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Disqualification Based on Comments to the Media in a Pending Case by Cynthia Gray

Canon 3A(6) of the 1972 American Bar Association Model Code of Judicial Conduct stated: "A judge should abstain from public comment about a pending or impending proceeding in any court." Concerned that language was "overbroad and unenforceable," the ABA narrowed that provision in the 1990 model code. Milord, *The Development of the ABA Judicial Code* at 21 (1992). Thus, Canon 3B(9) of the 1990 model code provides, "A judge shall not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness"* (emphasis added).

Under both the 1972 and 1990 model codes, a judge is clearly prohibited from commenting on the merits of a case pending before the judge because any such comments could "reasonably be expected to affect its outcome or impair its fairness." Comments about a case pending before the commenting judge might give the appearance that the judge has already decided the case, casting doubt on the judge's "objectivity and his willingness to reserve judgment until the close of the proceeding." Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589 (1989). Moreover, judges "who

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Disposition of Unexpended Judicial Campaign Funds

by Cynthia Gray

Although the American Bar Association Model Code of Judicial Conduct prohibits the use of campaign contributions for "the private benefit of the candidate or others," the model code does not give more specific direction on how judges should or may dispose of funds left over after a campaign. Some state codes, however, do have express provisions that address permitted uses for excess funds as discussed in the box on page 10. Provisions in Arkansas and South Dakota, for example, require that excess funds be returned to contributors.

Moreover, even in the absence of an express provision, some judicial ethics opinions have advised that the most appropriate method for disposing of unexpended campaign funds is to return them to donors on a pro rata basis. *New York Advisory Opinion 87-2; New York Advisory Opinion 88-89; New York Advisory Opinion 91-12; New York Advisory Opinion 92-94; New York Advisory Opinion 93-80; Tennessee Advisory Opinion 90-1; Tennessee Advisory Opinion 95-5*. This rule applies even if the donor does not want the refund (*New York Advisory Opinion 91-12*), and a judge may not request donors to consent to the judge keeping the funds (*New York Advisory Opinion 93-15*).

Use in a subsequent campaign

The New York State Commission on Judicial Conduct recently admonished a judge for authorizing his campaign

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Judicial Campaign Restrictions Upheld

The United States Court of Appeals for the 8th Circuit has upheld Minnesota code of judicial conduct provisions that implement the statutory requirement that Minnesota judicial elections be non-partisan and that restrict judicial candidates from announcing their views on disputed legal and political issues and personally soliciting campaign contributions. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (2001), *affirming*, 63 F. Supp. 2d 967 (District of Minnesota 1999). A judicial candidate, the Republican Party of Minnesota, and several other individuals and organizations had filed a complaint seeking declaratory and injunctive relief and alleging that Canon 5 of the Minnesota code violated the free speech and association guarantees of the First Amendment. The defendants were members of the Board on Judicial Standards and the Lawyer Professional Responsibility Board.

"[T]he prohibition on candidates announcing their views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests . . ."

Views on disputed legal or political issues

Up-holding the prohibition on candidates' announcing their views on disputed legal or political issues, the court stated:

> [I]t is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial officers, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts.

The court noted that the code's prohibition on a candidate making pledges and promises "addresses the type of campaign conduct that most blatantly subverts the judicial office." The court stated, however, that the prohibition on pledges and promises "does not reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary," because it does not reach "declarations by candidates that legislation relating to hot-button social issues is or is not constitutional," or declarations by candidates of their opinions about how unsettled legal issues should be resolved.

The plaintiffs argued that the lawyer and judicial disciplinary boards "did not prove there was any concrete evidence showing the harmfulness of candidates announcing their views in the public record before the Minnesota Supreme Court at the time the court adopted the announce clause." Rejecting that argument, the court held the evidentiary burden was met by "evidence of widespread and longstanding consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." The court also stated, "It is reasonable to infer that the prohibition on candidates announcing their views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary."

