JUDICIAL CONFLICTS OF INTEREST

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I. OHIO JUDICIAL CONFLICTS – DISQUALIFICATION/RECUSAL RULES

A. Ohio Code of Judicial Conduct[1]

1. *Rule 2.4 – External Influences on Judicial Conduct*

2. *Rule 2.11 – Disqualification*

3. *Comments to Rule 2.11*

   a. *Campaign contributions:* A judge's knowledge that a lawyer, firm or party contributed to the judge's election campaign does not, by itself, disqualify the judge. (Official Comment 1)

   b. *Relative of Judge:* The fact that lawyer in a proceeding is affiliated with the firm in which a relative of the judge is affiliated does not by itself disqualify judge. However, disqualification is required if the judge's impartiality might reasonably be questioned or if the judge knows that the relative has an interest that could be substantially affected by the proceeding. (Official Comment 4)

   c. *Exception:* An exception is made for matters requiring immediate action. In such an instance, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable. (Official Comment 3)

[1]The Code of Judicial Conduct became effective March 1, 2009, the complete text of the specific rules cited are attached.

B. Affidavits of Disqualification

Affidavits of Disqualification were created by the legislature as a statutory vehicle, codified at R.C. §2701.03, by which a litigant or attorney may request the Chief Justice of the Supreme Court to prevent a common pleas, probate, or court of appeals judge from hearing a specific case. Affidavits of Disqualification are not applicable to Court of Claims, municipal court or county court judges, or to magistrates or referees

1. *Requirements for Affidavits of Disqualification*

   The Affidavit of Disqualification must be filed with the Supreme Court of Ohio no less than seven days *prior* to the day on which the next hearing in the proceeding is scheduled and must include:

   a. The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

   b. The jurat of a notary public or another person authorized to administer oaths or affirmations;

   c. A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel; and

   d. The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled. (See R.C. §2701.03(B).)

2. *Procedure for Affidavits of Disqualification*

   a. Once the affidavit is filed, the judge against whom the affidavit is filed is deprived of any authority to preside in the proceeding until the Chief Justice of the Supreme Court, or a justice of the Supreme Court designated by the Chief Justice, rules on the affidavit. (R.C. §2701.03(D)(1).)

An exception is recognized in the following situations:

(i) the affidavit was not timely filed;

(ii) the judge determines that the matter to be heard does not affect the substantive rights of a party; or

(iii) in domestic relations and juvenile court proceedings.

b. If the Chief Justice of the Supreme Court, or any justice of the Supreme Court designated by the Chief Justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the Chief Justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge. (R.C. §2701.03(E).)

c. Waiver may result where an affidavit is not filed as soon as possible after the affiant becomes aware of circumstances supporting disqualification. *State ex rel. Miller v. Mayer (In re DeWeese)* (1994), 74 Ohio St.3d 1256.

3. R.C. §2701.03 provides the exclusive means by which a litigant can assert a common pleas judge is biased or prejudiced. Thus, an appellate court clearly lacks any authority to pass upon the disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *Holmes Cty. Bd. of Comm'rs. v. McDowell*, 169 Ohio App.3d 120, 2006-Ohio-5017; *Beer v. Griffith* (1978), 54 Ohio St.2d 440.

C. Disqualification Decisions

Disqualification is necessary where impartiality might reasonably be questioned, or where the appearance of bias, prejudice or impropriety reasonably exists.

1. The terms, "biased" or "prejudiced," when used in reference to a judge before whom a cause is pending, implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts. *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463.

2. *In re Disqualification of Saffold* (Apr. 22, 2010), Ohio Sup. Ct. No. 10-AP-036, Slip.Op.

   a. *Issue:* Whether trial judge presiding over aggravated murder case should be disqualified based on appearance of impropriety.

   b. *Grounds for Disqualification:*

      (i) As reported in a newspaper article published in the *Plain Dealer* on March 26, 2010, the moniker "lawmiss," which was affiliated with the judge's personal and office email accounts was used by someone to post derogatory comments on the Plaint Dealer's website about the Defendant and his attorney, giving the appearance of bias and prejudice;

      (ii) Judge engaged in improper *ex parte* communication with Judge McGinty, a *Plaint Dealer* reporter, and the reporter's attorney; and

