterial district judge recuses or is disqualified.¹⁸ Comment [1] cautions, however, that "[u]nwarranted disqualification or recusal may bring public disfavor to the court and to the magisterial district judge personally" and a magisterial district judge "should not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues."¹⁹

¹⁴ New Rules, Canon 2, Rule 2.3(A).

¹⁵ New Rules, Canon 2, Rule 2.3 cmt. [2].

¹⁶ New Rules, Canon 2, Rule 2.3 cmt. [4] and [5].

¹⁷ New Rules, Canon 2, Rule 2.6(B).

¹⁸ New Rules, Canon 2, Rule 2.7.

¹⁹ New Rules, Canon 2, Rule 2.7 cmt. [1].

Comment [2] provides a new “substantial question in reasonable minds” test as a guide for disqualification.²⁰ Even if a magisterial district judge subjectively feels he or she can preside impartially, a magisterial district judge may still disqualify if “in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters,” the magisterial district judge concludes that facts and circumstances “could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required.”²¹ This replaces the old common law objective test of whether “a significant minority of the lay community could reasonably question the court’s impartiality.”²²

For the first time, the New Rules reference the issue of disclosure of information that may have bearing on a parties’ decision to request disqualification. Comment [3] states that a magisterial district judge “should disclose” to the parties or their lawyers information that “might reasonably [be] consider[ed] relevant to a possible motion for disqualification or recusal.” Such disclosure should be made “even if the magisterial district judge believes there is no proper basis for disqualification or recusal.”²³ While the issue of disclosure has not been elevated to a Rule requirement, Comment [3] is clear that it is commended as guidance to magisterial district judges as something they “should” do.

In the area of judicial demeanor, New Rule 2.8(B) expands the persons to whom a magisterial district judge must be “patient, dignified, and courteous” to now include “court staff [and] court officials.”²⁴ If there was any doubt before, this crystalizes that a magisterial district judge cannot mistreat such court personnel, which would encompass his or her office staff.

Changes have also been made to the requirement not to engage in *ex parte* communications. While under the Old Rules a magisterial district judge was admonished to “neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding,”²⁵ it imposed no obligation to stop a person from approaching a judge and commencing an *ex parte* communication. New Rule 2.9(A) changes that and now adds that a magisterial district judge not “permit” an *ex parte* communication.²⁶ A magisterial district judge now has an affirmative duty to stop a person from engaging in an *ex parte* communication with him or her about a pending or impending matter.

²⁰ New Rules, Canon 2, Rule 2.7 cmt. [2].

²¹ *Id.*

²² This common law test was set forth by the Supreme Court in *Commonwealth v. Darush*, 501 Pa. 15, 22-23, 459 A.2d 727, 731-32 (1983). The New Rules also address the change in this test in Comment [5] to New Rule 1.2. See New Rules, Canon 1, Rule 1.2 cmt. [5].

²³ New Rules, Canon 2, Rule 2.7 cmt. [3].

²⁴ New Rules, Canon 2, Rule 2.8(B).

²⁵ Old Rules, Rule 4D.

²⁶ New Rules, Canon 2, Rule 2.9(A).

New Rule 2.9 does provide, however, a limited safe harbor for an *ex parte* communication that concerns “scheduling, administrative, or emergency purposes, which does not address substantive matters.”²⁷ *Ex parte* communications falling under this category are permitted so long as the magisterial district judge “reasonably believes that no party will gain a procedural, substantive, or tactical advantage” from the communication and the other parties are promptly notified and given an opportunity to respond.²⁸ Further, a magisterial district judge is also permitted to engage in an *ex parte* communication “when expressly authorized by law to do so,”²⁹ which may include when “serving on a therapeutic or problem-solving courts, mental health courts, or drug courts” where the magisterial district judge may assume a more interactive role.³⁰

New Rule 2.9 also now explicitly addresses the issue of “*ex parte* investigations,” something not discussed in the Old Rules. New Rule 2.9 directs that a magisterial district judge “shall not investigate facts in a matter independently,” but must only consider evidence and facts properly presented to the court.³¹ In short, a magisterial district judge cannot research or investigate independently facts concerning a case, but must remain the neutral arbiter who only considers what the parties properly present as evidence.