The court rejected the argument that the restriction prohibits candidates from discussing virtually every topic related to their campaigns. The court noted that the canon does not restrict candidates from "discussing or publicizing information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits, and abilities, which are subjects the Minnesota General Assembly has determined to be highly relevant to a candidate's qualification for office." The court noted that the Minnesota Supreme Court allows candidates to state their views on how they would handle administrative duties if elected and allows general discussions of case law or a candidate's judicial philosophy. The court also noted that the Judicial Standards Board had stated that the canon does not prohibit candidates from discussing appellate court decisions and had approved an extensive, wide-ranging list of sample questions that interested voters could pose to judicial candidates consistent with Canon 5.

Personally soliciting contributions

The court also held that the prohibition on judicial candidates personally soliciting campaign funds was necessary to serve compelling state interests. The court noted:

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Combination of Functions Within Conduct Commissions Held Not to Violate Due Process

All courts that have considered the issue have concluded that due process does not require the bifurcation of functions in the judicial discipline process. Most recently, the Nevada Supreme Court rejected a judge's argument that the combination of investigative, prosecutorial, and judging functions within a judicial conduct commission was unconstitutional. *Mosley v. Nevada Commission on Judicial Discipline*, 22 P.3d 655 (2001).

The *Las Vegas Review-Journal* published two articles alleging that a judge agreed to show leniency to two defendants in exchange for testimony in a court hearing in the judge's custody dispute that his son's mother was unfit. Following an investigation, the Nevada Commission on Judicial Discipline found probable cause to authorize formal disciplinary hearings. The judge asked the state supreme court to terminate the proceeding on due process grounds.

Relying on *Withrow v. Larkin*, 421 U.S. 35 (1975), the court held that due process does not require the separation of prosecutorial and adjudicative functions absent a showing of a risk of actual bias. The court stated the judge must overcome a presumption, recognized in *Withrow*, that adjudicators are honest and must also demonstrate that "'under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"

Denying the judge's petition for extraordinary relief, the court noted that the judge had offered no evidence suggesting that Commission members were dishonest, biased, or prejudiced in any manner. The court also stated it "could not conclude that under any appraisal of 'psychological tendencies and human weaknesses,' the Commission's combination of functions poses a risk of actual bias requiring our intervention."

Other courts have also held that giving a judicial conduct commission the dual functions of investigation and making findings does not result in a biased or partial tribunal that violates a judge's constitutional rights.

As noted, other courts have also held that giving a judicial conduct commission the dual functions of investigation and making findings—often referred to as a "one-tier" system—does not result in a biased or partial tribunal that violates a judge's constitutional rights. Moreover, in states in which the commission simply makes a recommendation to the supreme court, an additional reason cited for upholding the combination of functions is that the commission's findings and recommendations are advisory only, and the state supreme court remains the ultimate authority in disciplinary matters affecting judges. The following cases uphold the constitutionality of one-tier systems. *In re Hanson*, 532 P.2d 303 (Alaska 1975); *In the Matter of Flournoy*, 990 P.2d 642 (Arizona 1999); *Kloepfer v. Commission on Judicial Performance*, 782 P.2d 239 (California 1989); *In re Zoarski*, 632 A.2d 1114 (Connecticut 1993); *In re Kelly*, 238 So. 2d 565 (Florida 1970), *cert. den.*, 401 U.S. 962 (1971); *In the Matter of Vaughn*, 462 S.E.2d 728 (Georgia 1995); *In the Matter of Holien*, 612 N.W.2d 789 (Iowa 2000); *In re Rome*, 542 P.2d 676 (Kansas 1975); *In re Bowers*, 721 So. 2d 875 (Louisiana 1998); *In re Diener*, 304 A.2d 587 (Maryland 1973), *cert. den.*, 415 U.S. 989 (1974); *Matter of Del Rio*, 256 N.W.2d 727 (Michigan 1977), *app. dismissed*, 434 U.S. 1029 (1978); *In re Mikesell*, 243 N.W.2d 86 (Michigan 1976); *Mississippi Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Mississippi 1997); *In re Elliston*, 789 S.W.2d 469 (Missouri 1990); *Friedman v. State of New York*, 249 N.E. 2d 369 (New York 1969); *In re Nowell*, 237 S.E.2d 246 (North Carolina 1977); *In re Schenck*, 870 P.2d 185 (Oregon 1993), *cert. den.*, 513 U.S. 871 (1994); *In re Cunningham*, 538 A.2d 473 (Pennsylvania 1988), *app. dismissed*, 488 U.S. 805 (1988); *In re Brown*, 512 S.W.2d 317 (Texas 1974); *In re O'Dea*, 622 A.2d 507 (Vermont 1993); *In re Deming*, 736 P.2d 639, *as amended by*, 744 P.2d 340 (Washington 1987).

