

Proposed Legislation on Judicial Election Campaign Finance

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In light of the recent extraordinary rise in judicial campaign spending, illustrated in Ohio's 2000 judicial elections (and elsewhere, and in Ohio again in 2002), we must consider improving the Model Code of Judicial Conduct. The 1999 amendments to the Code addressed campaign finance, but did not address two major problems. The first one is the absence of limits on aggregate contributions from law firms; only Texas has such limits. This gap allows large contributions from law firms to go to judges presiding in cases in which those firms participate, circumventing the recusal and disqualification triggers. The second problem is the prevalence and impact of unregulated "issue ads" by non-party, non-PAC interest groups, which are not subject to disclosure requirements because they are not "explicit advocacy." These "stealth" ads also evade recusal and disqualification triggers.

I propose, for balance, to address the problems together. First, I urge adopting an aggregate contribution limit as in Texas' "Judicial Campaign Fairness Act." Second, I urge requiring disclosure of spending for large advertising efforts by non-candidate, non-party group— in judicial elections, given their differences from other elections. Focusing such requirements on large efforts addresses those with the most impact, while eliminating a "chill" effect for small groups and small contributors. Relatedly, I propose requiring parties in a case to certify that all campaign contributions and expenditures by the party and its counsel regarding a judge in that proceeding have been disclosed.

I. INTRODUCTION

Ohio's recent experience highlights the need to consider improving on the 1999 amendments of the ABA Model Code of Judicial Conduct. The amendments added several provisions on campaign finance—for example, on full disclosure, on setting limits on contributions (the level of the limit to be set in light of the jurisdiction's experience), and on disqualification of judges if a party or counsel made an illegally large contribution.¹

Two major problems are not touched by those amendments. In the 2000 judicial elections, both of these problems loomed large in Ohio and elsewhere. One problem is that, although many States limit how much any individual can contribute, only Texas limits how much a single law firm can give. In fact, sometimes one single firm's lawyers, spouses and employees give so much together that striking problems are created. To correct this, we need only adopt Texas's thorough, fair provision.

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¹ MODEL CODE OF JUD. CONDUCT Canons 3(C)(5), 3(E), 5(C)(3)–(5) (2000).

The second problem is that “issue ads,” so controversial in nonjudicial elections, became major factors in Ohio’s and Michigan’s elections in 2000. That meant that the identities of very large contributors to those races were undisclosed to the public and, worse, functioned to evade the recusal process that exists to correct for any unduly large contributions.

The proposal to address these two problems is balanced: One proposed provision would aim at the major weapon used by some of “the trial lawyer side,” and the other provision would aim at the major weapon used by some of the big-corporation or single-issue-group side.

II. A LIMIT ON AGGREGATE CONTRIBUTIONS FROM ANY SINGLE LAW FIRM

The first proposed provision aims at limiting how much any single law firm can contribute to a judicial candidate. Although the 1999 Model Code amendments do not include such a provision, it was one of the recommendations of the ABA Task Force Report² that led to these amendments. The amendments did not include this provision, not because of any disagreement, but simply as a result of the streamlining that occurred as the proposals progressed through the ABA’s process between 1998 and 1999.

Since 1995, Texas’ “Judicial Campaign Fairness Act” has included a \$30,000 aggregate limit on how much any single law firm (*i.e.*, the firm, partners, employees, spouses, etc.) can contribute to a judicial candidate.³ That figure, six times the \$5,000 cap on any individual’s contribution, was deemed a fair balance between, on the one hand, the large firms the contributions from which could easily go above \$30,000, and on the other hand, the small firms, particularly plaintiffs’ firms, which have far fewer potential donors. In fact, while in other states large firms often do produce large aggregate contributions, in many states we find that plaintiffs’ firms, however small in number of partners, make contributions of more than \$200,000.

The 1998 ABA Task Force on Lawyers’ Political Contributions gave the following reasons for having such a per-firm limit:

If there is no [such limit], then the limits on contributions from individuals have a far greater impact on small firms than on large ones. However, we recognize that flexibility is needed to set fair limits on aggregate contributions from firms. If too low a per-firm limit is set (*e.g.*, for all firms regardless of size, five times the limit on an individual’s contributions), then members and employees of large firms

² A.B.A. TASK FORCE ON LAWYER’S POLITICAL CONTRIBUTIONS, REPORT, pt. 2, at 30–31 (1998) [hereinafter TASK FORCE REPORT].

