REPORT AND RECOMMENDATIONS OF THE ILLINOIS STATE BAR ASSOCIATION'S SPECIAL COMMITTEE ON JUDICIAL DISQUALIFICATION STANDARDS

EXECUTIVE SUMMARY

Over the last several years, the American public has witnessed the ever-increasing roles of money and partisan interest groups in judicial elections. Likely fueled by this trend, there is a related public perception that campaign contributions and other related support influence judicial decision-making. The existence of this perception presents a significant threat to the public's respect for the judiciary as being impartial and fair.

In 2009, campaign contributions and other related support in judicial elections were addressed by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Company*. In *Caperton*, a West Virginia Supreme Court of Appeals justice refused to disqualify himself in a case in which one of the parties contributed substantial funds in support of his election campaign. Ultimately, the justice voted with a 3-2 majority in reversing a $50 million jury verdict against the contributing party. On review, the U.S. Supreme Court held that the justice's failure to disqualify himself constituted a due process violation under the U.S. Constitution's Fourteenth Amendment.

The *Caperton* decision provided additional fuel for the ongoing debate about judicial disqualification based on the role of monetary and non-monetary support in judicial elections. As a result of *Caperton*, a number of states have adopted new and varied court rules concerning judicial disqualification.

The post-*Caperton* debate, and the resulting focus on disqualification related to the possible effect of campaign support on judicial decision-making, led to the creation of the Illinois State Bar Association's Special Committee on Judicial Disqualification Standards ("Special Committee") in May 2012. Its mission was to consider judicial disqualification standards in Illinois and to make recommendations on how to clarify and

improve them, particularly, if possible, in such a way as to improve the public's perception concerning the impartiality of judicial decision-making. The Special Committee met frequently throughout the summer and fall of 2012. It reviewed academic materials, case law, and the actions of other states. It also drew on its members' own experiences with judicial elections and disqualification procedures in Illinois.

After extensive discussion and evaluation, the Special Committee proposes that the ISBA recommend to the Illinois Supreme Court an amendment to the Illinois Code of Judicial Conduct. The recommended amendment, to be added as a new subsection (3) to Ill. S. Ct. R. 63C, specifically addresses campaign contributions and other related support as a basis for disqualification. The proposed rule provides that a judge shall disqualify himself or herself when, after considering all relevant circumstances, there exists a probability of bias. The proposed rule includes a number of specific factors to be considered by a judge when contemplating disqualification. They include such items as the amount of monetary support, the nature of non-monetary support, and the timing and impact of the support. The Special Committee also proposes a "Committee Commentary" related to Rule 63C(3) as an aid in the interpretation of the proposed new rule.

The Special Committee believes that its recommendations appropriately address the complex issue of judicial disqualification on the basis of campaign contributions and other related support. If the Illinois Supreme Court adopts the Special Committee's recommendations, an express rule addressing campaign contributions and other related support in judicial elections will be established where none now exists. To be sure, the

proposed rule does not answer every possible disqualification scenario. It is not designed to do so. Two of the 10-member Special Committee felt that the recommendations do not go far enough. Nevertheless, together with the proposed committee commentary, the rule proposed will provide the bench and bar a framework for evaluating judicial disqualification based upon monetary and non-monetary campaign support, while providing recognition of the public's perception that campaign contributions and other support may impact judicial decision-making. The proposed rule and its accompanying commentary represent a manifestation of the efforts of bench and bar to ensure an impartial judiciary.

I. INTRODUCTION

The strength and legitimacy of any legal system is founded in large part upon adherence to the principle "that an independent, fair and competent judiciary will interpret and apply the laws…"[1] In practice, that requires that judicial decisions must be rendered by impartial judges. Judicial impartiality is not a platitude, but a reasonable expectation for all who find themselves before a court of law. In Illinois, the right to judicial impartiality finds expression in a number of court rules, judicial opinions, and statutes.[2]

Public perception, however, is that judges may be influenced by campaign contributions and other campaign-related support. This perception is no doubt fueled by the reality of the increasing cost of judicial campaigns (election and retention), the increased (or at least more public) involvement of issue-oriented organizations in judicial elections, "cross-over" attitudes related to the conduct of non-judicial election campaigns and elected officials, and the-all-too-human tendency to ascribe complex outcomes to simple rationales.

Given the skepticism with which the public may hold the elected judiciary, it is incumbent upon the organized bar to do what it can to preserve and, when necessary, restore the public's confidence in the integrity and impartiality of the courts and its

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[1] Illinois Code of Judicial Conduct, S.Ct.R. 61 *et seq.*, Preamble.

[2] For example, Supreme Court Rule 63 governs the disqualification of judges when their impartiality "might reasonably be questioned." Also, section 2-1001 of the Code of Civil Procedure and section 114-5 of the Code of Criminal Procedure of 1963 allow for substitution of a judge as a matter of right, or for cause.

judges. This is an issue which affects all lawyers. There is no divide between plaintiff and defense, civil or criminal.

One issue that is central to strengthening the public's confidence that the judiciary is fair and impartial is the disqualification of judges in cases where litigants or their lawyers, or those associated with them, have made campaign contributions or provided other related support. Many organizations have long advocated reform in this area. Perhaps more significant, many states have taken on the issue following the 2009 U.S. Supreme Court opinion in *Caperton v. A.T. Massey Coal Co.*, where the Court found due process was violated when a West Virginia Supreme Court of Appeals justice refused to disqualify himself in a case where one of the parties had contributed more than $3 million in campaign contributions and other related support to his campaign.[3]

To address the poor public perception of the judiciary, specifically as it relates to monetary and non-monetary campaign contributions, the ISBA's Special Committee on Judicial Disqualification Standards ("Special Committee") was formed. After many months of consideration and discussion, the Special Committee recommends amendments to the Illinois Code of Judicial Conduct. One recommendation, a new subsection (3) to Ill. S. Ct. R. 63C, specifically addresses campaign contributions and other related support and requires disqualification of a judge whenever a "probability of bias" exists as a result of those campaign contributions or other related support. As described in detail below in section V.A.2., a two-person minority of the 10-person Special Committee preferred a different standard. The proposed rule includes factors, unanimously agreed to within the Special Committee, that a judge is required to consider

[3] *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

in analyzing disqualification. In addition, the Special Committee recommends that a committee commentary be adopted to further explain the new rule. The Special Committee is confident that these proposals constitute an important step towards addressing the public's perception that campaign contributions or other support affects judicial decision-making.

II. THE SPECIAL COMMITTEE

The Special Committee was formed in May 2012 at the suggestion of then-President-elect, now-President John E. Thies. It was established in part to address the poor public perception of the judiciary, particularly as it relates to the perceived influence that monetary and non-monetary campaign contributions have on judicial decisions. The Special Committee's specific charge was to: (1) consider judicial disqualification standards in Illinois and, in particular, the interrelationship between 725 ILCS 5/114-5, 735 ILCS 5/2-1001, Supreme Court Rule 63C, the Illinois Supreme Court decision in *In re Marriage of O'Brien* and the U.S. Supreme Court decision in *Caperton v. A.T. Massey Coal Co*.; (2) evaluate how to clarify and improve such standards and related procedures in a manner that enhances public confidence in the judicial system; and (3) report its findings and recommendations.

Throughout the summer and fall of 2012, the Special Committee met numerous times to carefully consider and discuss the complex issue of judicial disqualification as it relates to campaign contributions and other related support. Together with its recommendations, this Report reflects the Special Committee's analysis and conclusions.

The Special Committee is co-chaired by retired First District Appellate Court Justice Gino L. DiVito and the current chair of the joint ISBA/IJA/CBA Judicial Ethics

Committee, Warren Lupel. Other members of the Special Committee include: Stephen L. Corn (Mattoon); the Honorable Celia Gamrath (circuit court of Cook County); James D. Green (Champaign); Raylene D. Grischow (Springfield); the Honorable Michael B. Hyman (circuit court of Cook County); Diane F. Klotnia (Chicago); retired Judge Raymond J. McKoski (Nineteenth Judicial Circuit, Lake County); and Christopher T. Hurley (Chicago). The Special Committee had staff support from ISBA General Counsel, Charles J. Northrup, who acted as reporter. The members of the Special Committee reflect a diverse and well respected group of experienced practitioners and active and retired judges.