The New Rules have more carefully tailored the prohibition on public comment. While the Old Rules directed that a magisterial district judge “shall abstain from public comment about a proceeding pending or impending in their offices or in any court,”³² the New Rules are more specific and prohibit a magisterial district judge from making a public comment “that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”³³ The New Rules also address nonpublic statements and prohibit a magisterial district judge from making a nonpublic statement “that might substantially interfere with a fair trial or hearing.”³⁴

On disqualification, New Rule 2.11 now includes same sex relationships in describing circumstances where a magisterial district judge’s impartiality might reasonably be questioned. For example, it now requires that a magisterial district judge disqualify when his or her “spouse or domestic partner,” or the “spouse or domestic partner” of a person within the third degree of relationship to either of them, is (a) a party to a proceeding, or an officer, director, general partner, managing member, or trustee of a party; (b) acting as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially

²⁷ New Rules, Canon 2, Rule 2.9(A)(1).

²⁸ *Id.* at Rule 2.9(A)(1)(a) and (1)(b).

²⁹ *Id.* at Rule 2.9(A)(4).

³⁰ *Id.* at Rule 2.9(E).

³¹ *Id.* at Rule 2.9(C).

³² Old Rules, Rule 6.

³³ New Rules, Canon 2, Rule 2.10(A).

³⁴ *Id.*

affected by the proceeding; or (d) is likely to be a material witness in the proceeding.³⁵

While the Old Rules required disqualification from a matter when a magisterial district judge knew that they, their spouse or a minor child residing in their household, had a financial interest in a matter that could be “substantially affected by the outcome of the proceeding,”³⁶ the New Rules only require they have “an economic interest in the subject matter in controversy or is a party to the proceeding.”³⁷

Expanding into new territory, the New Rules now include under disqualification the subject of campaign contributions. When a magisterial district judge knows or learns that a party, the party’s lawyer or law firm has made a direct or indirect campaign contribution to the magisterial district judge’s campaign in an amount “that would raise a reasonable concern about the fairness or impartiality of the magisterial district judge’s consideration of a case” involving such party or party’s lawyer or law firm, the magisterial district judge must disqualify.

When making the decision to disqualify, the magisterial district judge is guided to consider “the public perception regarding such contributions and their effect” on the magisterial district judge’s impartiality. The Rule provides a rebuttable presumption that a magisterial district judge does not have to disqualify when the campaign contribution or reimbursement for travel expenses is “equal to or less than the amount required to be reported as a gift on a magisterial district judge’s Statement of Financial Interest.”³⁸

In contrast to the Old Code of Judicial Conduct, the Old Rules always contained a direct prohibition against nepotism, directing that a magisterial district judge “shall not make unnecessary appointments to their staff” and “shall exercise any such power of appointment. . . only on the basis of merit, avoiding nepotism and favoritism.”³⁹ New Rule 2.13 continues this prohibition, but adds that a magisterial district judge shall also exercise the power of appointment “impartially” and “avoid nepotism, favoritism, and unnecessary appointments.”⁴⁰ Comment [2] now provides guidance on the meaning of nepotism, stating it “is the appointment of a magisterial district judge’s or President Judge’s spouse or domestic partner, or any relative within the third degree of relationship” to either of them or to their spouse or domestic partner or to the person within the third degree of relationship.⁴¹

³⁵ New Rules, Canon 2, Rule 2.11(A)(2).

³⁶ Old Rules, Rule 8A(3).

³⁷ *Id.* at Rule 2.11(A)(3).