Disqualification for Economic Interest: Recent Case

The Arkansas Supreme Court has held that the ownership of $700,000 worth of Wal-Mart stock by a judge and his wife would create in reasonable minds the perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence would be impaired in a case involving Wal-Mart. *Huffman v. Arkansas Judicial Discipline and Disability Commission*, 42 S.W.2d 386 (2001). Therefore, the court denied a judge's petition seeking review of an admonishment issued by the Judicial Discipline and Disability Commission for failing to disqualify.

At the time the judge issued a TRO at the request of Wal-Mart, he and his wife held approximately 12,000 shares of Wal-Mart stock worth about $700,000. The judge argued that his and his wife's economic interest in Wal-Mart was *de minimis* relative to the total outstanding shares of stock of Wal-Mart, and their *de minimis* economic interest could not be substantially affected by the proceeding. The Arkansas code, like the ABA model code, requires disqualification if the judge or judge's spouse owns a more than de minimis interest in a party, and "de-minimis" is defined as an "insignificant interest that could not raise reasonable question as to a judge's impartiality."

The court stated that "there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percent of the total stock existing in Wal-Mart." However, the court concluded that, in a case where a judge and his or her spouse have an economic interest in a party litigant, the first question the judge should consider is whether that economic interest would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. "If the answer to the question is 'yes,'" the court stated, "the judge should recuse, and one need not consider whether the economic interest in the party litigant was *de minimis* or not." The court also noted that the judge had recused twice before in cases involving Wal-Mart when he was requested to recuse; that he attempted to have another judge review the petition; and that his concern should have been heightened because in seeking the TRO, only counsel for Wal-Mart was present.

One justice dissented "to point out that the judicial canons this court has adopted regarding disqualification by a judge when he or she possesses a *financial interest* in the subject matter in controversy are confusing."

Affair with Assistant Prosecutor: Recent Case

The Iowa Supreme Court suspended for 60 days a judge who (1) had been dilatory in filing rulings and in making reports on unfinished rulings as required by a supreme court rule and (2) had an intimate relationship with an assistant county attorney who regularly appeared before him without recusing from her cases or disclosing the relationship to anyone, including criminal defendants and their attorneys. *In the Matter of Gerard*, No. 00-1893 (July 5, 2001). The court acknowledged that it "normally would be loath to interfere in such personal matters." However, the court concluded that "the private aspects of the affair are secondary to the public problems it has created" and held that a sexual affair is improper when it involves a subordinate in a professional, highly sensitive public context.

Noting that the affair went undisclosed for several weeks, the court stated the judge "decided that he was the best judge of what information defendants were entitled to know and withheld this information potentially to their detriment. Such a supercilious response is an offense to our rules of disclosure and recusal." Rejecting the judge's argument that his misconduct was mitigated because he had not acted partially toward the state, the court stated it was "immaterial that the judge's association may not have had a detrimental impact on defendants appearing before him" because "once the public learned of the judge's relationship with the State's attorney who appeared before him daily, the appearance of bias was very real." That several intimate encounters took place in various rooms of the courthouse, the court stated, "was a serious misuse of the judge's privilege to work and serve there as a servant of the citizens of Iowa," and "demonstrated a lack of discretion by engaging in what was intended to be private conduct in a public place which, nevertheless, had the potential to become a public matter."

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covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media." *United States v. Microsoft Corp.*, 253 F.3d 34 (U.S. Court of Appeals District of Columbia Circuit 2001).

If off-the-bench comments about a pending case cast doubt upon the judge's ability to act impartially, those comments may disqualify the judge from the case. For example, in *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), the Court of Appeals for the Tenth Circuit considered the appearance on a national television show by a judge who had entered an injunction against abortion protests. The judge had stated his views regarding the continuing protests, the protesters, and his determination that his injunction against the protests was going to be obeyed.