III. THE PERCEPTION OF INFLUENCE

For most lawyers, the integrity and impartiality of judges is rarely a serious concern. Certainly, this is a view shared by the members of the Special Committee. This confidence in the judiciary is appropriately reflected in substantive law by the long and firmly established rule that judges are presumed to act impartially.[4]

Regardless of the views of lawyers and judges, there is a perception that the public is less confident in the justice system, and whether monetary or non-monetary campaign contributions influence judicial decision-making.[5] This poor public perception is well documented. In an ABA poll from 2002, 76% of voters felt that campaign

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[4] *E.g.*, *Eychaner v. Gross*, 202 Ill.2d 228, 280, 269 Ill.Dec. 80 (2002)

[5] Whether campaign contributions in reality affect judicial outcomes is a very debatable topic. See Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 Ark.L.Rev. 1, 17 (2011), wherein Professor Rotunda references a 2002 study performed by the Chicago Daily Law Bulletin showing no statistical correlation between campaign contributions and success before the Illinois Supreme Court. *But see* James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards* (Brennan Center for Justice at New York University School of Law) 2008, www.brennancenter.org where it was suggested that there is a correlation between campaign contributions and outcomes. See also, Sheperd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623 (2009).

contributions had some influence on judicial decisions.[6] By 2009, the percentage that believed campaign contributions influenced judges had increased to 89%.[7] Attitudes about the Illinois judiciary reflect the same general concern, including a 2002 poll that found 86% of the Illinois public believed campaign contributions influence judicial decisions.[8] Interestingly, a 2008 survey reveals that even a fair amount of judges (26%) feel that campaign contributions had some influence on judicial decisions.[9]

The sources of this skepticism about judicial impartiality is likely varied. The growing cost of judicial elections no doubt contributes. Contributions to Illinois Supreme Court candidates increased 37% from 1990 to 2000.[10] In 2004, a contested Illinois Supreme Court race broke a national record for fundraising, exceeding $9.3 million between the two candidates.[11] Illinois' 2010 Supreme Court retention election saw the involvement of national business groups and "extraordinary" contributions exceeding $2.6 million, the second highest amount contributed in a retention election in the nation's history.[12] This level of expenditure will likely not decrease, particularly in light of the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*

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[6] Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 Ark.L.Rev. 1, 17 (2011).
[7] *Id.*
[8] Illinois Campaign for Political Reform (2002), www.ilcampaign.org/sites/default/files/survey.pdf. See also American Judicature Society: History of Reform Efforts: Illinois, www.judicialselection.us/judicial_selection/reform.
[9] James Sample, David Pozen, and Michael Young, Fair Courts: Setting Recusal Standards (Brennan Center for Justice at New York University School of Law) 2008, www.brennancenter.org.
[10] American Judicature Society, *Judicial Campaigns and Elections*, www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state.
[11] *Id.*
[12] Special Interest Spending Soars in Illinois High Court Race, (Brennan Center for Justice at New York University School of Law) October 19, 2010, www.brennancenter.org/content/resource/special_interest_spending_soars_in_illinois_high_court_race.

holding that the government is prohibited from placing limits on independent spending for political purposes by corporations and unions.[13]

The greater involvement of issue-oriented organizations eager to affect legal interpretations, particularly the validity of legislation on public policy issues, is also likely contributing to the public's perception of the judiciary. In 2010, in an election sending shockwaves through the bar and judiciary, three Iowa Supreme Court justices failed in their bids for retention in the face of an organized and well-funded campaign against them for striking down as unconstitutional Iowa's ban on gay marriage.[14] Illinois too has witnessed the involvement of partisan special interest groups seeking to defeat sitting justices for ideological reasons.[15]

These increasing trends of money and special interests intertwined together sometimes cast judges in the role of partisan politicians. Partisanship, however, is the antithesis of being an impartial decision-maker. Accordingly, likely lacking first hand knowledge of the court system as do lawyers and judges, the public is all too willing to allow a partisan view of politicians influence their perception of judges.

The importance of ensuring the public's confidence in the integrity and fairness of the courts cannot be reasonably disputed. But given the documented poor public perception of the judiciary, how can it be changed? Illinois could amend its Constitution and do away with judicial elections, favoring some form of merit selection. In fact, the ISBA has long supported the merit selection of Illinois judges. Such a proposal was

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[13] *Citizens United v. Federal Election Commission*, 130 S.Ct.876, 175 L.Ed. 2d 753 (2010).
[14] Grant Schulte, *Iowans Dismiss Three Justices*, Des Moines Register, November 3, 2010 available at www.desmoinesregister.co/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices.
[15] Monique Garcia, *State Supreme Court Justice Wins Retention Battle*, Chicago Tribune, November 2, 2010, referencing the well funded efforts to unseat Justice Kilbride for his alleged failure to stop large plaintiff jury awards.

beyond the scope of the Special Committee, however, but more important, seems not to be favored by the Illinois electorate.[16] Judicial campaign contribution laws could be reformed. This too was beyond the scope of the Special Committee and is action more suited for legislative attention.[17] Certainly, the organized bar could embark upon a concerted program of public education in an effort to change the public perception, but such educational campaigns may, without substantial resources, do little to affect widely held perceptions.

In the end, the Special Committee feels that, at this time, the most viable way to address the public perception that campaign contributions and other related support influences judicial decision-making is to ensure by rule that judges do not sit on cases where bias and partiality may objectively be present. As discussed in section IV.B. below, courts in many states have taken this approach. For the public, the adoption of an express rule acknowledges the public's concern with this issue. Adoption of the rule would provide further evidence that the courts are not biased in favor of campaign contributors or supporters. For the bench and bar, not only would adoption highlight the need for judges to continue to recognize and consider disqualification based on campaign contributions, but adoption also would provide a standard of conduct and guidance when faced with such questions.

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[16] In a 2002 survey of Illinoisans, 79% surveyed felt judges should be elected. Illinois Campaign for Political Reform (2002), www.ilcampaign.org/sites/default/files/survey.pdf. The same is generally true on a national basis as well, where a 2008 ABA poll indicated 55% of survey respondents favored election of judges. www.abanow.org/wordpress/wp-content/files_flutter/1274728123harrispoll_judicialselection.pdf. See also Rotunda, supra notes 5 and 6, at 17 citing Daniel C. Vock, End Private Funding of Judge Races, Chi. Daily L.Bull., Sept. 18, 2002).

[17] For an interesting discussion of disclosure reform, see Hyman and Johnson, *Money in Judicial Elections: A Call for Expanded Disclosure*, Illinois Lawyer Now, Fall 2012 p.10.

The Special Committee recognizes the difficulty of affecting what appears to be a widely held, and negative, public perception that campaign contributions influence judicial decision-making. Nevertheless, the Special Committee believes establishing an express rule on judicial disqualification based on campaign contributions or other related support is a reasonable and appropriate step towards combating the public's perception of possible judicial bias.

IV. THE JUDICIAL DISQUALIFICATION LANDSCAPE

Impartial decision-making, free from a judge's personal or professional bias, is a foundation of judicial independence. As referenced above, increased campaign costs, the involvement of special interest organizations, and the resulting public belief that judicial decision-making may not be impartial, are legitimately viewed as assaults upon judicial independence. The bar is uniquely positioned to defend this independence.[18] The best support for an independent judiciary, however, is a public that has confidence in its impartiality and fairness.

Ensuring impartiality is achieved, in part, by rules prohibiting a judge from sitting in judgment on a case in which he or she has an interest or is biased. That is a longstanding feature of American jurisprudence and political thought.[19] Not surprisingly then, judicial disqualification has been the focus of efforts to combat the public perception that a judge's decision-making can be influenced by campaign contributions.