³⁸ *Id.* at Rule 2.11(A)(4). For more information on the application of this provision, see Judicial Conduct Board Alert No. 2015-1 – Rule 2.11 & Disqualification Issues Arising from Campaign Contributions.

³⁹ Old Rules, Rule 5C.

⁴⁰ New Rules, Canon 2, Rule 2.13(A)(1) and (2).

⁴¹ New Rules, Canon 2, Rule 2.13 cmt. [2].

Another significant change from the Old Rules is the inclusion of a section dealing with the topic of disability and impairment. New Rule 2.14 imposes on a magisterial district judge the duty to “take appropriate action” when he or she has a “reasonable belief” that a lawyer or another judge is “impaired by drugs or alcohol, or by a mental, emotional, or physical condition.”⁴² New Rule 2.14 states that appropriate action may include “a confidential referral to a lawyer or judicial assistance program”⁴³. Comment [1] adds further meaning to the phrase “appropriate action” as “action intended to help the magisterial district judge or lawyer in question address the problem and prevent harm to the justice system,” which may include speaking directly to the impaired person and notifying a supervisor over the impaired person.⁴⁴ Comment [2], however, points out that depending on the gravity of the conduct, a magisterial district judge may even have to report the impaired person to the appropriate authority, which could include the Judicial Conduct Board or the Disciplinary Board of the Supreme Court.⁴⁵

While the Old Rules did not address reporting judge or lawyer misconduct, New Rule 2.15 imposes on a magisterial district judge the duty to do so to the appropriate authority when he or she has knowledge that another magisterial district judge or a lawyer has committed a violation of the New Rules, or Rules of Professional Conduct applicable to lawyers, “that raises a substantial question” regarding their “honesty, trustworthiness, or fitness.”⁴⁶

Finally, New Canon 2 finishes with another new requirement not found in the Old Rules. New Rule 2.16 imposes upon a magisterial district judge the obligation to “cooperate and be candid and honest with judicial and lawyer disciplinary agencies.”⁴⁷ A magisterial district judge who fails to cooperate and be candid with a Judicial Conduct Board investigation will now be subject to disciplinary action. New Rule 2.16 also directly prohibits any retaliation “against a person known or suspected to have assisted or cooperated with an investigation of a magisterial district judge or a lawyer.”⁴⁸ While the Judicial Conduct Board has understood such retaliation on the part of a judicial officer to constitute misconduct separate from the matter being investigated, this new Rule makes this view explicit.

CANON 3

While much of what appears in New Canon 3 has appeared in some form in the Old Code of Judicial Conduct, most is entirely new to magisterial district judges and was not part of the Old Rules. This is particularly true when considering a magisterial district judge’s extrajudicial activities, which the Old Rules did not address. New Canon 3, through fifteen Rules, now describes types of activities that

⁴² New Rules, Canon 2, Rule 2.14.

⁴³ In Pennsylvania, this would include Lawyers Concerned for Lawyers and Judges Concerned for Judges.

⁴⁴ New Rules, Canon 2, Rule 2.14 cmt. [1].

⁴⁵ *Id.*, Rule 2.14 cmt. [2].

⁴⁶ New Rules, Canon 2, Rule 2.15(A) and (B).

⁴⁷ New Rules, Canon 2, Rule 2.16(A).

⁴⁸ *Id.* at Rule 2.16(B).

magisterial district judges are forbidden from doing in their personal or extrajudicial professional lives with limited exceptions to those prohibitions spelled out (*e.g.*, “A magisterial district judge shall not do x...unless the following exceptions apply...”).