The court held the judge's comments created in reasonable persons a justified doubt as to his impartiality and required his disqualification from cases involving the protests. The court stated:

> Two messages were conveyed by the judge's appearance on national television in the midst of these events. One message consisted of the words actually spoken regarding the protesters' apparent plan to bar access to the clinics, and the judge's resolve to see his order prohibiting such actions enforced. The other was the judge's expressive conduct in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him. Together, these messages unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.

Responding to attacks by attorneys

Granting a petition for writ of mandamus, the Court of Appeals for the First Circuit held that a trial court judge should have disqualified herself after making comments to a reporter that a reasonable person could have interpreted as doing more than correcting misrepresentations and as creating an appearance of partiality. *In re: Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). A federal suit was filed challenging Boston's elementary school student assignment process, claiming that the petitioners had been deprived of preferred school assignments based on their race. The district court judge postponed a decision on a motion for class certification until further discovery. In a statement to a reporter quoted in a *Boston Herald* story, the attorney for the petitioners "made the provocative claim that '[i]f you get strip-searched in jail, you get more rights than a child who is of the wrong color,'" referring to a case in which the judge had certified a class of women who had been strip-searched in jail.

"In newsworthy cases where tensions may be high, judges should be particularly cautious about commenting on pending litigation."

The judge responded to what she viewed as inaccuracies in the article. In a follow-up article, the *Herald* quoted the judge as saying: "In the [strip search] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. This is a more complex case." In a motion to disqualify, the petitioners argued that the judge's statement could be construed as a comment on the merits of the pending motions for a preliminary injunction and class certification, signaled that relief was unlikely to be forthcoming, and provided defendants with a ready-made argument with which to distinguish the cases.

Noting "Judges are generally loath to discuss pending proceedings with the media, even when litigants may have engaged in misrepresentation," the First Circuit stated:

> In newsworthy cases where tensions may be high, judges should be particularly cautious about commenting on pending litigation. Interested members of the public might well consider Judge Gertner's actions as expressing an undue degree of interest in the case, and thus pay special attention to the language of her comments. With such public attention to a matter, even ambiguous comments may create the appearance of impropriety . . . . In fact, the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias.

Stating "the judge's public comments could easily be characterized as legitimate efforts to explain operative law," the court concluded the "com-

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ments were sufficiently open to misinterpretation so as to create the appearance of partiality, even when no actual prejudice or bias existed." The court stated, "The fact that Judge Gertner's comments were made in response to what could be characterized as an attack by counsel on the procedures of her court did not justify any comment by Judge Gertner beyond an explanation of those procedures. Whether counsel for petitioners misrepresented the facts or not is irrelevant . . . ."

In *Judith R. v. Hey*, 405 S.E.2d 447 (West Virginia 1990), a judge was disqualified from a custody proceeding when he made several comments to the press and on a national television program highly critical of the reputation, character, and motivation of one of the parties. The judge had said, among other things, "My primary concern, and I want to make this clear, is for the welfare of that child, and I don't think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one." Subsequently, the court censured the judge for those remarks. (*In the Matter of Hey*, 425 S.E.2d 221 (West Virginia 1992)) and also held that the judge's remarks were not "judicial acts" for which he should have absolute immunity from the mother's suit for defamation. *Roush v. Hey*, 475 S.E.2d 299 (1996). *See also In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995) (a judge was disqualified from an IBM anti-trust case based on judicial and extra-judicial actions, including newspaper interviews he gave concerning IBM's activities and an assistant attorney general's role in the suit); *Papa v. New Haven Federation of Teachers*, 444 A.2d 196 (Connecticut 1982) (where a judge made critical comments quoted in a newspaper about a particular teachers' strike and stated that he was "ready to jail more" teachers if the strike was not settled soon, he was disqualified from a case involving that strike).

"Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press."

"Passion for publicity"

Most recently and infamously, the comments Judge Thomas Penfield Jackson made to reporters during the Microsoft case formed part of the basis for the decision vacating his remedy order and led the Court of Appeals for the District of Columbia Circuit to direct that the case be assigned to a different trial judge on remand. *United States v. Microsoft Corporation*, 253 F.3d 34 (2001). The court emphasized it found no evidence of actual bias. However, it concluded that the judge's "secret interviews with members of the media" and "numerous offensive comments about Microsoft officials in public statements outside of the courtroom" gave rise to an appearance of partiality, "seriously tainted the proceedings," and "called into question the integrity of the judicial process."