      (iii) Judge has a financial interest in the underlying case because the Judge and her daughter have sued the *Plain Dealer* over the disclosure of the Judge's email account as alleged sources for the March 26 article.

   c. *Judge's Response:* Judge Saffold had already denied three motions filed by the defendant requesting her recusal. Although she did not dispute that comments about the defendant and his attorney were linked to the judge's personal online account, she maintained that she did not post the comments. Rather, that they were posted by her adult daughter who shares the online account, and that the comments do not reflect the judge's views.

   d. *Ruling for Disqualification:* Acting Chief Justice Pfeifer determined that the website postings created a situation that poses an impediment to the judge's ability to resolve any remaining issues in a way that will appear to the parties and the public to be factual and fair. Although the record did not cause the acting Chief Justice to question Judge Saffold's ability to be fair and impartial, "the nature of the comments and their widespread dissemination might well cause a reasonable and objective observer to harbor serious doubts about the judge's impartiality." *In re Disqualification of Saffold*, supra. at 3. Even in cases where no evidence of actual bias is apparent, disqualification is appropriate where the public's confidence in the integrity of the judicial system is at stake. An appearance of bias can

be just as damaging to public confidence as actual bias. Id. at 3-4. Although the record did not support a finding of ***actual*** bias or prejudice, the judge's removal was determined to be necessary "to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge." Id. at 4-5, citing *In re Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354, ¶ 10.

e. *Follow-Up:* It should be noted that in a May 9, 2010 follow-up article, the Plain Dealer reported that the username "lawmiss" had been tied to comments on other internet sites attacking Arabs, disparaging Asians, vilifying white men, condemning homosexuals and railing against police. The implication is that additional affidavits of disqualification based upon the appearance of bias, prejudice or impropriety could potentially be filed seeking to disqualify Judge Saffold from other cases.

3. *Other instances of disqualification:*

a. When a judge's impartiality might reasonably be questioned or the judge has a personal bias or prejudice toward a party or witness. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 91-13.)

b. To avoid an appearance of racial bias. *Bolding v. Dublin Local Sch. Dist.* (1996), 77 Ohio St.3d 1258.

c. Where the judge is related within the third degree to a party, lawyer, or a material witness in the proceeding (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 87-024; Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 89-10; Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 89-19.)

d. Where the judge is a party in a pending lawsuit, and the judge's attorney represents a party in an action pending before the judge. The necessity for recusal lasts at least as long as there is an attorney-client relationship with the judge. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 89-34.)

e. Where a lawyer in the proceeding rents office space from the judge or the judge's spouse. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 91-8.)

f. Where the judge owns stock in an entity that is a party to the proceeding. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 91-14.) However, see, *In re Disqualification of Lavrich* (1990), 74 Ohio St.3d 1216 (Spouse's ownership of minute percentage of stock of corporate party does not require disqualification.)

g. Where a party to the proceeding is represented by a newly elected judge's former law partner, when the judge is still receiving income collected from accounts receivable of the former partnership. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 95-3.)

h. Where a judge initiated an *ex parte* conversation with an attorney that included substantive matters. *In re Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354.

i. Where a judge's courtroom conduct demonstrates hostility toward an attorney or litigant. *Kaffeman v. Maclin*, 88 Ohio St.3d 1220, 2000-Ohio-279. The judge in this litigation referred to counsel's incarceration for contempt as a "time out," denied counsel's reasonable requests to record objections to the manner in which the proceedings were being conducted, and subjectively characterized testimony yet to be placed on the record.

j. Where there is a significant likelihood that the judge will be called as a witness. *In re Disqualification of Bond*, 94 Ohio St.3d 1221, 2001-Ohio-4102.

4. *Disqualification of All Judges:* There are instances where the disqualification of all judges of a particular court has been deemed appropriate to avoid the appearance of bias, prejudice or impropriety. In three situations a visiting or retired judge is normally appointed for the proceeding. Specific instances where all judges of a court have been disqualified include:

a. Where a county commissioner is a party to the proceeding. *In re Corrigan*, 110 Ohio St.3d 1217, 2005-Ohio-7153.

b. Where a court administrator is a party to proceeding. *State v. Fautenberry* (1996), 77 Ohio St.3d 1252.

c. Where a judge is a party to proceeding. *Stokes v. Plain Dealer Publishing Co.* (1991), 74 Ohio St.3d 1233.

d. Where county funds related to the court's budget are at issue. *State ex rel. Jones v. McDonald* (1996), 77 Ohio St.3d 1235.