Magisterial district judges are prohibited from making a presentation at a public hearing, or consulting with, executive or legislative bodies or officials, unless it is connected with the law, legal system, or the administration of justice, involves matters about which the magisterial district judge acquired knowledge or expertise from his or her judicial duties, or when the magisterial district judge is acting *pro se* in a matter involving his or her legal or economic interests, or as a fiduciary.⁴⁹ They are also prohibited from serving in another governmental position unless it concerns the legal system or the administration of justice or is a non-law, uncompensated board or commission position and service on it would not create a conflict of interest or appearance of impropriety.⁵⁰

Perhaps one of the most striking additions to New Canon 3 is the inclusion of New Rule 3.6 relating to the prohibition on affiliating with discriminatory organizations. Rule 3.6 is entirely new and has no counterpart in the Old Rules. New Rule 3.6 states:

Affiliation with Discriminatory Organizations

(A) A magisterial district judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, disability or sexual orientation.

(B) A magisterial district judge shall not use the benefits or facilities of an organization if the magisterial district judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A magisterial district judge’s attendance at an event in a facility of an organization that the magisterial district judge is not permitted to join is not a violation of this Rule when the magisterial district judge’s attendance is an isolated event that could not reasonably be perceived as an endorsement of that organization’s practices.⁵¹

Under New Rule 3.6, a magisterial district judge may be subject to official sanction for either membership in or use of the benefits of an organization that practices invidious discrimination, even though membership in such an organization may be legal for other citizens. This prohibition reflects both the well-settled precept that a magisterial district judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens⁵² and the recurring theme of New Canon 3 - a magisterial district judge’s otherwise legal

⁴⁹ New Rules, Canon 2, Rule 3.2.

⁵⁰ New Rules, Canon 2, Rule 3.4.

⁵¹ New Rules, Canon 3, Rule 3.6(A) and (B).

⁵² See New Rules, Canon 1, Rule 1.2. cmt. [2].

extrajudicial behavior may undermine the judge's independence, integrity, and impartiality.⁵³

New Canon 3 also establishes for the first time regulation of a magisterial district judge's personal financial activities, including financial reporting requirements for magisterial district judges receiving extrajudicial compensation, gifts, or reimbursement. Under New Rule 3.12, a magisterial district judge "may accept reasonable compensation" for teaching, speaking, and writing unless it would undermine his or her independence, integrity, or impartiality.

A magisterial district judge may also "engage in financial activities" in the form of service as "an officer, director, manager, general partner, advisor, or employee of any business entity,"⁵⁴ except if such service would interfere with their judicial duties, lead to frequent disqualification, involve the magisterial district judge in frequent transactions or business relationships with lawyers or others likely to come before them, or result in a violation of the New Rules.⁵⁵ This is distinctly different from the New Code of Judicial Conduct, which, with limited exceptions for family enterprises, forbids judges from serving as directors or being employed in any capacity by any business entity.

As Comment [1] notes, magisterial district judges "are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families" subject to the requirements of the New Rules.⁵⁶ As an example of how the New Rules would affect such activity, Comment [1] states that it would be improper for a magisterial district judge to invest so much time in business activity that it interfered with the performance of judicial duties, which would violate Rule 2.1 and its directive that judicial duties shall ordinarily take precedence over extrajudicial activities.⁵⁷

The Comments provide further guidance and advise that a magisterial district judge must divest herself or himself of investments and other financial interests that might require frequent disqualification or which might violate New Rule 3.11, and must do so "[a]s soon as practicable without serious financial detriment."⁵⁸ A judge may alternatively use a "blind trust or similarly protective financial vehicle to avoid problems under the New Rule 3.11."⁵⁹

Concerning gifts, loans, bequests, benefits, or other things of value, the New Rules provide highly detailed directives for magisterial district judges regarding what may be accepted and what must also be publicly reported. Generally, New Rule 3.13 forbids a magisterial district judge from accepting gifts, loans, bequests, benefits or other things of value if acceptance is prohibited by law or would appear

⁵³ New Rules, Canon 3, Rule 3.1(C).

⁵⁴ New Rules, Canon 3, Rule 3.11(B).

⁵⁵ *Id.* at Rule 3.11(C).

⁵⁶ New Rules, Canon 3, Rule 3.11 cmt. [1].

