Arkansas Bar Association

Tradition. Integrity. Trust.

June 1, 2016

RE:
Report of Task Force on Maintaining a Fair and Impartial Judiciary

Dear Association Members:

Attached you will find the report of the Task Force on Maintaining a Fair and Impartial Judiciary.

This report will be presented to the House of Delegates on June 17, 2016 at the Annual Meeting in Hot Springs. Therefore, I am providing it for your review so that you will have opportunity to contact your delegate and discuss any concerns that you have regarding the report. If you would prefer, please feel free to contact me at ewalker@fortsmithlaw.com or at 479-783-5000.

The Task Force members have dedicated a tremendous amount of time and effort analyzing the issues and suggesting courses of action that will likely improve the public's confidence in the Judicial process. Please extend your thanks to the members of the task force whenever you have an opportunity to do so.

Thank you.

Yours truly,

Eddie H. Walker

Eddie H. Walker, Jr.
President

EHW: gb

2224 Cottondale Lane Little Rock, Arkansas 72202 • 501-375-4606 • 800-609-5668 • Fax: 501-375-4901

www.arkbar.com

Dear Mr. Walker:

I have transmitted to the Bar Association office the final Report & Recommendations of the Task Force on Maintaining a Fair and Impartial Judiciary, along with our proposed Resolutions 1-5 to be considered by the House of Delegates.

All members of the Task Force gave serious consideration to the issues we discussed. We understand that the House of Delegates will consider the matters raised by the Task Force in their June 17, 2016 Meeting.

Thank you for your confidence in us. We are proud of the Arkansas Bar Association and hope that our efforts reflect well on the Bar and its membership.

Very Truly Yours,

Jon Comstock, Chair

Jon Comstock
Comstock Conflict Resolution Services
Rogers AR
479-659-1767

June 1, 2016

FINAL

To: Eddie H. Walker, Jr.
President, Arkansas Bar Association

To: House of Delegates
Arkansas Bar Association

From: Task Force on Maintaining a Fair and Impartial Judiciary

June 1, 2016

REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY

This Report and Recommendations of the Task Force on Maintaining a Fair and Impartial Judiciary ("Task Force") is submitted this date to Mr. Eddie H. Walker, Jr., President of the Arkansas Bar Association, for presentation to and consideration by the House of Delegates of the Arkansas Bar Association.

Arkansas Constitution - Current

Amendment 80, Section 18,
Election of Supreme Court Justices and Court of Appeals Judges.

(A) Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office. Provided, however, the General Assembly may refer the issue of merit selection of members of the Supreme Court and the Court of Appeals to a vote of the people at any general election. If the voters approve a merit selection system, the General Assembly shall enact laws to create a judicial nominating commission for the purpose of nominating candidates for merit selection to the Supreme Court and Court of Appeals.

(B) Vacancies in these offices shall be filled by appointment of the Governor, unless the voters provide otherwise in a system of merit selection.

Judicial Guidance

"We hold that judicial independence is a fundamental principle to which the people of this state and the members of this court have subscribed. We have no hesitancy in adding that judicial independence is a compelling interest of the State. We cannot and will not countenance a blurring of the judge's role with that of the executive or legislative branches." *Griffen v. The Arkansas Judicial Discipline and Disability Commission,* 355 Ark. 38, 51 (2003).

"[T]he legitimacy of the judiciary rests entirely on its promise to be fair and impartial. A judge's sole constituency should be the law. If the public loses faith in that impartiality, there

there is no reason to prefer the judge's interpretation of the law to the opinions of the real politicians representing the electorate." *The Necessity of Judicial Independence: Merit-Based Selection for Arkansas's Court of Last Resort,* 68 Arkansas Law Review 1061, Footnote 1, Justice Sandra Day O'Connor.

"Judges are not politicians, even when they come to the bench by way of the ballot." *Williams-Yulee v. Florida Bar,* 135 S.Ct. 1656, 1662 (2015).

"We have recognized the 'vital state interest' in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." *Williams-Yulee, quoting Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 889 (2009).