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[18] Not only is the bar uniquely positioned to defend the judiciary because of its relationship and experiences with it, it may also be compelled to do so by the Illinois Rules of Professional Conduct. See RPC 8.2, Comment[3] ("To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.").

[19] *Caperton*, 556 U.S. at 876 ("This rule [judicial recusal] reflects the maxim that 'no man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" citing The Federalist No. 10, p.59 (J. Cooke ed. 1961 (J. Madison).

The focus on judicial disqualification as a means of ensuring greater pubic confidence in the judiciary as it relates to campaign contributions and other related support was heightened by the U.S. Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Company*. In addition, since that 2009 decision, a number of states have revised their judicial conduct rules to address campaign contribution and disqualification issues. The impact of *Caperton* and the developments in other states provided a foundation upon which the Special Committee acted. These matters are discussed below.

A. *Caperton v. A. T. Massey Coal Co.*

In 2009, the U.S. Supreme Court decided the case of *Caperton v. A.T. Massey Coal Company*.[20] In that case, the Court reversed a decision of the Supreme Court of Appeals of West Virginia in which a justice of that court refused to disqualify himself in a matter before the court in which one of the parties contributed approximately $3 million towards his election. The justice's refusal to disqualify himself was held to be a violation of the Due Process Clause of the Fourteenth Amendment.[21]

The facts as described by the U.S. Supreme Court are straightforward. In 2002, a West Virginia jury returned a $50 million verdict against defendant Massey Coal Co. (hereafter "Massey") and in favor of Plaintiff Caperton.[22] Subsequent to the verdict, but before the appeal to the West Virginia Supreme Court of Appeals, Massey's Chairman made a $1,000 direct campaign contribution (the statutory maximum) to Brent Benjamin, a candidate for election to that court.[23] Massey's Chairman also made a $2.5 million donation to a "527" organization opposed to candidate Benjamin's electoral opponent, a

[20] For full citation, *see supra* footnote 3.
[21] *Caperton*, 556 U.S. at 887.
[22] *Id.* at 872.
[23] *Id* at 873.

sitting justice on the court.[24] Finally, Massey's Chairman also made more than $500,000 in independent expenditures in support of candidate Benjamin.[25] This $3 million in total contributions towards the election of candidate Benjamin was more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own campaign committee.[26] Benjamin won the election and took a seat on the West Virginia Supreme Court of Appeals.

After the election, with the case about to be appealed to the West Virginia Supreme Court of Appeals, Caperton moved to disqualify now-Justice Benjamin from participating in the decision, citing Massey's Chairman's campaign contributions and other related support.[27] Justice Benjamin denied the motion.[28] Later, with Justice Benjamin in the majority, the West Virginia Supreme Court of Appeals reversed the $50 million jury award against Massey in a 3-2 opinion.[29] Caperton sought a rehearing and the parties moved for the disqualification of three of the five West Virginia Supreme Court of Appeals justices, including Justice Benjamin.[30] Two justices agreed and disqualified themselves.[31] Justice Benjamin did not. Justice Benjamin, now acting as chief justice, appointed two replacement justices. Caperton moved again to disqualify Justice Benjamin, who again refused.[32] On rehearing, the West Virginia Supreme Court

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 873-874.
[28] *Id.* at 874.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 874-875. One justice recused himself after it came to light that he had been vacationing in Europe with Massey's Chairman during the pendency of the appeal. Another justice recused himself for criticizing Massey's Chairman's support of Justice Benjamin.
[32] *Id.* at 875.

of Appeals again reversed the jury award in a 3-2 opinion.[33] The U.S. Supreme Court granted *certiorari*.

The issue before the U.S. Supreme Court was whether the Due Process Clause of the Fourteenth Amendment was violated when Justice Benjamin denied the motions seeking his recusal.[34] In a 5-4 opinion authored by Justice Kennedy, the Court concluded that it was. The Court applied an objective standard focusing ultimately on whether the facts demonstrated a "probability of actual bias."[35] In focusing on a "probability of actual bias" standard, the Court did not attempt any analysis of whether Justice Benjamin was actually biased as a result of the campaign contributions and other support at issue, making it clear that actual bias need not be shown.[36] The Court acknowledged Justice Benjamin's subjective analysis of his own potential bias, but found that analysis subordinate, if relevant at all, to an objective review.[37] Further articulating the requirement of an objective standard, the Court concluded that "there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on this case by raising funds or directing the judge's election campaign when the case was pending or imminent."[38]

In concluding that due process was violated, the Court's factual inquiry focused on: the size of the contributions in question in comparison to the total amount of funds contributed to the election campaign; the total amount spent in the election; and the

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[33] *Id.*
[34] *Id.* at 872.
[35] *Id.* at 884 and 887.
[36] *Id.* at 886.
[37] *Id.*
[38] *Id.* at 884.

apparent effect of the contribution on the outcome of election.[39] In its analysis, the Court found significant that the $3 million in contributions and campaign support from Massey's Chairman "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee."[40] In addition, the Court noted the temporal relationship between the campaign contributions, Justice Benjamin's election, and the pendency of the case.[41]

In reaching its conclusion, the Court focused on the unique circumstances of the case, noting that the campaign contributions in *Caperton* were "extraordinary" and that the facts at issue "extreme."[42] The Court pointed out that "not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."[43] Nevertheless, *Caperton* stands for the establishment of a broad objective standard in evaluating the propriety of judicial disqualification in individual cases that accommodates a review of all the factual circumstances.[44] The opinion serves as the constitutional floor below which judicial disqualification is required as a matter of due process. While states remain free to impose more rigorous restrictions, *Caperton* serves as an important guide in evaluating and applying disqualification standards at the state level, including in Illinois.

B. *State and Bar Response to Caperton*

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 886.
[43] *Id.* at 884.
[44] *Id.* at 885. ("Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average…judge to...lead him not to hold the balance nice, clear and true'" (citations omitted)).

Judicial disqualification resulting from campaign contributions and other related support was the subject of academic debate prior to *Caperton*. While organizations such as the American Bar Association advocated for disqualification reform in this area, little (if any) action was being taken by the states, either legislatively or judicially.[45]

Once it was decided, *Caperton* was met with swift reaction within the legal community, and a number of commentators saw the decision as a victory for reform over the perceived influence of campaign contributions and other related support in judicial elections.[46] In addition, a number of states took action and revised their judicial codes to address campaign contribution issues.[47] Reform at the state level has taken many forms. Arizona, California, and Utah have established bright line campaign contribution limits requiring disqualification if exceeded.[48] In New York, no case may be assigned to a judge if that judge's campaign committee has received $2,500 or more from a party, a lawyer appearing on behalf of a party, or that lawyer's law firm.[49] Other states have

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[45] In fact, it appears that notwithstanding ABA revisions to the Model Code of Judicial Conduct to address the campaign contribution and support issue, no state had adopted the ABA's revisions. Cynthia Gray, Campaign Supporters and Disqualification, 3 Judicial Conduct reporter 1 (2007).

[46] *Caperton v. Massey – Court Cases*, Brennan Center for Justice, (June 8, 2009) www.brennancenter.org/content/resource/caperton_v_massey.

[47] States enacting some form of campaign contribution recusal reform include Arizona, California, Georgia, Iowa, Michigan, Missouri, New York, Oklahoma, Tennessee, Utah, and Washington. However, efforts at reform in some states, including Montana, Nevada, and Texas, have been defeated as well.

[48] *Judicial Recusal Reform – Two Years After Caperton* (Brennan Center for Justice, New York University School of Law) June 2, 2011, www.brennancenter.org/content/resource/judicial_recusal_reform_two_years_after_caperton/. In Arizona, recusal is required if a party or the party's lawyer has contributed more than $840 in the previous four years. In California, recusal is required in the event a party or a lawyer contributes more than $1,500 in the preceding (or upcoming) election. Finally, Utah requires recusal if a party or lawyer has contributed more than $50 within the previous three years.