⁵⁷ *Id.*

⁵⁸ New Rules, Canon 3, Rule 3.11 cmt. [2].

⁵⁹ *Id.*

“to a reasonable person to undermine the magisterial district judge’s independence, integrity, or impartiality.”⁶⁰

Magisterial district judges may accept gifts, loans, bequests, benefits, or other things of value without being required to publicly report them on a Statement of Financial Interest if they have little intrinsic value, are from friends, relatives, or others whose appearance before the magisterial district judge would require their disqualification, or constitute ordinary social hospitality.⁶¹ Magisterial district judges may also accept the following without being required to publicly report them so long as they were available on the same terms and criteria to similarly situated persons and open to persons who are not magisterial district judges: commercial or financial opportunities, discounts, loans; rewards and prizes; and scholarships and fellowships.⁶² Further, magisterial district judges may accept resource materials by publishers on a complimentary basis for official use as well as gifts, awards, or benefits stemming from a business, profession, or separate activity of a spouse, domestic partner, or family member residing in the magisterial district judge’s household, that incidentally benefit the magisterial district judge.⁶³

A magisterial district judge may also accept the following, but is required to publicly report them: gifts incidental to a public testimonial; invitations for the magisterial district judge and his spouse or domestic partner to attend an event without charge associated with a bar-related function, or activity related to the law or the administration of justice or an event associated with the magisterial district judge’s educational, religious, charitable, fraternal or civic activities, if offered to non-magisterial district judges engaged in similar ways in the activity as is the judge. Additionally, the magisterial district judge must publicly report any gifts, loans, bequests, benefits, or other things of value if the source is a party or person “who has come or is likely to come” or “whose interests have come or are likely to come” before the magisterial district judge.⁶⁴

The amount of gifts or other things of value must be publicly reported when the value of such items “alone or in the aggregate with other items” received in the same year from the same source exceed \$250.00.

New Rule 3.14 regulates a magisterial district judge’s acceptance of reimbursement for “necessary and reasonable expenses for travel, food, lodging, or other incidental expenses” or waivers of fees or charges for “registration, tuition, and similar items.”⁶⁵ A magisterial district judge is permitted to accept such reimbursement or waivers if it comes from sources other than the entity employing the judge and are associated with participation in permissible extrajudicial activities.⁶⁶ The reimbursement or waivers must be publicly reported if the amount

⁶⁰ New Rules, Canon 3, Rule 3.13(A) and (B).

⁶¹ New Rules, Canon 3, Rule 3.13(B).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ New Rules, Canon 3, Rule 3.13(C).

⁶⁵ New Rules, Canon 3, Rule 3.14(A).

⁶⁶ *Id.*

“alone or in the aggregate with other reimbursements or waivers” received in the same year from the same source exceed \$650.00.⁶⁷

CANON 4

While the Old Rules addressed a magisterial district judge’s political activity in one rule, New Canon 4 covers political activity with five rules, which, in large part, carry forward the basic precepts found in Old Rule 15 but with greater detail and supplementary direction.

New Rule 4.1 encapsulates the general prohibition from engaging in political activity. For example, it carries forward from the Old Rules the prohibition that a magisterial district judge “shall not. . . personally solicit or accept campaign contributions other than through a campaign committee.”⁶⁸

New Rule 4.1 further adds newly expressed prohibitions, including that magisterial district judges or judicial candidates shall not “use court staff, facilities, or other court resources in a campaign for judicial office.”⁶⁹ A magisterial district judge cannot use office supplies (paper, envelopes, paperclips) or equipment (photocopiers, computers, staplers) for personal campaign work, or use his or her staff to prepare campaign materials, stuff envelopes, hand out campaign signs, circulate nominating petitions, or work for judicial candidates at polling places.