"[A] state's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained [previously], States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." *Williams-Yulee,* 135 S. Ct. at 1667.

I. History – 2012 Task Force on Judicial Election Campaign Reform

The Arkansas Bar Association, in conjunction with the Judicial Council, previously engaged in a very deliberative review of judicial campaigns, which culminated in their Report of June 5, 2012.

The 2012 Task Force Report recommended that a non-profit 501(c)(3) be formed, wholly independent of the Arkansas Bar Association, which would oversee three programs, as follows: (1) maintaining a website to provide information on judges and judicial candidates, for access by the public; (2) a rapid response team, referred to as the Judicial Fair Advertising Compliance Team (JFACT), which will monitor campaign messaging, and seek compliance with applicable codes and voluntary guidelines; and, (3) the development of a "PLEDGE" to be signed voluntarily by judicial candidates.

The House of Delegates subsequently passed a Motion in support of the Task Force Report of 2012, and the non-profit was formed, "Arkansas Judicial Campaign and Education Committee, Inc." To learn more, go to www.arkansasjudges.org

The present Board of Directors is made up of Beverly A. Morrow, Harry Truman Moore, Hon. Annabelle Imber Tuck (Ret.), Hon. Mary McGowan, Hon. Robert Brown (Ret.), Jim L. Julian, and Nate Coulter.

II. Formation, Membership and Direction of the Current Task Force

At the request of the House of Delegates made during its meeting held in conjunction with the Bar Association's January 2016 Mid-Year Meeting, President Walker formed this Task Force, consisting of a Chair and 16 Members. [See President Walker's appointment letter, Attachment A.]

Mr. Walker's letter of direction to the Task Force stated, that he "will leave it to …the Task Force to determine the full scope of the recommendations that should be made to the House of Delegates", but indicated he would like for the following issues to be addressed:

Question 1: Whether Judges in Arkansas should continue to be elected or whether an appointment process would be more appropriate.

Question 2: If an appointment process is recommended, should it apply to all Judges or only Appellate Judges?

Question 3: If an appointment process is recommended, how should the appointment process be structured?

Question 4: Should some specific level of financial contribution to a Judge's campaign cause automatic recusal of that Judge regarding cases involving the contributor?

Question 5: What safeguards can be used in order to best protect the judicial election process from the influence of "dark money"?

Mr. Walker further requested that our Report and Recommendations be submitted by June 1, 2016, in order to allow sufficient time for consideration by the House of Delegates at its forthcoming June 17, 2016 meeting.

III. Summary Response to President Walker's Requests

Answer To Question 1:

A majority of the Task Force recommends an appointment process for members of the Arkansas Supreme Court.

Answer To Question 2:

A majority of the Task Force recommends maintaining non-partisan contested elections for members of the Court of Appeals, Circuit Courts and District Courts.

Answer To Question 3:

A majority of the Task Force recommends that, in the event an appointment process is implemented, the structure of implementation would include the following: (a) a Nominating Commission, to whom any attorney in good standing with the Arkansas Supreme Court could apply to an open judicial position; (b) which Commission membership would be sufficiently broad-based and diverse that the general public would have confidence in its representative status and independence; (c) where the Commission's work would be transparent to the public, including public interviews of candidates, with limited executive sessions for discussion purposes only; (d) with the names of 3 qualified candidates being submitted to the Governor; (e) from which roster the Governor would be required to make an appointment; and, finally, (f) that there be strict time-lines that govern the process with adequate default provisions that assure a timely appointment to fill the judicial vacancy.

Answer to Question 4:

A Majority of the Task Force rejected an automatic recusal based on the specified amount of a campaign contribution. The universal consensus of the Task Force was that this issue would simply be one more factor that would be weighed by the litigants, their counsel and the Court in the event a timely motion for recusal was submitted.

Answer to Question 5:

There was a universal consensus that "what can be done, should be done" to mitigate the perceived adverse impact of dark money on the ability of the judiciary to remain fair and impartial, and on the public's confidence that its judiciary remains fair and impartial.

For the majority of Task Force members, the most straightforward safeguard for Supreme Court judicial selection would be to adopt a nominating commission/appointment process.