The court found that accounts of the judge's interviews began appearing immediately after he entered final judgment and that "the Judge also had been giving secret interviews to select reporters before entering final judgment—in some instances long before." The judge had "embargoed" the early interviews, insisting that the fact and content of the interviews remain secret until the final judgment.

In the interviews, the judge discussed numerous topics relating to the case, including his distaste for Microsoft's defense of technological integration (one of the central issues in the lawsuit), "what he regarded as the company's prevarication, hubris, and impenitence;" "his contemporaneous impressions of testimony;" "after-the-fact credibility assessments;" and his views on the appropriate remedy. The court concluded that the judge was not discussing purely procedural matters, which is one of the narrow exceptions to the prohibition on public comments, but was disclosing "his views on the factual and legal matters at the heart of the case." The court stated that the reports of the interviews conveyed "the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write."

The court noted that the judge's comments might not have required disqualification had he spoken them from the bench, giving Microsoft "an opportunity to object, perhaps even to persuade" and creating a record for appeal. However, the court stated: "It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge's

remarks would be reported." The court also stated that the judge's insistence on secrecy "made matters worse" because it suggested knowledge of the impropriety and "prevented the parties from nipping his improprieties in the bud."

The court also explained that the judge's interviews raised serious questions about whether he had violated the prohibition on ex parte communications. The court stated: "When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case." Moreover, noting that the judge's secret interviews "provided a select few with inside information," the court stated that for all the judge knew, the reporters "may have been trading on the basis of the information he secretly conveyed."

The court emphasized that the judge's violations of the prohibition on commenting on pending cases "were deliberate, repeated, egregious, and flagrant." The court explained the judge's conduct could not be excused by an intention to "'educate'" the public about the case or to rebut 'public misperceptions' purportedly caused by the parties."

If those were his intentions, he could have addressed the factual and legal issues as he saw them—and thought the public should see them—in his Findings of Fact, Conclusions of Law, Final Judgment, or in a written opinion. Or he could have held his tongue until all appeals were concluded.

The court concluded:

Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire. . . ." Judges are obligated to resist this passion. Indulging it compromises . . . the "cold neutrality of an impartial judge." Cold or not, federal judges must maintain the appearance of impartiality. . . . Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

*This article is an excerpt from "Commenting on Pending Cases," a new paper in the **Key Issues in Judicial Ethics** series published by the Center for Judicial Conduct Organizations. See below for more information.*

Judicial Campaign Restrictions Upheld *(continued from page 2)*

Raising campaign funds, a practical requirement for judicial candidates who face popular election, has been identified as presenting "the greatest of all conflicts" between necessity and judicial impartiality and that judges, "more than officeholders in other branches of government, risk the appearance that those who contribute to their campaigns can impermissibly influence governmental processes."

The court rejected the plaintiffs' argument that the provision preventing the campaign committee from revealing the identity of campaign contributors obviates the need for limitations on candidates soliciting funds from groups personally or by letter. The court held that a state may conclude that a judicial candidate seeking funds directly from those who stand to gain from the candidate's decisions in office "is incongruous with the decorum of judicial office whether or not the candidate is shielded from knowing who ultimately contributed." Rejecting the argument that the canon prevented candidates from running an effective campaign, the court noted the provision expressly permits committees to conduct campaigns through mailings, brochures, and advertisements and the plaintiffs had not alleged that these alternatives were ineffective.

Seeking funds directly from those who stand to gain from the candidate's decisions in office "is incongruous with the decorum of judicial office whether or not the candidate is shielded from knowing who ultimately contributed."

Non-partisan elections

By statute, Minnesota judicial elections are non-partisan, meaning that party affiliation is not listed when candidates file for office and does not appear on the ballot. In addition, Canon 5A of the code of judicial conduct provides that judicial candidates shall not "identify themselves as members of a political organization, except as necessary to vote in an election;" "attend political gatherings;" or "seek, accept or use endorsements from a political organization."