The prohibition on using staff is consistent with a prior Supreme Court Order prohibiting employees of the unified judicial system from engaging in partisan political activity,⁷⁰ which, if violated, was itself a basis for disciplining a magisterial district judge. The New Rules, however, now explicitly prohibit using court staff or resources for political campaign work. Further, while New Rule 4.2 repeats this prohibition, it also provides that a magisterial district judge candidate “may use court facilities for the purpose of taking photographs, videos, or other visuals for

⁶⁷ New Rules, Canon 3, Rule 3.15(A)(3).

⁶⁸ New Rules, Canon 4, Rule 4.1(A)(7). By Amendment on October 31, 2014, effective December 1, 2014, the New Rules carried forward the prohibition against personal solicitation or acceptance of campaign funds found in Old Rule 15D(4). Because it was absent from New Rule 4.1 when originally adopted, the amendment addresses any confusion as to whether the prohibition on personal solicitation continues into the New Rules. It does. Prior to the amendment, the prohibition was only mentioned in Comment [1] to New Rule 4.4, and so did not have the force and effect of a rule provision.

⁶⁹ New Rules, Canon 4, Rule 4.1(A)(8) and Rule 4.2(C)(2).

⁷⁰ See *In re: Prohibited Political Activity by Court-Appointed Employees*, 201 Jud. Adm. Dkt. 1 (Pa. 1998)(reaffirming prior order of 1987); *In re: Prohibited Political Activity by Court-Appointed Employees*, 82 Jud. Admin.Dkt. 1 (Pa. 1987).

campaign purposes” so long as such facilities are equally available to other candidates for judicial office.⁷¹

In the Old Rules, magisterial district judges or candidates were prohibited during a campaign from “misrepresent[ing] their identity, qualifications, present position, or other fact.”⁷² The New Rules express this prohibition in much broader terms, directing that a magisterial district judge or candidate “shall not. . . knowingly or with reckless disregard for the truth make any false or misleading statement.”⁷³

Further, New Rule 4.2 applies this to the campaign committee, directing that a magisterial district judge candidate “shall not. . . knowingly or with reckless disregard for the truth, make, or permit or encourage his or her campaign committee to make, any false or misleading statement.”⁷⁴ The implication is clear that not only must magisterial district judges or judicial candidates be truthful in campaign advertisements, they are likewise responsible for what is put out by their campaign committees. Where a candidate is the subject of false, misleading or unfair allegations, the judicial candidate or the candidate’s campaign committee may respond. In making any response, care must be taken to “make a factually accurate public response” that does not violate the New Rules in the same fashion as those statements to which the judicial candidate or the campaign committee is responding.⁷⁵

The same is true for public statements made during political campaigns. A magisterial district judge or candidate “shall. . . not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court.”⁷⁶ This precludes appearing on television shows as a so-called “talking head” legal expert to discuss ongoing trials in any court, not just the magisterial district judge’s court or a court in Pennsylvania.

Again, New Rule 4.2 applies this prohibition to the campaign committee, directing that a magisterial district judge candidate “shall not. . . knowingly or with reckless disregard for the truth, make, or permit or encourage his or her campaign committee to. . . make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”⁷⁷

While the Old Rules explicitly permitted a magisterial district judge or candidate to make political contributions to the campaign of a member of their immediate family,⁷⁸ this exception has been eliminated in the New Rules. As

⁷¹ New Rules, Canon 4, Rule 4.2(C)(2).

⁷² Old Rules, Rule 15D(3).

⁷³ New Rules, Canon 4, Rule 4.1(A)(9).

⁷⁴ New Rules, Canon 4, Rule 4.2(C)(3).

⁷⁵ New Rules, Canon 4, Rule 4.2 cmt. [7].

⁷⁶ New Rules, Canon 4, Rule 4.1(A)(10).

⁷⁷ New Rules, Canon 4, Rule 4.2(C)(4).

⁷⁸ Old Rules, Rule 15B(2)(b).