For the entire Task Force membership, to the extent that any members of the judiciary are to be elected, then legislative reforms should be supported, along with appropriate improvements to the rules governing professional conduct.

IV. The Workings of your Task Force

Just as we each have more confidence in the decisions of a Judge who "does his/her homework," we believe that it is important for you to have confidence that this Report And Recommendations results from the substantial efforts of the Task Force Members to become

educated on the concerns being raised, and the multitude of paths that various states have gone down, in an effort to assure a fair and impartial judiciary, while trying to parse out "best practices."

Until nearing the eve of when this Report was due to you, we have avoided "staking out positions" during most of our meetings, but rather, we have been in a perpetual learning mode. We have heard from a wide range of the Arkansas Bar membership, in addition to representatives of national organizations of the highest professional stature, whose mission revolves around safeguarding a fair and impartial judiciary. In addition, we have been provided with a wealth of quality written information (inclusive of, but not limited to Attachment B).

Our first meeting occurred on March 28, 2016 at the Bar Center. Following, we have since met at the Bar Center on April 5, April 18, April 28, May 9, May 16, May 21 (Saturday), May 24, and May 26. In addition, we have conducted a phone-only conference call on May 11.

We heard from the following persons, listed in the order that they visited with us, each of whom was considered an invaluable resource for the Task Force:

1. Debra Erenberg, Justice At Stake (JAS), "*Judicial Selection Report: Keeping Arkansas Courts Fair and Impartial*". www.justiceatstake.org
2. Malia Reddick, Institute for the Advancement of the American Legal System (IAALS), www.iaals.du.edu Advisory Committee chaired by United States Supreme Court Justice Sandra Day O'Connor (Ret.), "*The O'Connor Judicial Selection Plan*".
3. David Sachar, Arkansas Judicial Discipline & Disability Commission. www.arkansas.gov/jddc
4. David Stewart, University of Arkansas, School of Law (formerly with the Arkansas Judicial Discipline & Disability Commission).
5. Bob McMahan, Arkansas Office of the Prosecutor Coordinator.
6. Scott Trotter, Trotter Law Firm,PLLC.
7. Scott Strauss, Arkansas Association of Defense Counsel.
8. Bill James, Arkansas Criminal Defense Attorneys Association.
9. Bob Edwards, Arkansas Trial Lawyers Association.
10. Justice Annabelle Imber Tuck, Arkansas Supreme Court (Ret.)
11. State Rep. Clarke Tucker
12. Alicia Bannon and Matthew Menendez, Brennan Center for Justice, www.brennancenter.org, *"Fair Courts: Setting Recusal Stanards"*.
13. Max Sprinkle, W. Harold Flowers Law Society.
14. Honorable Dan Kemp (Chief Justice Elect of the Arkansas Supreme Court).

V. Specific Recommendations of the Task Force

There were numerous individual issues that were considered by the Task Force. On the most substantive and debated issues, the numerical count is indicated for both the majority (which requires at least 9 votes in favor) and minority view. On some issues, the vote count is less than 17 (Chair and 16 Members) as a Member may not have been present when that vote was cast. Consistent with past practice in previous task force reports to the House of Delegates, the name of any Member's vote on a specific issue is not indicated.

If there was not a majority for any specific issue, then it is noted simply as a subject that was considered by the Task Force.

Keep in mind that every Recommendation made was evaluated through the filter of what will enhance a fair and impartial judiciary, and the public's confidence in that outcome:

First Recommendation:

[See Resolution No. 1 – To be presented to the House of Delegates. Attached.]

Appointment of Supreme Court Justices: The Bar should work with relevant groups to modify the selection process for Supreme Court Justices from the current election process, to a nominating commission/appointment process. All other judicial officers should continue to be elected in non-partisan elections.

[Vote: 11 in favor, 6 oppose.]

Second Recommendation:

[See Resolution No. 2 – To be presented to the House of Delegates. Attached.]