The court rejected the plaintiff-candidate's contention that Minnesota has no interest in the independence of its judiciary because it has chosen to make its judges stand for election. The court also found that the record supported the state supreme court's conclusion that "merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement." The court noted testimony by a former governor and a former chief justice that they believed allowing judicial elections to become partisan contests would discourage many qualified candidates from seeking election. The court also relied on news accounts of the dangers partisan elections have posed in Texas. The court concluded: "This is an issue where 'a long history, a substantial consensus, and simple common sense,' combine to show that regulation is necessary to protect the institution of the judiciary from the dangers of partisanship and corruption."

The court noted that the code allowed judicial candidates "alternative means of communicating subjects of valid interest to voters." The court stated that candidates may speak to gatherings other than those of political organizations; appear in newspaper, television, or other advertisements; distribute pamphlets and other promotional literature; and establish committees to campaign for them in various ways.

The Republican Party contended that the prohibition on disclosing party affiliation was too broad because it includes disclosing past party affiliation as well as present. The court held that the state supreme court's apparent conclusion that the public would infer that identification of past membership was tantamount to identification of present membership was reasonable.

The Party also contended that the restrictions on a candidate's partisan activity violated equal protection because association with other organizations that could affect a judge's independence is not restricted. The court noted that political parties "are simply in a better position than other organizations to hold a candidate in thrall" and that political parties' comprehensive platforms mean the "obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues is not restricted." The court concluded that the state was justified in imposing greater restrictions on a judicial candidate's partisan political activities than on association with other kinds of organizations.

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committee to use unexpended campaign funds in subsequent campaigns rather than return them to contributors. *In the Matter of Mullen*, Determination (February 8, 2001) (www.scjc.state.ny.us/mullen.htm). The judge was a judge of the court of claims and an acting justice of the supreme court, and in 1996, sought election as a supreme court justice. After he failed to get the nomination at the Republican Party's judicial nominating convention, his campaign committee had an unexpended balance of $18,441. The judge authorized the committee's treasurer to retain the funds until the next year to be used in another effort to obtain the nomination. The judge's campaign committee used the 1996 contributions in the judge's 1997, 1998, and 1999 campaigns, but the judge failed to get the nomination. Funds remained on deposit with the committee, and no funds were returned to the donors.

The New York code of judicial conduct provides that a candidate for judicial office may solicit and accept campaign funds only during a "window period," beginning nine months before the pertinent judicial nominating convention and ending, if the candidate fails to be nominated, six months after the convention. The Commission found that by authorizing funds that had been raised in 1996 to be used in his successive efforts to obtain the nomination, the judge "violated both the letter and spirit of the 'window period' provisions." The Commission stated that the judge's actions in permitting his Committee to carry over "a substantial 'political pocketbook' . . . gave him an unauthorized benefit and an unfair advantage over other judicial candidates who, under the rules, had a limited time span for raising funds to further their candidacy." The Commission concluded that by permitting his campaign funds to be used in a manner clearly inconsistent with the ethical rules, the judge "was insensitive to the special ethical obligations of judges and judicial candidates."

As the Commission noted, the judge was aware that the New York Advisory Committee on Judicial Ethics had issued numerous opinions prohibiting the use of unexpended campaign funds in subsequent judicial campaigns. In those advisory opinions, the committee stated that a judicial candidate may not use funds left over from a campaign for non-judicial office because "[i]t may be contrary to the intentions of the donors to elect the candidate to a judicial office" (*New York Advisory Opinion 92-94*). If the funds were left over from a campaign for a different judicial office, the committee reasoned, it cannot be presumed that the intention of the original donors was to support the judge for a higher office (*New York Advisory Opinion 88-89*). Even if the office sought is the same, the committee concluded:

> the opposition may be different, and a donor who supported the inquiring judge in the first election may not support him against a different opponent. Moreover, circumstances may have transpired during the intervening period, causing donors to alter their support of the judge in connection with further judicial campaigns.

New York Advisory Opinion 90-6. Accord New York Advisory Opinion 92-68. See also Michigan Advisory Opinion CI-1040 (1984) (judges may not use excess campaign funds to repay personal loans to their campaign committees resulting from prior elections); *New York Advisory Opinion 97-4* (a judge may not apply excess campaign funds to an earlier campaign that had a deficit).

Several states have advised that the most appropriate method of disposing of unexpended campaign funds is to return them pro rata to donors.