[49] Id., NY CLS Standards and Admin. Pol. Sec. 151.1 (2012).

taken a more general view by simply referencing the factors discussed in *Caperton* or even the case itself.[50]

Recently, the Tennessee Supreme Court enacted comprehensive disqualification reform in an effort to preserve judicial integrity and independence.[51] Tennessee's new judicial disqualification rule requires a judge to disqualify himself or herself when campaign contributions or support by a party, a party's lawyer, or the law firm of a party's lawyer might reasonably question the judge's impartiality.[52] The substance of this rule, however, is in the official commentary. The commentary identifies a number of factors set out in *Caperton* as being important to consider in determining whether disqualification is appropriate, including: the level of direct and indirect campaign contribution, particularly in relationship to the overall contributions to the judge as well as all the other candidates; whether the contributions or other expenditures were direct or independent; the timing of the contributions or other support in relation to the case at issue; and the relationship of the contributor to any litigants, the issue, or the candidate.[53] Echoing *Caperton*, the commentary makes it clear that campaign contributions or other related support alone does not require a judge's disqualification.[54] Finally, the Tennessee

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[50] For example, Wisconsin provides very specific and lengthy commentary concerning the effect of campaign contributions on any recusal decision. Wis. SCR 60.04. Conversely, Missouri simply admonishes judicial candidates "to consider whether his or her conduct may create grounds for recusal for actual bias or a probability of bias pursuant to *Caperton v. A.T.Massey Coal Co.*"

[51] Editorial, *A Reform for Fair Courts*, N.Y. Times, January 29, 2012. Unfortunately, while the NY Times praised Tennessee's efforts, Illinois was singled out as a jurisdiction "plagued" by campaign spending problems. Other organizations advocating recusal reform such as the Brennan Center for Justice also supported the new Tennessee rules.

[52] Tenn. Sup.Ct.R.10, Canon 2, Rule 2.11 (2012).

[53] *Id.*

[54] Tenn. Sup.Ct.R.10, Canon 2, Rule 2.11, Comment [7] (2012) ("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. Absent other facts, campaign

Court also adopted a specific procedure for seeking the disqualification of trial judges and appellate and supreme court justices. The rule also requires, in part, a written order disposing of a motion for disqualification including the grounds upon which such a motion is denied.[55] It also provides for an interlocutory appeal as of right.[56]

Lastly, the ABA continues to advocate for reform in the area of campaign contributions and judicial disqualification. DRI, another national bar group, concurs with the importance of reform in this area.[57] Most recently, the ABA Standing Committee on Ethics and Professional Responsibility issued a "Revised Draft for Comment – Rule 2.11 of the Model Code of Judicial Conduct designed to assist states in setting their own judicial disqualification standards based upon their own circumstances or substantive election law."[58] Generally, the ABA draft proposal suggests that a judge shall disqualify himself or herself when (1) he or she knows that a party, a party's lawyer, or the firm of a party's lawyer (2) has made aggregate contributions in an amount (to be determined by the individual states) to the judge's campaign committee (3) or an entity that contributed to or supported the judge (4) within a particular number of years (also to be determined by individual states) previous to the lawyer's appearance before the judge.[59] The rule is further explained extensively in proposed commentary. There, factors such as the

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contributions within the limits of the [applicable Tennessee election code], or similar law should not result in disqualification.").

[55] Tenn. Sup.Ct.R. 10B, Section 1.03 (2012).

[56] Tenn. Sup.Ct.R. 10B, Section 2.01 (2012).

[57] *Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability* (DRI f/k/a Defense Research Institute). In discussing the impact of campaign contributions in judicial races and *Caperton*, the DRI noted: "real reform is needed at the state court level to ensure that our legal system is perceived to be fair."

[58] Revised Draft for Comment – Rule 2.11 of the Model Code of Judicial Conduct, July 16, 2012. www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20120712_scepr_rule_2_11_disqualification_final.authcheckdam.pdf.

[59] *Id.* Draft Rule 2.11(A)(4).

amount, value, source, timing, and importance of contributions are all identified as circumstances to consider in determining whether a reasonable question as to the judge's impartiality is raised.[60]

The actions of other states and bars highlight the importance of addressing judicial disqualification related to campaign contributions and other support.

C. *Disqualification in Illinois*

Like all states, Illinois has rules and procedures governing judicial disqualification. First and foremost, under the Illinois Code of Judicial Conduct, Illinois judges are bound by standards of ethical conduct requiring them to act impartially.[61] Failure to do so may result in discipline.[62] In addition, every civil litigant and criminal defendant has a statutory right to one substitution of judge *without cause*.[63] Every civil litigant and criminal defendant also may seek to substitute a judge *for cause* by filing a petition for substitution.[64]

Apart from these general requirements and procedural mechanisms, there is very little authority in Illinois addressing disqualification based upon campaign contributions or other related support. There are no judicial opinions on the subject, although the *Caperton* "probability of bias" standard has been acknowledged by the Illinois Supreme Court in its 2011 case of *In re Marriage of O'Brien*.[65] There are no court rules dealing

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[60] *Id.* Draft Rule 2.11, Comment [6].
[61] Ill. S.Ct. R. 63(C)(1)
[62] See Ill. S.Ct. R. 71 ("A judge who violates Rules 61 through 68 may be subject to discipline by the Illinois Courts Commission.").
[63] 735 ILCS 5/2-1001(a)(2); 725 ILCS 5/114-5(a).
[64] 735 ILCS 5/2-1001(a)(3); 725 ILCS 5/114-5(d).
[65] *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 48, 354 Ill.Dec. 715 (2011) ("We have acknowledged that recusal is constitutionally mandated under *Caperton* in instances where the facts reveal that there exists a high probability of the risk of actual bias on the part of the challenged judge and have alerted our trial judges to utilize *Caperton's* standard to guard against due process violations."

expressly with campaign contributions. Predating *Caperton* and most of the academic debate on the influence of campaign contributions and other related support, the official Committee Commentary to Rule 67 of the Illinois Code of Judicial Conduct does note that: "Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Cannon 3."[66]

The absence of any express authority on campaign contributions and other support related to judicial disqualification may leave the public with little confidence that the issue is being seriously addressed. Certainly, should litigants or lawyers obtain campaign contribution information sufficient to believe that the judge assigned to their case will not act impartially, a motion for substitution as of right under section 2-1001(a)(2) of the Code of Civil Procedure could be filed. A litigant identifying campaign contributions or other campaign support during the course of a pending proceeding could also file a petition for substitution for cause under section 2-1001(a)(3) and allege a *Caperton*-type due process violation. Finally, a litigant might file a motion with the court under S.Ct. Rule 63 of the Illinois Code of Judicial Conduct raising issues of bias as a result of campaign contributions or other related support.[67]

Notwithstanding these procedural mechanisms to raise issues involving campaign contributions and other related support, the absence of any express treatment of the issue

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[66] Ill. S.Ct. R. 67, Committee Commentary.

[67] Ill. S.Ct. R. 63C(1). The availability of present Rule 63C as a basis to seek recusal of a judge was questioned in *dicta* in *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45, 354 Ill.Dec. 715 (2011) ("The Judicial Code, which is part of our rules, says nothing that would give the impression that its provisions could be used by a party or his lawyer as a means to force a judge to recuse himself, once the judge does not do so on his own."). However, in a special concurrence by Justice Karmeier, joined by Chief Justice Kilbride, consideration of the standards set out in Ill. S. Ct. R. 63C was viewed as entirely appropriate and consistent with prior case law. *O'Brien*, at ¶ 147.

may contribute to the negative public perception that it is an issue not being addressed by the courts.

V. PROPOSAL

The Special Committee recommends that the ISBA encourage the Illinois Supreme Court's adoption of an express rule related to campaign contributions and other related support as a basis for judicial disqualification. Specifically, the Special Committee proposes amending Rule 63C of the Illinois Code of Judicial Conduct by adding a new subparagraph (3). The proposed new rule, set out below and at Appendix 1, requires a judge to disqualify himself or herself from a proceeding in which the litigants or lawyers have provided campaign contributions or other related support to the judge's campaign sufficient to create a probability of bias. It is an objective test. The proposed rule also sets out a number of factors, not intended to be exhaustive, that the judge must consider when determining whether or not to disqualify himself or herself. To further assist the judiciary and the bar in applying the proposed rule, the Special Committee also proposes an official committee commentary, which also is set out below and at Appendix 1.