Structure of Appointment Process for Selection of Supreme Court Justice: As to the structure of the nominating commission/appointment process, it is recommended that it contain at least the following components:

a. The membership of the nominating commission should be sufficiently broad-based and diverse, yet with a majority being attorneys, that the public has confidence in the independence of its work. Consistent with that goal, the make up of the commission should draw on the wisdom and expertise of groups and authorities that represent the full spectrum of interests and constituencies with knowledge of and expertise in the judiciary and the judicial process, including, if deemed appropriate, the ability on the part of such entities to nominate and/or appoint members of the nominating commission. The actual configuration should be determined after further

consideration of various practices used in other states, with the goal of achieving the most effective and independent commission for Arkansas – to further assure a fair and impartial judiciary.

b. Members of the nominating commission ("Members") would be required to be knowledgeable of the role and characteristics that should be exemplified by a member of the judiciary, and agree to be bound by a specific Code of Ethical Conduct.

c. Members shall be provided specific training as to their role, their Ethical Code, and the role and judicial characteristics that should be exemplified by a member of the judiciary.

d. Members shall serve staggered terms of office.

e. The Nominating Commission shall be governed by a comprehensive set of rules of procedure, which shall include, but not be limited to the following:

    i. The Commission proceedings shall generally be fully transparent and open to the public, subject to right of Commission to conduct deliberations in a private executive session.
    ii. Applicants for judicial appointment shall complete an application form adopted by the Commission.
    iii. The public shall have prior notice of the applicant interviews, which the public shall be allowed to attend.
    iv. Any applicant shall be required to give consent for a comprehensive background check.

f. The Commission shall, after the interview process, submit the names of 3 qualified applicants to the Governor for consideration.

g. The Governor shall make a selection from the 3 names submitted by the Commission.

h. Strict timelines shall govern the entire process, and default outcomes shall be provided, in the event of a failure of any party to fulfill their role within the time stated. For instance, the Governor should have a time period within which to make the selection/appointment. In the event that the Governor fails to timely appoint, then there should be a default-decision maker, such as the Commission itself or the Chief Justice of the Supreme Court.

[Vote: 15 in favor of all, with exception that only 9, still a majority, voted in favor of specifically requiring "diversity" and "attorneys being in the majority". Further, 6 of the 15 still expressed a primary preference for elections only for all judicial positions.]

Third Recommendation:

[See Resolution No. 3 – To be presented to the House of Delegates. Attached.]

Improvements to the Code of Judicial Conduct, Code of Professional Conduct and Related Rules of Civil and Criminal Procedure: We believe there are several areas in which the Code of Judicial Conduct , the Code of Professional Conduct, and the Rules of Procedure could be improved. While specific suggested line-edits are attached to Resolution No. 3, our submission to the House of Delegates is with the express caveat that it be viewed as illustrative of changes deemed appropriate by the Task Force.

We fully recognize that the Supreme Court itself is conducting its own review of the Judicial Code of Conduct, and that its Committee on the Rules of Civil Procedure is currently reviewing the subject of recusal. Our proposal here is intended solely as a contribution to those on-going efforts, for the consideration of the Court and the Committee, as they deem merited.

As several topics are addressed in Resolution 3, they are called out here in summary form for your convenience:

Subpart 1: Code of Judicial Conduct

a. Allow judges and judicial candidates to have knowledge of their contributors. (by amending Comment 3A to Rule 4.4).

b. Make clear that knowledge of a campaign contribution does not result in automatic recusal, but becomes one of the factors to be weighed by the court, litigants and their counsel. (by adding (A)(4) to Rule 2.11).

c. Make clear that consideration of attorney campaign donation extends to "the lawyer's law partner" as well as the lawyer appearing before the court. (by adding to Comment 4A to Rule 2.11).

d. Rule 3.13 currently disallows gifts loans, bequests, benefits, or other things of value to judges from anyone other than relatives and "friends". Our proposal is to provide a definition of "relatives" and strike the word "friends", thus gifts would only be allowed by relatives. The proposal does create one exception to this limitation, by allowing a gift made by a non-relative in connection with a special occasion for the judge, such as a wedding, anniversary, or birthday, as long as the gift is fairly commensurate with the occasion and the relationship of the donor and the judge. (by striking certain language from (A)(2) and (C)(3) and adding new Comments 6 and 7).