However, not all authorities prohibit the application of excess campaign funds to a subsequent campaign. As discussed in the box on page 10, some state codes allow such a use of unexpended funds.

Moreover, advisory opinions from Florida and Pennsylvania state that a successful judicial candidate may keep excess funds in his or her campaign committee treasury until the next election without violating the prohibition on using campaign contributions for the private benefit of the candidate or others (*Florida Advisory Opinion 77-5; Pennsylvania Advisory Opinion 89-1*). Similarly, the Missouri advisory committee, withdrawing an earlier opinion, recently stated that a judge may retain leftover campaign funds from one judicial election to the next, although the judge should refund a pro rata share to any contributor who requests one after an election (*Missouri Advisory Opinion 178* (2001)). The committee also stated

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that when it becomes clear that the judge will no longer seek further judicial office, he or she should disburse leftover campaign funds in any manner authorized by statute or the canon. *See also Alabama Advisory Opinion 88-334* (a judge may use unspent campaign contributions to repay prior loans personally made by the judge and associated with a previous campaign, as long as it is clear that the funds are being used to reimburse previous campaign expenditures).

Donations to charities and political organizations

The Alabama judicial ethics committee allows a judge to donate any excess political campaign funds to a charity as long as the judge has no connection or involvement in the management or control of the charity and does not claim a charitable deduction on his or her personal income tax return. *(Alabama Advisory Opinion 93-479.) See also Florida Advisory Opinion 77-5* (using excess campaign funds to make a charitable donation does not violate the prohibition on using campaign contributions for the private benefit of the candidate or others). Similarly, some state codes specifically allow judicial can-

Specific canons on disposition of campaign funds

Some states have added specific provisions to the code of judicial conduct to define the appropriate treatment of unexpended campaign funds. For example, Canon 5C of the **Arkansas** code provides, "Any campaign fund surplus shall be returned to the contributors or turned over to the state treasurer as provided by law." The Arkansas advisory committee has interpreted that provision to prohibit a judge's campaign committee from maintaining a surplus to be used as a filing fee in the next election (*Arkansas Advisory Opinion 93-4*).

Canon 7E of the **Louisiana** code gives a judge or judicial candidate six months after a judicial election to divest "any unused campaign funds . . . by pro rata refund to the campaign contributors or by donation to a charitable organization," but also allows the judge or judicial candidate to retain campaign funds in amounts established by the code, which are proportionate to the population of the election district. For example, if the election district has a population below 25,000, the judge or candidate may retain $25,000; if the population is over 400,000, the judge may retain $150,000.

In **Michigan**, Canon 7B(2)(f) provides, "Any candidate or committee having funds remaining after payment of all campaign expenses shall either return such funds to the contributors thereof or donate the funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election." The code's specific direction about disposition of excess funds precludes a judge from other applications such as donating funds to a charitable organization (*Michigan Advisory Opinion CI-664*) or financing a post-election investiture celebration (*Michigan Advisory Opinion JI-60* (1992)).

In Canon 5C(3)(c), the **Nevada** code gives a candidate who is elected to judicial office five options for contributions that were not spent during the campaign: (1) to return the funds to contributors; (2) to donate the money to the general fund of the state, county, or city relating to the judge's office; (3) to use the money in the judge's next election; (4) to pay for other expenses related to the judge's public office or the judge's campaigns; or (5) to donate the money to "any tax-exempt nonprofit entity, including a non-profit state or local bar association, the Administrative Office of the Courts or any foundation entrusted with the distribution of Interest on Lawyer's Trust Accounts (IOLTA) funds."

The **New Mexico** code provides in Rule 21-800D:

> A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors or donate the funds to a charitable organization, or to the State or New Mexico, as the candidate may choose, within thirty days after the date the election results are certified.

The **South Dakota** Guidelines for Judicial Campaigns (Appendix to SDCL 12-9) provide, "All unexpended campaign funds shall be returned to the contributors on a pro rata basis." The South Dakota judicial ethics committee advised that this rule applies even when the amount to be returned is very small (*South Dakota Advisory Opinion 91-1*).

didates to donate excess funds to a charitable organization or bar association. *See* discussion of Louisiana, Michigan, New Mexico, and Nevada codes in the box on page 10.