³ TEX. ELEC. CODE ANN. § 253.157 (Vernon Supp. 2002).

may be barred from political participation. On the other hand, if the per-firm limit is too high, it will be viewed as only a facade.⁴

The Texas provisions became law in 1995. How well have they worked? Because of dramatic “cooling-down and quieting” of Texas judicial elections in the three cycles since 1995, all one can say is that the provisions seem to work fine, so far.⁵

From Ohio, we have an example illustrating the concerns about aggregate contributions from a single law firm.⁶ This involves the Ohio Supreme Court and a suit for damages against Conrail. Plaintiff’s daughter, Wightman, had been killed by a train when she drove onto a grade crossing despite closed gates and flashing lights. The extensive proceedings involved three trials: a jury trial for compensatory damages, a bench trial for punitive damages, and then after an appeal, a jury trial for punitive damages. There then followed another appeal, followed by a final appeal to the Ohio Supreme Court. That appeal was sought by both sides after the second jury had awarded punitive damages of \$25,000,000, reduced by the trial judge to \$15,000,000.

Plaintiff was represented by Murray & Murray Co., a firm that includes nine members of the Murray family. Before the Ohio Supreme Court agreed to hear the appeal on February 18, 1998, campaign contributions were made to two associate justices by that firm, by nine Murrays in the firm, and by seven Murray spouses. Those contributions were made on February 9 to one justice, and to the other justice between January 19 and January 21. Each contribution complied with the relevant legal limit on contributions and totaled \$25,000 to each justice. Those justices ran for reelection in November 1998, and according to their post-election campaign finance reports, these contributions turned out to be 4.4% of one justice’s total, and 4.7% of the other’s. These contributions were, for each justice, among the largest received.

Both justices participated in the oral argument on November 10, 1998. Their campaign finance reports were filed a month later, and in January 1999 Conrail filed a motion seeking the recusal of each justice. In October 1999, without the court or either of those justices addressing that motion, the court decided in favor of plaintiffs. Conrail subsequently made these facts its major basis for seeking certiorari to the U.S. Supreme Court, but it was denied.⁷

Another example comes from the Michigan Supreme Court elections in 2000. As of September, Michigan’s sixteenth largest law firm (Sommers,

⁴ TASK FORCE REPORT, *supra* note 2, at n. 51.

⁵ On Texas’s recent quietude, see Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. STATE U.-DETROIT C. L. 849, 881–82.

⁶ This example is also set forth in Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1503–04 (2001).

⁷ *Consol. Rail Corp. v. Wightman*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000).

Schwartz, Silver & Schwartz, which includes leading personal injury lawyers) had contributed more than \$225,000 to the three Democratic candidates. That constituted more than 20% of the total contributed to those candidates—29% of one candidate's total, 19% for another, and just under 19% for one who was once a partner at that firm.⁸

Both Ohio and Michigan have explicit limits on individual contributions in judicial campaigns—in Ohio \$5,000, in Michigan \$3,400.

Would you line up with Texas, or with Ohio, Michigan, et. al.? Many observers of campaign finance express particular concern about fund-raising from single or concentrated sources. That is, many observers believe that contributions from many sources, whatever the total amount, are less problematic.

III. DISCLOSURE OF SPENDING AND CONTRIBUTIONS TO *LARGE* ADVERTISING EFFORTS IN JUDICIAL CAMPAIGNS BY NON-CANDIDATE, NON-PARTY GROUPS

Everyone is familiar with “issue ads” by interest groups—more with non-judicial races than judicial, but active in both realms. These ads name a candidate but under current law do not “expressly advocate” support for or opposition to the candidate, and so do not come under almost any existing regulation, disclosure or otherwise. But in the eyes of almost everyone except “the law,” such ads do unarguably support or oppose a candidate. In addition to such “issue ads,” even ads that do “expressly advocate” are arguably outside the requirements of some states’ laws on disclosure of the amount being spent and the contributors to the spending. For example, Chamber of Commerce ads in the Mississippi Supreme Court races in 2000 led to litigation that is still pending; United States Supreme Court review will be sought for the Fifth Circuit’s decision that the advertising in question was not express advocacy. A petition for certiorari of a separate, related decision by the Mississippi Supreme Court was denied in November 2002.⁹

⁸ See Dawson Bell, *Law Firm Raises Cash, Eyebrows in Judicial Races*, DETROIT FREE PRESS, Sept. 27, 2000, <http://www.freep.com/newslibrary> (search terms: “Law Firm Raises Cash”). A new study by the Michigan Campaign Finance Network gives different figures, according to which: For 2000, that firm, Sommers, Schwartz, Silver & Schwartz, gave \$274,987; for one candidate, they gave 11%, to another 10%, and to a third 8%. MICH. CAMPAIGN FIN. NETWORK, SPECIAL INTERESTS V. PUBLIC VALUES - FUNDING MICHIGAN SUPREME COURT CAMPAIGNS, 1994–2000, at 41, 43, 45 (2002), available at www.mcfn.org. (at “Reports” hyperlink). In 1998 and 1996, the firm’s top percentage gift was 16%. *Id.* at 29, 37.