e. As related to reimbursement of expenses and waivers of fees or charges by a judicial officer, the proposed change would add a prohibition to getting such reimbursement from "a political organization," which is being broadly defined

to include a wide range of organizations which may contribute to candidates or that expends money to influence the outcome of an election, or engages in lobbying. An exception is made for any national and state-wide lawyer association. (by amending Rule 3.14(A).

f. Makes explicit that judges may appear before a public body concerning "proposals affecting the judiciary." (by adding phrase to Rule 3.2(A).

g. Make explicit that a judge or candidate shall not, "solicit, directly or indirectly, the efforts of any individual, committee, or organization independent of the judge's campaign that expends money in efforts to influence the outcome of the election in which the judge is a candidate." (by adding subpart 5 to Rule 4.1(A)).

h. Retains the prohibition that states a judge or candidate shall not "seek, accept, or use endorsements from a political organization" and adds the words, "or elected official." In conjunction, incorporate the new definition of "political organizations" (as referenced above) (by adding to Rule 4.1(A)(7) and a new Comment 7).

The new Comment 7 goes on to provide that a judicial candidate is free to speak to a political organization or elected official about the judicial candidate's campaign if the communication does not seek an endorsement.

i. The proposed change would amend Rule 4.4 to allow a judicial campaign fund to contribute any campaign surplus fund to a section 501(c)(3) nonprofit organization, whereas the current Rule 4.4 mandates that it be turned over to contributors or the State Treasurer.

j. Regarding recusal other than where the recusal decision is being made due to bias or prejudice, directing that a judge "shall" disclose the grounds on the record "if a request is made by a party" (whereas current rule provides "may"). (by amending Rule 2.11 (C)).

k. Regarding recusal, ADDS new rules to Civil Procedure and Appellate Procedure, which provide a comprehensive process to file and manage a recusal motion, to be handled by the judge being asked to recuse, and providing an expedited appeal, using a *de novo* standard of review (rather than current "abuse of discretion").

l. Assure timely decisions by judicial officers. (by amending Rule 2.7).

[Vote: Majority in favor. As to proposed amendment to Rule 2.7, vote was 11 in favor, 2 opposed.]

Subpart 2: Code of Professional Conduct and Rules of Civil and Appellate Procedure

As the Task Force did not complete suggested red-line edits, we recommend that the House of Delegates direct designated Bar Association committees to develop and propose changes that would require attorneys, members of their firm, and the clients being represented, to disclose to the Court and the parties, any contributions (funds and in-kind) made to the judicial officer before whom they are appearing in a matter.

[Vote: Majority in favor.]

Subpart 3: Candidate Pledge

Regarding the Pledge which is currently used by the Arkansas Judicial Campaign and Education Committee, Inc., ("AJCEC"), we recommend that members of the Arkansas Bar Association who are candidates for judicial office may elect to sign the Pledge, in which event, they may publish that fact in their campaigns. There will no enforcement role by the Bar, as enforcement will be performed by AJCEC as deemed appropriate.

[Vote: Majority in favor.]

Fourth Recommendation:

[See Resolution No. 4 – To be presented to the House of Delegates. Attached.]

Judiciary – With the goal of improving the perception by the public of members of the judiciary, the following is recommended:

That the Bar, for educational purposes, adopt the listing of judicial characteristics we and the public would expect to see in our individual judges, as stated in the Attachment to this Resolution.

That the Bar and the Supreme Court develop, or supplement existing programs, to provide a proactive education campaign on a routine basis that educates the general public of the role of the judiciary and core values and characteristics they bring to the bench; and that all judges be encouraged to participate in this effort.

[Vote: Majority in favor.]

Fifth Recommendation:

[See Resolution No. 5 – To be presented to the House of Delegates. Attached.]