5. *Judicial Disqualification has been Deemed Unnecessary:*

a. *In re Disqualification of Osowick*, 117 Ohio St.3d 1237, 2006-Ohio-7224. Defendant Thomas Noe filed an affidavit of disqualification seeking to disqualify Judge Thomas Osowik, and all other Lucas County judges from Noe's criminal proceeding. Noe had served as chairman of the county Republican party, and referred in his affidavit to Judge Osowik and the other Lucas County judges as "political enemies." He believed that no one else had contributed more to the campaigns to unseat the Lucas County judges than he had.

Chief Justice Moyer refused to disqualify Judge Osowik. He indicated that there was no rule mandating the recusal of a judge merely because a party to or lawyer in the underlying proceeding campaigned for or against the judge. The Chief Justice noted, "The defendant's use of the term 'political enemy' to describe Judge Osowik and other judges in Lucas County perhaps reflects the defendant's own views about the judges, but it tells us nothing about Judge Osowik's views of the defendant." Id. at 1238.

b. Where an incumbent judge's campaign opponent represents a party to a proceeding before the incumbent judge, unless the judge's impartiality might reasonably be questioned. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 87-023.)

c. Where one of the parties has appeared before the judge as an attorney. *In re Disqualification of Panagis* (1989), 74 Ohio St.3d 1213.

d. Where a lawyer in the proceeding is member of the judge's campaign committee or was co-chairman of a fundraiser for the judge. (Bd. of Comm's. on Grievances and Discipline, Advisory Opinion 92-9; *State v. Ahmed*, 117 Ohio St.3d 1239, 2006-Ohio-7225.)

e. Where a newspaper that endorsed the judge is party to the proceeding. *Oakar v. Plain Dealer Publishing Co.* (1995), 74 Ohio St.3d 1273.

f. Where a friendship exists between the judge and a lawyer or witness in the proceeding. *In re Disqualification of Ward*, 100 Ohio St.3d

1211, 2002-Ohio-7467; *State v. Kehl*, 81 Ohio St.3d 1215, 1997-Ohio-27.

g. Where the judge is affiliated with a religious organization that is a party to the proceeding. *Herakovic v. Catholic Diocese of Cleveland*, 101 Ohio St.3d 1223, 2003-Ohio-7357.

6. *Consent:* Note that a party may be deemed to have consented to the participation of the judge where, in absence of extraordinary circumstances, lengthy proceedings have taken place before the judge without objection of any party. *In re Disqualification of Valen* (1991), 73 Ohio St.3d 1204.

II. JUDICIAL CAMPAIGN FINANCE ISSUES

A. Overview

1. *Elected Judges:* Thirty-nine states elect judges. Ohio started electing judges in 1851. Voters rejected a proposal in 1987 to return to an appointative system. A Supreme Court of Ohio justice campaign costs approximately $2 million.

2. *Campaign Contributors:* A 2006 study by the *New York Times* found that Supreme Court of Ohio justices voted in favor of non-lawyer/law firm campaign contributors 70% of the time.

   a. The study did not find a significant relationship between contributions from lawyers or law firms and outcome of cases.

3. *ABA Model Code of Judicial Conduct:* In 1999 ABA revised the Model Code of Judicial Conduct to require judges to recuse themself if they received campaign contributions of a certain amount from a party or its lawyer. Importantly, they did not name an amount, but rather left it to states should they adopt the code. No state has adopted a sum certain.

B. Ohio Code of Judicial Conduct Rules

1. *Rule 4.1 – Political and Campaign Activities of Judges and Judicial Candidates*

2. *Rule 4.2 – Political and Campaign Activities of Judicial Candidates*

3. *Rule 4.4 – Campaign Solicitations and Contributions*

C. *Caperton v. A.T. Massey Coal Co.* (Mar. 3, 2009), 129 S.Ct. 2252, 173 L.Ed.2d 1208

1. *Facts:* A West Virginia jury returned a verdict against A.T. Massey Coal Company ("Massey Coal") in the amount of $50 million, finding Massey Coal liable for fraudulent misrepresentation, concealment and tortious interference with contractual relations. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing that the Supreme Court of West Virginia would consider the appeal, Massey Coal Chairman and CEO, Don Blankenship decided to support Brent Benjamin in his campaign against incumbent Justice McGraw.