From 1994 to 2000, the firm gave a total \$659,417 to ten candidates, making them the second largest contributor to supreme court races. *Id.* at 8. The largest was Republican State Committee, at \$661,145; the third largest was Michigan Trial Lawyers PAC at \$340,000. *Id.*

⁹ Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir. 2002), *cert denied*, 2002 WL 31018269 (U.S. Nov. 12, 2002).

Although the Chamber has refused to disclose anything beyond the fact of its sponsorship (not only in Mississippi, but also in Ohio, where ads were run by Chamber affiliates), we know from a *Wall Street Journal* front-page article that the Chamber's efforts in several states' judicial races in 2000 were supported by \$1,000,000 contributions from each of the following: Wal-Mart, DaimlerChrysler, Home Depot, and the American Council of Life Insurers. General Motors, a major supporter of related Chamber efforts, "told them that our [money] cannot be used in judicial races."¹⁰ May I suggest that the Chamber is like the Taliban? They both like burqas—the Taliban for women, the Chamber for their contributors. We need to get the burqas out of Ohio.

Some chief justices and others are concerned not merely about the general non-disclosure of major efforts in judicial campaigns, but—and here judicial elections differ from other elections—also about the actual or potential "stealth" aspect of such non-disclosure. If a state limits the amount of contributions to judicial races, we all know that efforts to circumvent that limitation might take two routes: "independent spending," or contributions to a party or PAC. Those routes still trigger full disclosure. However, another route—"issue ads"—entirely evades disclosure.

Without disclosure, a lawyer or potential litigation party can put large sums into a judicial race, entirely free of any fear of efforts to disqualify the judge. Such "stealth" campaign efforts wipe out the judiciary's ability to assure that no litigant is unduly favored or disfavored, and also erode the public's confidence in the fairness of the judges.

Ohio's League of Women Voters has a proposed bill on disclosure, set forth in the Appendix, with "annotations" changing the threshold levels that would trigger disclosure. The change is made to focus on only *large* advertising efforts, for two reasons: (1) We believe that small advertising efforts matter little if at all, and (2) constitutional values that would protect small efforts from required disclosure are not in play for *large* efforts. Of course, what is "large" will differ in different jurisdictions and different eyes. I urge raising the League's disclosure trigger-level aggregate amount of spending from \$1000 to \$10,000 or \$25,000 on "electioneering communication" efforts. On which contributors' names (etc.) would be disclosed, I also urge raising their trigger-level aggregate of contributions from \$100 to \$5000 or \$10,000.

These higher levels reflect two goals. First, the advertising and similar efforts that matter are not the tiny ones but the substantial ones mounted by substantial interest groups. Such efforts often use "stealth ads" to avoid the disclosure that would come with contributions to the candidates, parties, or PACs. Substantial efforts "matter" both in the impact they may have and in the value of assuring that the public has information about such efforts. The point is that disclosure will be

¹⁰ Jim VandeHei, *Major Business Lobby Wins Back Its Clout By Dispensing Favors*, WALL ST. J., Sept. 11, 2001, at A1.

most meaningful if limited to major efforts, whether the “trigger level” should be, for example, \$10,000 or somewhat higher or lower.

Second, the more substantial the effort, the more significant the public interest and the less concern there is about “chilling” smaller groups or individuals. Also, the modest burdens of disclosure would be no problem for larger efforts but could be for smaller ones.

As for disclosing who contributed and how much, in addition to the considerations mentioned above, there is a personal privacy interest, and a possible fear of disclosure, that is reflected in several Supreme Court decisions.¹¹ Such concerns fade and even vanish as one raises the “trigger” amount to a level that protects freedom of association by bringing into the sunlight only people or entities with such substantial resources that, on the one hand, have no reason to fear retaliation, and on the other hand, warrant far greater public interest in knowing just who has such significant interest in the particular campaign.

Further, because “stealth” campaign efforts undermine safeguards to assure that judges do not hear cases involving counsel or parties who make contributions over the legal limit, I urge that the Court adopt a rule along lines like the one below. Indeed, I believe such a rule is a *sine qua non* for any effective effort to assure against litigants’ “stealth” efforts to “buy their judge.”

IV. ADDITIONAL DISCLOSURE BY PARTIES BEFORE THE SUPREME COURT

Any party to, or counsel in, a judicial proceeding shall provide to that court and all other parties in that proceeding a sworn affidavit that she, he, or it has filed (or been included in a filing by another person or entity) a statement disclosing all her, his, or its campaign expenditures or contributions in connection with the election campaign involving the justice(s) or judge(s) presiding in that proceeding. If any such expenditures have not been included in prior filings, the affidavit shall include the amount(s) contributed by and/or spent by the affiant, and a brief description of the advertising or other efforts involved.