Dark Money and Campaign Contributions Generally - There was universal consensus that "but for" the dark money concerns that have surfaced in the last three Supreme Court election campaigns, the Task Force would not have been formed. With that in mind, there was a universal consensus that we should "do something" in an effort to avoid what we all perceive as a threat to the judiciary and the public's confidence its ability to be fair and impartial. We recommend the following:

1. Transparency in Judicial Campaign Advertising

Properly informed voters being essential to a democracy, the Arkansas Bar Association recommends to the Supreme Court of Arkansas, the Arkansas General Assembly, and the Governor of Arkansas that they take all lawful action necessary to obtain and timely disclose to Arkansas voters the identities of all persons, companies and associations of any kind, irrespective of whether a legal entity or not, who fund advertising for or against candidates for Judicial office in Arkansas (where elections remain the method of selection), or engage in any type of electioneering conduct with an interest in affecting the outcome of the election, together with the amounts contributed by each; and specifically including the same information for any person, company or association, irrespective of whether or not a legal entity, directly or indirectly contributing funds to an person, association of persons, or entity of any kind that actually carries out the procurement of such advertising. The purpose of this recommendation is to have the same disclosure requirements currently imposed by law on individual contributors applied to those persons, associations, and companies, irrespective of whether a legal entity or not, who fund advertising for or against candidates for Judicial office in Arkansas, or contribute to any type of electioneering conduct with an interest in affecting the outcome of the election, so that the voters of Arkansas will be properly informed before casting their ballots in a Judicial race.

Additionally, the Task Force recommends that the Bar Association give active support to the spirit and intent of the effort to enforce disclosure of funds expended with the purpose to impact the outcome of judicial elections, as reflected in the submitted bill of State Representative Clarke Tucker.

[Vote: 13 in favor, 4 oppose.]

2. Equal Treatment for Contributors in Judicial Election Campaigns

We affirm that it is essential to securing and maintaining public confidence in the persons who may be elected to Judicial office in Arkansas, that all contributors who, directly or indirectly, contribute directly to a campaign, fund advertising for or

against a candidate for Judicial office, or contribute to any type of electioneering conduct with an interest in affecting the outcome of the election, should be treated equally. We therefore recommend to the Supreme Court of Arkansas, the Arkansas General Assembly, and the Governor of Arkansas that the individual contribution limits presently applied by law to individual contributors to a candidate for a Judicial office be made applicable to any person, or association of person, company or any other entity, whether characterized as a legal entity or not, where the funding is contributed directly to a campaign, or funds are provided for advertising for or against a candidate for Judicial office, or funds are provided for any type of electioneering conduct with an interest in affecting the outcome of the judicial election.

[Vote: 12 in favor, 5 oppose.]

3. Judges Should Know the Identities of Contributors and Amounts of Contributions or Expenditures

It being essential to securing and maintaining the confidence of Arkansas citizens and litigants in the Courts of Arkansas, we recommend that the Arkansas Bar Association recommend to the Arkansas Supreme Court, Arkansas General Assembly and the Governor of Arkansas that they take all lawful action necessary to require the Judges of Arkansas to know the identities of all persons, association of persons, companies of any kind, irrespective or whether or not a legal entity, who made contributions or expenditures that directly or indirectly supported the election of those Judges through advertisement or otherwise, and the amounts contributed or expended by each.

[Vote: 16 in favor.]

4. On-Line Filing of Campaign Finance Reports

We support on-line filing of campaign finance reports that will render them effectively and immediately real-time searchable by the public, with requirement that the timelines be modified to mandate most reporting to occur prior to the end of the campaign, so as to be most beneficial to the public.

[Vote: Majority.]

5. Public Financing of Judicial Campaigns

We do not believe that public financing of judicial campaigns is a viable option that should be considered by the Bar or the Legislature. As no actions are being recommended, this topic is not referenced in the attached Resolution.

[Vote: 16 agree public financing is not a viable option.]

VI. Discussion

A. Election v. Nominating Commission/Appointment

The single issue before the Task Force that resulted in the strongest opposing views, had to do with whether or not to change our initial judicial "selection" process from nonpartisan elections to a nominating commission/appointment process.