The Special Committee's recommendation to amend the Code of Judicial Conduct was viewed as a preferred and appropriate course of action. First, the Code of Judicial Conduct establishes binding ethical standards of conduct on the judiciary, including those situations where a judge must disqualify himself or herself because of bias or partiality.[68] In addition, the official Committee Commentary already references, albeit briefly, campaign contributions as a basis for disqualification. Second, addressing campaign

[68] See Preamble, Illinois Code of Judicial Conduct ("The text of the rules is intended to govern conduct of judges and to be binding on them.")

contributions and other related support within state judicial codes was viewed with approval by the U.S. Supreme Court in *Caperton*: "The Conference of the Chief Justices has underscored that the [judicial] codes are 'the principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"[69] Third, the Special Committee was reluctant to recommend action in other venues, such as the legislature, not only because the subject matter seemed particularly within the jurisdiction of the Illinois Supreme Court to address, but also because legislative action seemed more uncertain in terms of substance and timeliness. In light of these factors, the Special Committee concluded that addressing campaign contributions and other related support within the Code of Judicial Conduct was appropriate.

Finally, it should be noted that the Special Committee believes that the Illinois judiciary is independent, fair, and performs its judicial function with integrity. This well informed belief, based on years of personal experience and observation is reflected by the longstanding judicial principle that judges are presumed impartial.[70] This presumption must be preserved, and the Special Committee believes that its recommendations do so.

A. *The Code of Judicial Conduct: Rule 63C*

1. <u>Committee Proposal</u>

The Special Committee recommends amending Supreme Court Rule 63C of the Code of Judicial Conduct to include a new subsection (3):

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[69] *Caperton*, 556 U.S. at 889, citing the Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11.
[70] *E.g.*, *O'Brien*, 2011 IL 109039, ¶ 31.

> A judge shall disqualify himself or herself in a proceeding where monetary or non-monetary support related to the judge's election or retention creates a probability of bias. Factors to be considered in determining whether disqualification is required include, but are not limited to: the amount of the monetary support; the nature of non-monetary support; the timing and impact of support; the issues involved in the proceeding; whether the proceeding was pending or likely to be pending before the judge when the support was provided; and the connection of the supporter to the judge, to the proceeding, or to the litigants or attorneys participating in the proceeding.

The recommended new rule squarely addresses the campaign contribution and support issue. The first sentence articulates the *Caperton* probability of bias standard. It also affirms the policy, already existing in the Committee Commentary to Rule 67, that campaign contributions or related support may affect a judge's impartiality and serve as a basis for disqualification. By expressly addressing campaign contributions and other support as a basis for disqualification in a rule, the judiciary will demonstrate that it takes the issue, and the public's concern about it, seriously and is willing to address it in a meaningful way.

In addition to recognizing campaign contributions and other related support as a trigger for disqualification, the recommended rule sets out a number of factors to guide a judge in analyzing disqualification. The factors have their genesis in the facts and analysis of *Caperton*, but they also express a common sense attempt to identify relevant facts that could objectively affect a judge's partiality and lead to disqualification. Most are self-explanatory. They are, however, meant to be broad. For instance, the reference to "non-monetary support" is designed to encompass relationships and activities that may be a potential source of bias such as campaign committee leadership, fundraising, or hosting campaign events. In addition, no single factor is dispositive. They are intended to be considered together in order to ensure that all the circumstances relevant to a

disqualification decision are evaluated. For instance, a campaign contribution within legal limits would ordinarily not be grounds for disqualification. However, that factor, considered together with other factors, might call for greater scrutiny and self-reflection by the judge, and might require disqualification.

2. Minority View and Majority's Response

Two of the 10 Special Committee members believe that the proposed rule does not go far enough. The minority contends that the proposed rule is more permissive than the rule that currently exists for the circumstances defined by Rule 63C(1). Though the minority agrees that the Special Committee has adopted the standard announced in *Caperton* – the standard that requires an objective analysis of whether the campaign contributions or other support create a probability of bias on the part of a judge – it is concerned that a probability of bias test makes it easier for a judge to remain on a case than the standard for disqualification for circumstances that are tied to those instances where a "judge's impartiality might reasonably be questioned"[71] – a standard that is the equivalent of the "appearance of impropriety" test.

The views of the minority are fully expressed in its "Minority Report," which is provided with this Report and was prepared by the minority after it reviewed a substantially identical draft of this Report.

The question of whether issues raised by monetary and non-monetary campaign support should be covered by Rule 63C(1)'s "might reasonably be questioned" standard or the standard provided by *Caperton* was fully considered and discussed by the Special Committee. Aside from the two members who espouse the minority view, the Special

[71] S.Ct. Rule 63C(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned…").

Committee agreed, for reasons set forth below, to reject the standard provided by Rule 63C(1) and to adopt the "probability of bias" standard provided by *Caperton* and set forth in proposed Rule 63C(3).

The majority of Special Committee members remain convinced that mandating disqualification of a judge when campaign support creates a "probability of bias" best accommodates the interests served by a rule governing removal of a judge for reasons related to the electoral process.

First, establishing any disqualification standard for campaign support must take into account that Illinois, unlike federal courts and a majority of state courts, permits an automatic substitution of judge at the trial level. Obtaining a new judge using the automatic substitution procedure does not require a litigant to demonstrate a probability of bias or even make a showing that a judge's impartiality may reasonably be questioned. The judge is removed from a proceeding simply upon a party's request. So, in Illinois any litigant who has any concern, realistic or not, that a judge might be biased because of election support, can, without any showing, secure a new judge.

Second, the majority concluded that a recusal standard other than the probability of bias standard would have the potential of significantly reducing the participation of members of the legal profession in the judicial election and retention process. This would certainly be unfortunate since lawyers possess the most direct knowledge about the abilities, integrity, and temperament of judicial candidates. But more important, decreased participation in the electoral process by lawyers would create a void. That void would likely be filled by individuals and organizations not governed by the ethics code

applicable to lawyers, whose partisan interests and money would likely commandeer judicial elections.

Third, crafting a disqualification standard should take into account that – in the past – the people of Illinois have expressed a preference for the elective method of judicial selection.[72]

Fourth, campaign support differs fundamentally from other bases for judicial disqualification which are governed by the "might reasonably be questioned" standard of Rule 63C(1). The circumstances relevant to determining whether campaign support warrants disqualification, some of which are listed in proposed subsection (3), are not always within the judge's knowledge. On the other hand, as is obvious from a review of Rule 63C(1) which is provided at Appendix 2, the specific disqualifying circumstances governed by the less rigorous "might reasonably be questioned" standard of subsection (1) involve matters usually within the judge's knowledge. For example, subsection (1) of Rule 63C requires disqualification under the "might reasonably be questioned" standard when a family member appears as an attorney, party, or witness before a judge.

Finally, the standard espoused by the minority not only unduly reduces the test derived from the unusual circumstances in the *Caperton* case (where the Supreme Court easily could have applied a "might reasonably be questioned" test), it could, for any number of reasons, have the perverse effect of inviting into court proceedings issues related even to lawful and commonplace monetary and non-monetary campaign

[72] A 2002 survey of Illinois residents found that 78.5% of respondents "thought that judges should be elected," while 14.8 % "thought that judges should be appointed." 2002 Illinois Statewide Survey on Judicial Selection Issues, *available at* http://www.ilcampaign.org/sites/default/files/survey.pdf

contributions, thereby creating unnecessary focus and controversy where none should exist.