V. CONCLUSION

Adoption of the above “paired” proposals will go far toward reducing the problems that are so exacerbated by the recent extraordinary rise in campaign spending.¹²

¹¹ NAACP v. Alabama, 357 U.S. 449, 462–63 (1958); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995).

¹² In 2000, spending by “outside” groups in judicial elections was dimensionally greater than ever before; in the five “hottest” states, it came to at least \$16,000,000. The supreme court candidates’ spending in 2000’s elections totaled \$45,495,000, a 61% rise over the previous peak in 1998 and setting records in ten of the twenty states that held such elections. Schotland, *supra* note 5, at 850–51 (2002).

Appendix

Draft Language for Disclosure of Electioneering Communications* (Sham Issue Ads in Supreme Court Elections)

Section 3517.01 of the Revised Code is amended by adding at the end of division (B) the following new subdivision:

- (22) "Electioneering communication" means any public political advertising, as defined in section 3517.105(A)(1), that refers to one or more identified candidates, as defined in division (B)(17)(c) of this section, for the office of Chief Justice or Justice of the Supreme Court of Ohio and that is disseminated within 30 days before a primary election or within 60 days before a general election for such office to an audience that includes members of the electorate for such election.

"Electioneering communication" does not include any communication that:

- (a) appears in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, cable, or satellite, or newspaper, magazine, or other periodical, unless such facilities are owned or controlled by any political party, legislative campaign fund, political action committee, or candidate;
- (b) is disseminated by any corporation, organization, or association exclusively to its owners, stockholders, members, or executive or administrative personnel;
- (c) is a voting record or voting guide, in printed or electronic format, that:
 - (i) presents information in an educational manner solely about the voting record or position on an issue of one or more candidates;
 - (ii) is not coordinated with any candidate, campaign committee, or agent of a candidate; and,

* Ohio League of Women Voters' proposed statute (on file with author).

- (iii) does not contain a phrase such as “vote for”, “re-elect”, “support”, “defeat”, or “reject” or other language that, when read as a whole, and with limited reference to external events, can have no reasonable meaning other than to urge the election or defeat of one or more candidates; or
- (d) constitutes an expenditure or independent expenditure, as defined in section 3517.01(B).

Section 3517.10 of the Revised Code is amended by adding at the end the following new division:

- (M) Every person, as defined in section 3517.01(B)(17)(a), and every legislative campaign fund, political party, or other entity that makes one or more disbursements for electioneering communications in an aggregate amount in excess of [\$_____] during any calendar year shall file additional statements as follows:
 - (1) Statements shall be filed within two business days of each disclosure date on a form prescribed under this division, by electronic means of transmission as provided in this section and section 3517.106 of the Revised Code, or until January 1, 2003, on computer disk as provide in section 3517.106 of the Revised Code. For purposes of this division, “disclosure date” means:
 - (a) the first date during any calendar year on which an electioneering communication financed by disbursements in an aggregate amount in excess of [\$_____] is broadcast, published, mailed, or otherwise disseminated; and
 - (b) any date thereafter during such calendar year on which an electioneering communication is disseminated if the disbursements for such communication have not been previously disclosed in a statement required under this division.
 - (2) Each statement required under this division shall contain the following information:
 - (a) the full name and address of each person or entity making the disbursement, of any person or entity

sharing or exercising direction or control over the activities of the maker of the disbursement, and of the treasurer or other custodian of the books and accounts of the maker of the disbursement;

- (b) in the case of a political action committee, the registration number assigned to the committee under division (D)(1) of this section;
 - (c) the elections to which the electioneering communication pertains, and the names of the identified candidates;
 - (d) the amount of each disbursement more than [\$ _____] made for electioneering communications disseminated during the period covered by the statement, the full name and address of each person or entity to which the disbursement was made, and the aggregate amount of disbursements made for electioneering communications during the calendar year;
 - (e) the full names and addresses of each person or entity from whom the maker of the disbursement received contributions in an aggregate amount of more than [\$ _____] during the period beginning on the first day of the preceding calendar year and ending on the disclosure date, the aggregate amount of contributions from each person or entity, and for individual contributors, the name of the individual's current employer, if any, or if the individual is self-employed, the individual's occupation; provided, however, that if the disbursement was paid out of a segregated bank account that consists of funds contributed solely by individuals directly to such account for electioneering communications, the statement shall include the foregoing information with respect to all individuals who contributed an aggregate amount of more than [\$- _____] to such account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.
- (3) The failure to submit a statement required under this subdivision or the knowing submission of a statement containing false

information shall subject the person or entity responsible for filing the statement to a civil penalty up to three times the amount of total disbursements made for electioneering communications disseminated during the period covered by the statement. The penalty, which shall be the exclusive remedy for each violation, may be collected by the Secretary of State in a civil action brought in the Common Pleas Court of Franklin or in the county where the defendant resides.