Comment [5] to New Rule 4.1 explains, magisterial district judges are not to be involved in the campaigns of family members:

Although members of the families of magisterial district judges and judicial candidates are free to engage in their own political activity, including becoming a candidate for public office, there is no “family exception” to the prohibition in Rule 4.1(A)(3) against a magisterial district judge or candidate publicly endorsing candidates for public office. A magisterial district judge or judicial candidate must not become involved in, or publicly associated with, a family member’s political activity or campaign for public office. To avoid public misunderstanding, magisterial district judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member’s candidacy or other political activity.⁷⁹

New Rule 4.2, like New Rules 4.3 and 4.4, act as exceptions to the general prohibitions contained in New Rule 4.1. New Rule 4.2 addresses political and campaign activities in public elections.⁸⁰ As retention elections are “public elections,” the Rules precepts apply to them. Among the new requirements of the Rule are: 1) to act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary; 2) to comply with all elections laws and regulations, including those related to campaign financing; and 3) to review and approve all materials prepared by the judicial candidate or the candidate’s campaign committee before their dissemination.⁸¹

As was established in the Old Rules,⁸² the New Rules continue to permit a judicial candidate to begin campaigning immediately after the General Election “in the year prior to the calendar year in which a person may become a candidate for such office.”⁸³ The New Rules, however, permit a judicial candidate to also establish, immediately after the General Election, a campaign committee to start raising funds.⁸⁴ Previously, while the Old Rules permitted magisterial district judge candidates to start campaigning after the General Election, they prohibited establishing a campaign committee necessary for raising campaign funds any earlier than “thirty (30) days prior to the first day for filing nomination petitions.”⁸⁵ The inconsistency of permitting a judicial candidate to campaign immediately after the General Election, but restricting their ability to raise campaign money until months later, appears to have been remedied by New Rule 4.2(B)(1). Both can now commence simultaneously.

⁷⁹ New Rules, Canon 4, Rule 4.1 cmt. [5].

⁸⁰ New Rules, Canon 4, Rule 4.2.

⁸¹ New Rules, Canon 4, Rule 4.2(A)(1)-(3).

⁸² Old Rules, Rule 15C.

⁸³ New Rules, Canon 4, Rule 4.2(B).

⁸⁴ New Rules, Canon 4, Rule 4.2(B)(1).

⁸⁵ Old Rules, Rule 15D(4).

Unlike the Old Code of Judicial Conduct, which limited judicial candidates to speaking on behalf of other candidates only if they were candidates for the same judicial office,⁸⁶ the Old Rules never addressed the issue for magisterial district judge candidates. In apparent recognition of political reality, the New Rules now address the issue. New Rule 4.2 allows a judicial candidate to “publicly endorse or speak on behalf of, or publicly oppose or speak in opposition to” candidates for the same judicial office or “any other elective judicial office appearing on the same ballot.”⁸⁷

Another change from the Old Rules is found in New Rule 4.2(B)(4). Under Old Rule 15D(4), magisterial district judges or candidates were prohibited from personally soliciting statements of public support for their candidacies. They had to rely on their campaign committees to do so.⁸⁸ Now, judicial candidates may “seek, accept, or use endorsements from any person or organization.”⁸⁹

New Rule 4.3 adds another topic not covered in the Old Rules: activities of candidates for appointive judicial office. It permits candidates for appointive judicial office to communicate with the Governor (“the appointing authority”) and the Senate (“the confirming authority”), as well as any screening or nominating commissions.⁹⁰ It further allows the candidate to personally “seek endorsements for the appointment from any person or organization.”⁹¹ The Comment to New Rule 4.3 clarifies that a candidate for appointment is bound by new Rule 4.1(A)(11) and “must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”⁹²