B. ***Committee Commentary to Rule 63C***

The Special Committee also proposes the adoption of an explanatory note to the proposed new rule in the form of official committee commentary. The proposed committee commentary provides insight on the source and intent of the proposed rule, as well as including some important limitations that were not appropriate for inclusion in the proposed rule. The Special Committee proposes the following official committee commentary:

> Since 1993, the Committee Commentary to Rule 67 (Canon 7) has recognized that, "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Canon 3." Ill. S. Ct. R. 67, Committee Commentary.
>
> In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), referring to the matter before it as "an exceptional case" (*id*. at 884) and to the facts as "extreme by any measure" (*id*. at 887), the United States Supreme Court determined that a litigant's monetary campaign support, in combination with other circumstances, required disqualification under the Due Process Clause of the Fourteenth Amendment – even in the absence of actual bias. The Court held that disqualification is required where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).
>
> In light of the long-standing commentary to Canon 7 and the *Caperton* decision, subsection C(3) has been added to Rule 63 to clarify the effect of campaign contributions on a judge's ability to fulfill his or her constitutional function.
>
> Subsection C(3) adopts the due process disqualification standard announced in *Caperton* by requiring disqualification where monetary or non-monetary support related to a judge's election or retention effort

> creates a probability of bias. Disqualification issues concerning such monetary and other support provided by litigants, lawyers, and others in support of a judge's election or retention are governed exclusively by subsection C(3). Notwithstanding the exclusive treatment of the disqualification issue in subsection C(3), litigants in Illinois retain the statutory ability to substitute a judge as a matter of right under the provisions of section 2-1001(a)(2) of the Code of Civil Procedure, and in criminal cases under the provisions of section 114-5 of the Code of Criminal Procedure of 1963.
>
> Monetary support in amounts within legal limits to the election campaigns of judicial candidates or to the retention campaigns of judges generally do not require a judge's disqualification. Since 1848, the Illinois Constitution has provided for the election of judges. Campaign funding is a part of the election process and neither the general public nor the members of the legal profession should be excluded from that process.
>
> Even lawful campaign support, however, when combined with other factors, may create a probability of judicial bias. Subsection C(3) underscores that fact and provides a non-exhaustive list of relevant considerations to assist a judge in determining whether monetary or other campaign support requires disqualification.
>
> Judges do not have a legal or ethical duty to become informed of support for their election or retention campaigns. To insulate themselves from any claim of bias, some judges prefer not to be advised by their campaign committees as to the identity of supporters or the amount of monetary support. But a judge must disqualify himself or herself if the judge becomes aware of monetary or non-monetary support that, with other factors such as those described in subsection C(3), create circumstances requiring disqualification.

This proposed committee commentary was designed to provide additional interpretation and guidance on the proposed new rule. The proposed commentary acknowledges the principle already embodied in the Code of Judicial Conduct that campaign contributions can be the basis of judicial disqualification.[73] It then identifies and discusses *Caperton* as the source of the proposed rule's "probability of bias" standard. Finally, the proposed commentary identifies limitations of the proposed rule.

[73] *See supra* note 66.

First, the principle that legal campaign contributions or other support does not itself compel disqualification was important to reiterate.[74] The Special Committee was very concerned about suggesting any rule or interpretation that would impede or discourage the involvement of lawyers in judicial election campaigns. Second, the proposed commentary clearly provides that a judge has no ethical or legal obligation to become informed about contributions made to his or her campaign. Imposing such a knowledge requirement was inconsistent with the reasonable custom and practice of many judges who choose to insulate themselves from such knowledge as a means of minimizing any claims of bias.

C. *Rejected Considerations*

In arriving at the recommendations set out above, the Special Committee rejected a number of options for addressing campaign issues related to judicial disqualification.

1. Judicial Knowledge

Many states addressing judicial disqualification related to campaign contributions or other related support base rules, in part, on a judge's knowledge of the contributions. In Illinois, as noted above, it is often the practice of judges purposefully to shield themselves from such knowledge. In this way, these judges intend to preserve their impartiality. The Special Committee believes this is not an unreasonable position. Accordingly, compelling a judge to know who his or her campaign contributors are defeats this good faith attempt to preserve impartiality. Requiring knowledge of campaign contributions and other related support makes such an attempt potentially a violation of the Code of Judicial Conduct subjecting a judge to discipline. Furthermore,

[74] Even the Court in *Caperton* recognized this principle when it noted that: "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal…." *Caperton*, 556 U.S. at 884.

interjecting a "knowledge" requirement would potentially result in factual disputes that might serve to shift the disqualification inquiry away from an objective review and towards a subjective one. In drafting the proposed rule, therefore, the Special Committee was mindful of placing new (and possibly counter-productive) obligations on judges to know about campaign contributions or other related support that they might otherwise choose to shield themselves from. The Special Committee believes that an individual judge's discretion to know or not know who is contributing to their campaigns should be preserved.

2. Contribution Limits

Also considered but rejected by the Special Committee was a rule that mandates disqualification if litigants (or their counsel) contribute above a specific amount to a judge's campaign. Such limitations have been adopted by Arizona and Utah and are suggested by the ABA.[75] The strong belief of the Special Committee was that lawyers who legally contribute to a judge's campaign whom they believe is worthy of support should not thereafter be penalized by not being allowed to appear before that judge. Such a rule serves only to discourage participation in the election process by lawyers, likely the very persons with the most relevant knowledge about the competency and impartiality of the judges before whom they appear. Good judicial candidates and judges may ultimately be the ones harmed most by any *de facto* restrictions placed upon lawyer contributions.

3. Assignment Restrictions

Similar to the Arizona and Utah type mandatory disqualification based on a specific level of campaign contribution, the Special Committee considered a New York

[75] *See supra* footnotes 48 and 58.

style administrative rule whereby a judge may not be assigned to a case involving lawyers or litigants who have exceeded specified contributions limits to that judge. Here too, this type of administrative rule was rejected. As with any automatic disqualification related to campaign contributions or related support, such a rule is premised on the belief that campaign contributions buys influence. Notwithstanding whether that belief in the public mind is accurate, the Special Committee rejects the premise and any rule that has the effect of lending credence to it. The rule is also flawed in that it discourages lawyers from making otherwise legal contributions to judicial campaigns as well as eliminating any level of discretion or judgment in the disqualification decision. Finally, the rule seems to invite gamesmanship by allowing a party to preemptively remove a judge from a case simply by making a campaign contribution.

4. Judicial Disclosure

Another aspect of disqualification reform discussed by the Special Committee was a requirement that a judge be required to disclose to all parties campaign contributions or other related support provided by litigants or lawyers appearing before the judge. The benefit of such disclosure would be that campaign contribution or related support issues would be in the open and subject to consideration and motion practice by the non-contributing party. The Special Committee, however, identified a number of concerns with such a requirement. First, to be effective it would mandate judges to know who their contributors are. As referenced above, that is directly counter to the current custom and practice of many judges. Second, judicial disclosure was viewed as unnecessary in that campaign contribution information is currently available on the Illinois State Board of Elections website for those who may wish to review that

information for evidence of potential partiality.[76] The Special Committee views this readily accessible public information as a powerful tool in identifying and evaluating monetary support for judicial election or retention campaigns. Available information includes contributions searchable by committee, candidate, and individual contributors, as well as campaign committee officers. Finally, requiring campaign contribution disclosures during routine court matters was viewed as an invitation for procedural delay, particularly in high volume courts.

5. Lawyer Disclosure

Finally, the Special Committee considered whether lawyers should be required to disclose to opposing parties the campaign contributions or other related support they have provided to a judge before whom they are now appearing. Some on the Special Committee were familiar with lawyers who currently make such disclosures. There was consensus in the Committee that the Rules of Professional Conduct implicitly address attorney misconduct related to campaign support and that providing for attorney disclosure of lawful support would invite unnecessary focus on such support.

VI. CONCLUSION

"Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws."[77] The Special Committee is confident that the Illinois judiciary puts this principle into practice. Unfortunately, the Illinois public may not agree. The Illinois public may believe that judges are influenced by campaign contributions and other related support by lawyers and litigants. The increasing cost and partisan tone of judicial elections likely contribute to that belief.

[76] See www.elections.il.gov/InfoForVoters.aspx.
[77] Illinois Code of Judicial Conduct, Preamble.