The New York committee, however, stated that donation of unexpended funds to any charity, including the bar association or a community legal assistance group, would constitute a prohibited private and personal benefit to the judge from campaign funds and might be contrary to the wishes of the donors who "presumably donated their moneys for a very specific purpose (i.e., necessary campaign expenditures for a particular judicial candidate)." *New York Advisory Opinion 87-2. Accord New York Advisory Opinion 92-29; New York Advisory Opinion 93-80. See also New York Advisory Opinion 99-56* (a judge may not use unexpended campaign funds to purchase tickets and a journal advertisement as part of a charitable fund-raising event that will take place after the expiration of the window period). Moreover, the Tennessee judicial ethics committee allows the judge's campaign committee to donate unexpended funds to charities only if the surplus cannot be returned to contributors. (*Tennessee Advisory Opinion 95-5*.)

Advisory opinions prohibit judges from donating unexpended campaign funds to political campaigns or organizations such as a political party committee or the treasury of a political party for general political party use (*New York Advisory Opinion 87-2; New York Advisory Opinion 92-94*); the campaigns of candidates sharing the ballot with the judicial candidate (*New York Advisory Opinion 92-94*); the campaign committee for a group of judges in another jurisdiction (*Maryland Advisory Opinion 68*); or the political committee of a candidate for non-judicial office (*West Virginia Advisory Opinion* (April 14, 2000)). Further, the New York committee stated that unexpended funds for a judicial candidate may not be donated to the general fund (*New York Advisory Opinion 87-2*), although the codes in Arkansas, Nevada, and New Mexico expressly allow for such a donation. *See* discussion in the box on page 10.

Permitted uses

Some uses not strictly related to a campaign have been allowed for unexpended contributions. A judge may use excess campaign funds, for example, to buy equipment or furnishings for use in the judge's office or courtroom if the purchases become the property of the court system. *Alabama Advisory Opinion 93-482; Alabama Advisory Opinion 95-579; New York Advisory Opinion 91-87; New York Advisory Opinion 92-104; New York Advisory Opinion 93-4; New York Advisory Opinion 93-56; New York Advisory Opinion 98-139.* Under that rule, campaign funds may be used to purchase word processing and computer equipment, microphones for use in the court, an answering machine for use in chambers, a car phone used only for business or campaign activity, chambers office furniture, judicial robes, and carpeting for the judge's chambers. Unexpended campaign funds, however, cannot be used to purchase a wordprocessor for home use (*New York Advisory Opinion 91-79*).

The Alabama judicial ethics committee allows judges to use excess campaign funds to pay expenses such as tuition, transportation, food, and lodging to attend professional meetings of lawyers or judges, legal or judicial continuing education courses, or similar events and for membership dues to the state bar and the local chapter of the American Inns of Court (*Alabama Advisory Opinion 93-482; Alabama Advisory Opinion 95-579*). The Alabama committee also allows the use of such funds to pay the expense of letters of condolence and letters of congratulation, including a letter to every person admitted to the bar (*Alabama Advisory Opinion 93-482*) and to buy a ticket to a dinner meeting hosted by a political organization that has endorsed the judge in the past and to purchase an advertisement in the program booklet for the meeting (*Alabama Advisory Opinion 95-562*).

Similarly, the New York committee allows a recently elected judge to use campaign funds to pay for tickets to a political affair or to purchase an advertisement to thank the judge's supporters in a journal that is being distributed at a politically sponsored dinner although only if the event takes place within the six-month period after an election in which judges may attend such events (*New York Advisory Opinion 92-29; New York Advisory Opinion 99-38*). The New York committee also stated that a judge may use unexpended campaign funds to hold a modest reception following the judge's ceremonial robing to which contributors and campaign workers are invited (*New York Advisory Opinion 87-16*) or to hold a victory party for campaign workers within six months after the election (*New York Advisory Opinion 93-19*). However, the New York committee stated that a judge may not use unexpended campaign funds to purchase gifts for campaign workers (*New York Advisory Opinion 98-6*).

AJS has links on its web-site (www.ajs.org/ethics11.html) to judicial ethics advisory opinions from Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Michigan, Nebraska, Nevada, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

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