There is a variety among the states as to how they select their judges for their courts of last resort. A nominating commission/gubernatorial appointment process is followed in 22 states (including our neighbors, Kansas, Missouri, Oklahoma and Tennessee), a non-partisan election is used in 14 states (including Arkansas currently), and partisan elections in 8 states (including Louisiana and Texas). Of the remaining states, 4 use a pure gubernatorial appointment, without a commission for screening, and 2 use legislative elections. In 8 of the states with contested elections for supreme court, governors use a commission-based appointment process to fill interim supreme court vacancies. In total, then, 30 states and D.C. use a judicial nominating commission in some way in choosing supreme court justices.

Going forward, the Task Force's majority [11 votes] recommends that Arkansas Supreme Court justices be selected by a nominating commission/appointment process. While a wide range of issues were discussed, the most persuasive points, at least for the majority, were two. The first was that a system within which appellate judges of last resort are elected is at odds with the principles that originally informed the creation of the judicial branch, which saw the courts as a forum that was "above" the political fray. The second, and perhaps most telling, was that the single most effective way to secure a fair and impartial Supreme Court bench in Arkansas was to eliminate the immediate and destructive role of "dark money" in selecting our justices. The last three Supreme Court election campaigns in Arkansas demonstrate how local campaigns can be overwhelmed by the dark money effort. Based on what we heard from the Brennan Center for Justice, the Institute for the Advancement of the American Legal System, and Justice At Stake, there is every reason to believe that "dark money" will continue its aggressive presence in Arkansas – and will continue to unduly influence Supreme Court election outcomes.

Most contributors in the political arena insist that their support of a candidate is to further public policy directions with which they agree, and to assure the contributor "access and input" on those issues, not an illegal quid pro quo. The majority of your Task Force believes that continuing the current spending spree at the Supreme Court level will raise in the minds of the public, whether or not that same rule of access and input apply to the judiciary and to determining purely legal or constitutional questions.

As an aside, its worth noting, that this observation says nothing about the quality of those persons who won their Supreme Court elections in the last two cycles. The majority's concern is not "who" won, but the influence of dark money in the outcome, and the perceived adverse effect that such influence has on the public's continued confidence in a fair and impartial judiciary.

The majority believes that a well structured nominating commission, with diversity as part of its core, will enhance the diverse nature of justices on the bench, as to race, gender and points of view. The Brennan Center for Justice, through its report, *Improving Judicial Diversity*, offers a set of ten best practices to nominating commissions to attract the brightest female and minority candidates to the judiciary, including having a systemic recruitment effort.

The minority view [6 votes] agrees that they also are very troubled by the role of "dark money", but they believe that the current recommendation inappropriately takes away the right of citizens to elect their justices. The minority urges that the right to vote is much too important to the citizens of Arkansas, and that a sufficient case for taking away that right has not been made. The minority believes that much more should be done in an effort to clean up the dark money problem, by supporting legislation that will enforce public disclosure of those contributors. With that disclosure, the minority asserts that the public will be in a much better position to assess the reason a group may support a particular candidate. Additionally, the minority supports legislation that would put substantial dollar limits (that is, no more than what is allowed by an individual Arkansas contributor) on the same dark money contributors. Some of the minority asserts that appointment of judges will simply drive the "dark money" into the appointment process, where it will be even more difficult to ferret out. The minority also supports updating recusal rules that will allow for a meaningful opportunity to challenge a judge's continued handling of a case for which a fair concern of bias may be present due to campaign support and contributions.

Additionally, some in the minority believe that an appointment process will suppress diversity on the Court, be it diversity as to race, gender, or point of view.

The majority support most of the monetary reforms championed by the minority. As noted below, the financial reforms produced almost unanimity among Task Force Members.