It is incumbent upon the bar to ensure that the public has as much confidence and respect for the judiciary as the bar does. The Special Committee believes that the recommendations contained in this report may be an initial step in reversing the public's skepticism that the judiciary can be fair and impartial.

APPENDIX 1

SPECIAL COMMITTEE ON JUDICIAL DISQUALIFICATION

PROPOSED RULE AND COMMITTEE COMMENTARY

Ill. S. Ct. R. 63C(3):

A judge shall disqualify himself or herself in a proceeding where monetary or non-monetary support related to the judge's election or retention creates a probability of bias. Factors to be considered in determining whether disqualification is required include, but are not limited to: the amount of the monetary support; the nature of non-monetary support; the timing and impact of support; the issues involved in the proceeding; whether the proceeding was pending or likely to be pending before the judge when the support was provided; and the connection of the supporter to the judge, to the proceeding, or to the litigants or attorneys participating in the proceeding.

Committee Commentary for Ill. S. Ct. R. 63C(3):

Since 1993, the Committee Commentary to Rule 67 (Canon 7) has recognized that, "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Canon 3." Ill. S. Ct. R. 67, Committee Commentary.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), referring to the matter before it as "an exceptional case" (*id*. at 884) and to the facts as "extreme by any measure" (*id*. at 887), the United States Supreme Court determined that a litigant's monetary campaign support, in combination with other circumstances, required disqualification under the Due Process Clause of the Fourteenth Amendment – even in the absence of actual bias. The Court held that disqualification is required where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In light of the long-standing commentary to Canon 7 and the *Caperton* decision, subsection C(3) has been added to Rule 63 to clarify the effect of campaign contributions on a judge's ability to fulfill his or her constitutional function.

Subsection C(3) adopts the due process disqualification standard announced in *Caperton* by requiring disqualification where monetary or non-monetary support related to a judge's election or retention effort creates a probability of bias. Disqualification issues concerning such monetary and other support provided by litigants, lawyers, and others in support of a judge's election or retention are governed exclusively by subsection C(3). Notwithstanding the exclusive treatment of the disqualification issue in subsection

C(3), litigants in Illinois retain the statutory ability to substitute a judge as a matter of right under the provisions of section 2-1001(a)(2) of the Code of Civil Procedure, and in criminal cases under the provisions of section 114-5 of the Code of Criminal Procedure of 1963.

Monetary support in amounts within legal limits to the election campaigns of judicial candidates or to the retention campaigns of judges generally do not require a judge's disqualification. Since 1848, the Illinois Constitution has provided for the election of judges. Campaign funding is a part of the election process, and neither the general public nor the members of the legal profession should be excluded from participation in that process.

Even lawful campaign support, however, when combined with other factors, may create a probability of judicial bias. Subsection C(3) underscores that fact and provides a non-exhaustive list of relevant considerations to assist a judge in determining whether monetary or other campaign support requires disqualification.

Judges do not have a legal or ethical duty to become informed of support for their election or retention campaigns. To insulate themselves from any claim of bias, some judges prefer not to be advised by their campaign committees as to the identity of supporters or the amount of monetary support. But a judge must disqualify himself or herself if the judge becomes aware of monetary or non-monetary support that, with other factors such as those described in subsection C(3), create circumstances requiring disqualification.

APPENDIX 2

SPECIAL COMMITTEE ON JUDICIAL DISQUALIFICATION

CURRENT RULE 63C AND COMMITTEE COMMENTARY
WITH PROPOSED RULE AND COMMITTEE COMMENTARY UNDERLINED

Rule 63C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subparagraph) or, for a period of seven years following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law;

(d) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than *de minimis* interest that could be substantially affected by the proceeding; or

(e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or,

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(3) A judge shall disqualify himself or herself in a proceeding where monetary or non-monetary support related to the judge's election or retention creates a probability of bias. Factors to be considered in determining whether disqualification is required include, but are not limited to: the amount of the monetary support; the nature of non-monetary support; the timing and impact of support; the issues involved in the proceeding; whether the proceeding was pending or likely to be pending before the judge when the support was provided; and the connection of the supporter to the judge, to the proceeding, or to the litigants or attorneys participating in the proceeding.

D. Remittal of Disqualification.

A judge disqualified by the terms of Section 3C may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. This agreement shall be incorporated in the record of the proceeding.

Adopted December 2, 1986, effective January 1, 1987; amended June 12, 1987, effective August 1, 1987; amended November 25, 1987, effective November 25, 1987; amended August 6, 1993, effective immediately; amended October 15, 1993, effective immediately; amended March 26, 2001, effective immediately; amended April 1, 2003, effective immediately; amended December 5, 2003, effective immediately; amended April 16, 2007, effective immediately.

Committee Commentary
(April 1, 2003)

New subpart (B)(3)(b) is a modified version of the ABA Model Code of Judicial Conduct, Canon 3D(3) (1990).

New subpart (B)(3)(c) is the identical language currently contained in M.R. 14618 (Administrative Order of February 6, 1998, as amended June 5, 2000) subparagraph (b)(4) on confidentiality.

Committee Commentary

The provisions of this canon relate to judicial performance of adjudicative responsibilities, judicial performance of administrative responsibilities and the circumstances and procedure for judicial disqualification.

Paragraph A(4) and subsections C and D were amended, effective August 6, 1993, to incorporate the provisions of the Model Code of Judicial Conduct adopted by the ABA in 1990.

Paragraphs A(1) through A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

Paragraph A(4). This paragraph was amended, effective August 6, 1993, to adopt the provisions of Canon 3B(7) of the 1990 ABA Model Code of Judicial Conduct relating to *ex parte* communications. Paragraph A(4) differs in that it modifies ABA Canon 3B(7) by deleting the sentence which provides: "A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." The committee believed that such a procedure would be too close to the former practice of using masters in chancery which was abolished by the 1962 amendment of the judicial article. Furthermore both bar association committees were concerned with the possibility of a judge seeking advice from a law professor. The committee does not believe that the deletion of this provision affects the obligation of a judge to disclose any extrajudicial communication concerning a case pending before the judge to the parties or their attorneys. The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by paragraph A(4), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

Certain *ex parte* communication is approved by paragraph A(4) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in paragraph A(4) are clearly met. A judge must disclose to all parties all *ex parte* communications described in subparagraph A(4)(a) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that paragraph A(4) is not violated through law clerks or other personnel on the judge's staff.

Paragraph A(5). The ABA 1972 canon provides that "[a] judge should dispose promptly of the business of the court." The committee agreed with the ISBA/CBA joint committee recommendation that the language of the Illinois Constitution (art. VI, §13(b)) which requires that a judge should devote full time to his or her judicial duties should be incorporated into this paragraph. Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

Paragraph A(6). ABA Canon 3A(6) is adopted without substantive change. It was the view of the committee that, with regard to matters pending before the judge, a judicial officer should discuss only matters of public record, such as the filing of documents, and should not comment on a controversy not pending before the judge but which could come before the judge. "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by Rule 3.6 of the Illinois Rules of Professional Conduct.

Paragraph A(7). The Illinois Supreme Court allows extended media coverage of proceedings in the supreme and appellate courts subject to certain specified conditions. Except to the extent so authorized, however, the existing prohibition of the taking of photographs in the courtroom during sessions of the court or recesses between proceedings, and the broadcasting or televising of court proceedings, other than those of a ceremonial nature, is retained. While this prohibition does not extend to areas immediately adjacent to the courtroom, it does not preclude orders regulating or restricting the use of those areas by the media where the circumstances so warrant.

Paragraph A(8). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Paragraph B(3). A modified version of the ABA canon was recommended even though Illinois Supreme Court Rule 61(c)(10) only referred to an obligation to refer an attorney's unprofessional conduct in matters before the judge to the proper authorities. Thus the rule

here is broader, in that it is not limited to matters before the judge, and in that it extends the obligation to unprofessional conduct of other judges. In the case of misconduct by lawyers, the Rules of Professional Conduct, Rule 8.4, contains the circumstances of misconduct that are covered by paragraph B(3). This canon requires a judge to take or initiate appropriate disciplinary measures where he or she has knowledge of a violation of Rule 8.4. Where misconduct by an attorney is involved, a finding of contempt may, in appropriate circumstances, constitute the initiation of appropriate disciplinary measures. Furthermore, in both cases, the rule does not preclude a judge from taking or initiating more than a single appropriate disciplinary measure. Additionally, a judge may have a statutory obligation to report unprofessional conduct which is also criminal to an appropriate law enforcement official.