In more expansive terms than used in the Old Rules, the New Rules provide specific and detailed direction concerning the operation of campaign committees. New Rule 4.4 requires that a judicial candidate “take reasonable steps to cause the magisterial district judge’s campaign committee” to: (1) only solicit and accept contributions “permitted by law or Rule”; (2) not solicit or accept contributions until after the General Election “in the year prior to the calendar year in which a person may become a candidate for such office” and to terminate fundraising activity “no later than the last calendar day of the year in which the judicial election is held;” and (3) to “comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions,” including filing with the Secretary of the Commonwealth, no later than 30 days after an election “or within such other period as is provided by law,” a report listing information about persons making campaign contributions “in an aggregate value exceeding \$250 and . . . campaign contributions to the committee in an aggregate value exceeding \$50.”⁹³

⁸⁶ Old Code of Judicial Conduct, Canon 7A(2).

⁸⁷ New Rules, Canon 4, Rule 4.2(B)(3).

⁸⁸ Old Rules, Rule 15C(4).

⁸⁹ New Rules, Canon 4, Rule 4.2(B)(5).

⁹⁰ New Rules, Canon 4, Rule 4.3(A).

⁹¹ New Rules, Canon 4, Rule 4.3(B).

⁹² New Rules, Canon 4, Rule 4.3 cmt.

⁹³ New Rules, Canon 4, Rule 4.4(B)(1)-(3). Section 1626 of the Election Code, 25 P.S. §3246(b)(1), (2), requires the filing of these reports periodically during and

While lawyers are permitted to make campaign contributions, Comment [3] cautions that “the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification or recusal if the candidate is elected to judicial office.”⁹⁴

Finally, New Rule 4.5 addresses magisterial district judges who become candidates for a nonjudicial office. Old Rule 15E required that a magisterial district judge “shall resign their office when they become candidates either in a party primary or in a general election for non-judicial office.” New Rule 4.5 makes a distinction between a candidate for “elective office” and a candidate for “appointive office.”⁹⁵

A magisterial district judge who is a candidate for nonjudicial elective office is required to resign upon becoming a candidate unless the law permits otherwise.⁹⁶ As Comment [2] to New Rule 4.5 explains, “[t]he ‘resign to run’ rule set forth in [New Rule 4.5(A)] is required by Article V, Section 18(d)(4) of the Pennsylvania Constitution, which states: “A justice, judge or justice of the peace [now magisterial district judge] who files for nomination for or election to any public office other than a judicial office shall forfeit automatically his judicial office.” It insures that a magisterial district judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaigning retaliation from the magisterial district judge. . .in the event the magisterial district judge is defeated in the election.”

In contrast, if a magisterial district judge is a candidate for nonjudicial appointive office, he or she is not required to resign from their judicial office so long as they comply with other provisions of the New Rules.⁹⁷

after the election season, so the time frames set forth in the statute, and not the new Rule, will prevail since that is “such other period as is provided by law.”

⁹⁴ New Rules, Canon 4, Rule 4.4 cmt. [3].

⁹⁵ New Rules, Canon 4, Rule 4.5(A) and (B).

⁹⁶ *Id.* at Rule 4.5(A).

⁹⁷ *Id.* at Rule 4.5(B).

CONCLUSION

While the New Rules have a façade of complexity by virtue of the increase in the quantity of Rules from twenty-three to thirty-nine, the content of the Old Rules has simply migrated and been reorganized into the New Rules, refined with qualifying language, and supplemented with several new provisions and extensive accompanying commentary and definitions. The result is a more comprehensive and detailed road map to guide magisterial district judges' behavior in carrying out their judicial duties, participating in extrajudicial activities, and conducting their political campaigns. The New Rules provide more certainty and clarity to magisterial district judges in determining what is required and expected of their conduct, while also assisting them in understanding and avoiding ethical pitfalls through the numerous explanatory comments.

EDITOR'S NOTE: THIS ALERT WAS ORIGINALLY DISTRIBUTED BY THE JUDICIAL CONDUCT BOARD ON JANUARY 29, 2015. IT IS BEING REDISTRIBUTED HERE FOR THE CONVENIENCE OF THE READERSHIP.

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.