   Blankenship contributed the $1,000 maximum to Benjamin's campaign committee. He donated approximately $2.5 million to a political action committee formed to support Benjamin. He also spent more than $500,000 on independent expenditures (direct mail and television and newspaper advertisements) in support of Benjamin. Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters, and three times the amount spent by Benjamin's own committee. It was $1 million more than the amount spent by the campaign committees of both candidates combined. Benjamin won the election over McGraw 53.3% to 46.7%.

   In October 2005, Caperton moved to disqualify Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign contribution. Justice Benjamin denied the motion. In November 2007, the Supreme Court of West Virginia reversed the $50 million verdict against Massey Coal, with Justice Benjamin joining in the majority opinion. The Court granted Caperton's motion for rehearing, at which time two of the five justices recused themselves based upon their own perceived conflicts of interest with the parties. Justice Benjamin again refused to recuse himself, and now in the capacity of acting Chief Justice, selected the two acting justices to replace the recused justices. In April 2008, the Court again reversed the $50 million jury verdict in a 3-2 decision. Justice Benjamin again joined the majority opinion.

   The U.S. Supreme Court granted certiorari to determine "whether the *Due Process Clause of the Fourteenth Amendment* was violated when one of the justices in the majority denied a recusal motion."

2. *U.S. Supreme Court Analysis:* In a 5-4 decision, with the majority opinion delivered by Justice Kennedy, the U.S. Supreme Court determined that the *Due Process Clause* requires recusal where the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

tolerable. Actual bias is not pertinent. Instead, the question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest 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.

The Court noted that there is serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The proper inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

3. *Outcome:* The Supreme Court found that "Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – offer a possible temptation to the average *** judge to*** lead him not to hold the balance nice, clear and true." *Caperton*, 129 S.Ct. 2252, 2265. (Internal citations omitted.) The Court specifically noted that:

   a. Blankenship contributed $3 million to the judicial race;

   b. Blankenship's contributions surpassed the combined contributions of all of Justice Benjamin's other contributors; and

   c. Blankenship's contributions exceeded the amount spent by Justice Benjamin's campaign committee by 300%.

   The Court found that on these facts the probability of actual bias rises to an unconstitutional level requiring recusal.

   The Court did point out that this was an extraordinary situation with facts that are extreme by any measure. "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances." Id. at 2267.

4. *Implications for the Future:* Chief Justice Robert's dissent predicts that *Caperton* will lead to an increase in allegations of judicial bias, due to a lack of guidance in the opinion as to when judicial recusal is constitutionally required. He notes, "[T]he Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a 'probability of bias.' Unlike the

established grounds for disqualification, a 'probability of bias' cannot be defined in any limited way." *Caperton*, 129 S.Ct. 2252, 2267 (Roberts, C.J., dissenting).

Chief Justice Roberts believes that the decision will diminish confidence in judicial independence and leave state courts to deal with more than 40 issues which the Supreme Court did not provide guidance on, ranging from what level of contribution gives rise to a probability of bias, to whether a judge's vote must be outcome determinative in order for a non-recusal to constitute a due process violation.

He notes that the opinion "[R]equires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?)." Id. at 2272.

III. SUPREME COURT OF OHIO SEEKS PUBLIC COMMENT ON RECUSAL PROCESS

On March 29, 2010, the Supreme Court of Ohio issued a press release seeking public comment on a proposed rule to establish a recusal process for Supreme Court of Ohio Justices, when questions about impartiality arise.

Under proposed Rule 14.6 of the Rules of Practice of the Supreme Court of Ohio (see attached), a party would be permitted to request the recusal of a justice. The request would be submitted to the Supreme Court Clerk of Court in letter form, and would include an affidavit setting forth the facts upon which the request for recusal is based. The justice would then be required to file a response indicating whether he or she will recuse.

The proposed rule would also enable a justice to self-disclose if the justice believed there to be a basis for disqualification. The parties would have 15 days from the time of the self-disclosure to waive the disqualification.

The proposed Rule 14-6 will be scheduled for a vote by the Justices of the Supreme Court of Ohio. No date has been set.