Paragraph B(4). It is the position of the committee that this ABA canon implicitly includes the provision of Illinois Supreme Court Rule 61(c)(11) that a judge "should not offend against the spirit of this standard by interchanging appointments with other judges, or by any other device." Appointees of the judge include officials such as receivers and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this paragraph.

Paragraphs C(1)(a) through C(l)(c). When originally adopted on December 2, 1986, the existing ABA canon was modified in two ways. The words "or his lawyer" were added to paragraph C(l)(a) to expressly mandate disqualification in the case of personal bias or prejudice toward an attorney rather than a party. This modification was later incorporated by the ABA into its 1990 revision. More significantly a new subparagraph, C(1)(c), was added in 1986 regulating disqualifications when one of the parties is represented by an attorney with whom the judge was formerly associated and when one of the parties was a client of the judge. These modifications were in substantial accord with the joint committee recommendations. Hence ABA subparagraphs (c) and (d) were renumbered and are now subparagraphs (d) and (e) respectively.

Paragraphs C(1)(d) and (1)(e). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or that the relative is known by the judge to have an interest, or its equivalent, in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(l)(e)(iii) may require the judge's disqualification.

Paragraph C(3). Since 1993, the Committee Commentary to Rule 67 (Canon 7) has recognized that, “[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Canon 3.” Ill. S. Ct. R. 67, Committee Commentary.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), referring to the matter before it as "an exceptional case" (*id*. at 884) and to the facts as "extreme by any measure" (*id*. at 887), the United States Supreme Court determined that a litigant's monetary campaign support, in combination with other circumstances, required disqualification under the Due Process Clause of the Fourteenth Amendment – even in the absence of actual bias. The Court held that disqualification is required where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In light of the long-standing commentary to Canon 7 and the *Caperton* decision, subsection C(3) has been added to Rule 63 to clarify the effect of campaign contributions on a judge's ability to fulfill his or her constitutional function.

Subsection C(3) adopts the due process disqualification standard announced in *Caperton* by requiring disqualification where monetary or non-monetary support related to a judge's election or retention effort creates a probability of bias. Disqualification issues concerning such monetary and other support provided by litigants, lawyers, and others in support of a judge's election or retention are governed exclusively by subsection C(3). Notwithstanding the exclusive treatment of the disqualification issue in subsection C(3), litigants in Illinois retain the statutory ability to substitute a judge as a matter of right under the provisions of section 2-1001(a)(2) of the Code of Civil Procedure, and in criminal cases under the provisions of section 114-5 of the Code of Criminal Procedure of 1963.

Monetary support in amounts within legal limits to the election campaigns of judicial candidates or to the retention campaigns of judges generally do not require a judge's disqualification. Since 1848 the Illinois Constitution has provided for the election of judges. Campaign funding is a part of the election process, and neither the general public nor the members of the legal profession should be excluded from participation in that process.

Even lawful campaign support, however, when combined with other factors, may create a probability of judicial bias. Subsection C(3) underscores that fact and provides a non-exhaustive list of relevant considerations to assist a judge in determining whether monetary or other campaign support requires disqualification.

Judges do not have a legal or ethical duty to become informed of support for their election or retention campaigns. To insulate themselves from any claim of bias, some judges prefer not to be advised by their campaign committees as to the identity of supporters or the amount of monetary support. But a judge must disqualify himself or herself if the judge becomes aware of monetary or non-monetary support that, with other factors such as those described in subsection C(3), create circumstances requiring disqualification.

Paragraph D. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

MINORITY REPORT
OF THE ILLINOIS STATE BAR ASSOCIATION'S
SPECIAL COMMITTEE ON JUDICIAL DISQUALIFICATION STANDARDS

So long as state judges are subject to election, as they are in Illinois, money will be a factor. Judges must raise funds to support their election or retention. That electoral reality, however, has also helped to foster a public perception that campaign contributions or other support may influence a judge's ruling in a proceeding. Regardless of whether the perception is well-founded, it exists and it persists. Indeed, as the majority's report acknowledges, this Committee was expressly created "[t]o address the poor public perception of the judiciary, specifically as it relates to monetary and non-monetary campaign contributions . . . ." The mission adopted by the Committee similarly confirms that the Committee was formed in response to "increasing public and professional attention to campaign contributions in judicial elections and the perception that such contributions may influence judicial decision making." *See Special Committee Mission Statement*. Contrary to the majority's report, the minority does not believe that the proposed rule "does not go far enough." We believe that the proposed rule is a step backwards and sends entirely the wrong message about the judiciary.

The Committee's mission included both addressing disqualification in light of *Caperton,* and "evaluat[ing] how to clarify and improve such [disqualification] standards and related procedures in a manner which enhances public confidence in our judicial system." *Mission Statement. Caperton* held that disqualification is required where campaign contributions create a probability that the judge would be biased, threatening to interfere with due process. The ruling in *Caperton* provided an impetus for the ABA and other bar associations, including the ISBA, to address the public's perception that campaign funding has influenced the judiciary and consider possible redress through express rules governing disqualification.

The *Caperton* standard sets a higher bar for disqualification than the standard currently governing judicial disqualification under Illinois law. Illinois Supreme Court Rule 63(C)(1) requires that a judge disqualify himself or herself where "the judge's impartiality might reasonably be questioned . . . ." The Rule is sufficiently broad to encompass circumstances where campaign contributions or other non-monetary support create a reasonable question as to the judge's impartiality.

The majority proposes both to remove money and non-monetary support from the scope of Rule 63C(1) by creating a separate Rule 63C(3), and to *raise* the standard for disqualification to that of *Caperton* in instances involving campaign contributions and non-monetary support. Under the majority's proposed new rule, disqualification would be required only where the monetary contribution or other support creates a "probability of bias." Thus, as proposed by the Committee, when it comes to money provided to a judge for his or her election or retention, that judge would no longer be required to disqualify himself or herself even where the timing, amount or nature of the contribution raised a reasonable question as to the judge's impartiality or fairness so long as there was not a *probability* of actual *bias.* Although the minority agrees that the majority has identified the appropriate factors to be considered in determining whether disqualification is appropriate, the minority believes that disqualification should be required if those factors create a reasonable question as to the judge's impartiality.

Caperton does not require a state to raise the bar for disqualification based on campaign contributions and, in the opinion of the minority, it would be a mistake to do so. The higher standard proposed is contrary to the current trend. For example, the ABA's Standing Committees on Ethics and Professional Responsibility and on Professional Discipline recently proposed amending Rule 2.11 of the ABA's Model Code of Judicial Conduct to provide

expressly that a judge must disqualify himself or herself where a judge's impartiality "might reasonably be questioned" based on campaign contributions. The ABA's proposed standard – "might reasonably be questioned" – is the same that applies under the existing Illinois Supreme Court Rule 63C(1). Contrary to the majority's report, the fact that Illinois permits an automatic substitution of judge is not relevant. Substitution as of right is permitted only one time and only before trial or hearing begins or before the judge rules on a substantive matter. If campaign support creates a reasonable question as to the judge's impartiality, the judge should be disqualified, even if the party can no longer request a substitution as of right.

Raising the disqualification standard in Illinois when money and other campaign support are at issue, as the majority proposes, sends the wrong message. A higher standard will not combat the public's perception that money may influence judicial decision-making and will not serve to increase public confidence in the state judiciary. To the contrary, the majority's recommendation, however well-intentioned, will be perceived as being protective of judges and their campaign funding, and thus will serve to undermine, rather than enhance, public confidence in the judiciary. For these reasons, the minority strongly disagrees with the proposed rule.

Respectfully submitted:

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