The majority respects but disagrees with the minority view on preserving a "right to vote". The majority generally adheres to the view taken by the individuals that initially set up both the federal and Arkansas judiciaries, which recognized the reality that requiring a person to seek the vote of another compels the vote-seeker to take into account and quite possibly embrace the position of the voter. Its politics. Its understandable. The judiciary on the other hand, should have no such allegiance to majority will; in fact, judicial officers are a bulwark for the minority, tempered by an even application of the rule of law. We believe the Founding Fathers got it right. Historically, we know that we departed from this into the realm of an elected judiciary, as

a fall-out to a corrupted executive that appointed "cronies" and "hacks", thus causing the quality of the judiciary to suffer. We believe its time for the pendulum to swing in favor of the original structure, as the nominating commission/appointment process will avoid the "hack" appointments (as only qualified candidates will be submitted to the governor), and will do more than any other change to mitigate the adverse impact of dark money.

As it relates to other members of the judiciary, early on it was readily apparent that there was not serious consideration being given to suggesting any changes to the manner of selection of circuit and district judges [which issue ultimately garnered only 3 votes]. The voting was tighter as related to court of appeals, but still less than a majority in favor of nominating commission/appointment [7 votes for, 10 votes against]. On the majority side, the sense was that Arkansas had not sustained the kind of dark money efforts relative to the Court of Appeals, as has happened with the Supreme Court. The majority concurred in that observation, but stressed that Amendment 80 to Arkansas's Constitution authorized both appellate courts to be referred by the Legislature for transition to "merit selection". With that specific call out, it seemed prudent to get out in front of dark money's potential next target, especially when most of the states which have adopted the nominating commission/appointment process for its highest appellate court, have also done so for its intermediate appellate court.

B. Re-Selection Process for Supreme Court Justices

Likely the second most divided issue considered by the Task Force was our effort to form a consensus as to what should be the re-selection process for a Supreme Court Justice whose initial term was via nominating commission/appointment.

National experts educated us as to a range of options. Majority support among the Task Force for any single process was not achieved. The options considered and support from Task Force members were as follows: (a) retention elected after some initial term of office [5 votes]; (b) no retention election, but follow the original nominating commission/appointment process, with the commission and the governor having the same role as they did for the initial selection [1 vote]; (c) no retention election, but allow the nominating commission alone make the renewal decision [5 votes].

For many years, the norm of jurisdictions who follow a nominating/appointment process was to rely on a retention election, where there is no opponent. The voter is simply asked whether or not this jurist should remain on the bench, yes or no. However, as we learned from national experts, the retention election has become the "new" dark money battle. In the past, such elections were often referred to as "sleepy". But now, driven primarily by apparent dislike of very specific judicial decisions (which may well have been adhering to the rule of law), the forces of dark money enter into the fray. For that reason, there is more consideration being given to alternative reselection processes, as discussed above.

One final approach to this issue is to lengthen the term of office, perhaps even to the extent that there is only "one term". Practices from other states are in short supply. Arkansas' current 8 year term of office is consistent with a lot of states. Substantive discussion was had of terms ranging from 10-20 years, or possibly a single term to retirement (age 70 or whatever retirement age is mandated). Each of these is designed to address the concern for the unhealthy reach of dark money into the reselection process. There was a general consensus that this issue should be subjected to much more critical analysis and evaluation before any path is decided upon.

C. "Dark Money" and Campaign Contributions

The single group of issues on which there was almost unanimity among the Task Force Members, was the concern that money, especially from unknown groups outside the State (commonly referred to as "dark money") has, or will have, on the judiciary and the public's perception.

Timely disclosure of a contributor's identity is important in assisting a voter to assess any particular candidate for office.

Additionally, there was a majority view that contribution limits should be applied in way that disallows the inflated impact of dark money contributors on the outcome of an Arkansas judicial election. There was cautionary discussion as to whether such restrictions would withstand Constitutional challenge. The Task Force is well aware of *Citizens United* and its general holdings, but takes comfort from much of the discussion in the recently decided case of *Williams-Yulee v. Florida Bar.* While that was an enforcement action against an attorney by the governing bar association, multiple justices stated clearly that judges are not politicians, even if they get to the bench by the ballot. They recognized that the state's interest in securing a fair and impartial judiciary is of the highest order, which allows for a different analysis when looking at laws or rules that seek to assure that outcome for the public.

D. Recusal – who decides, when reviewed, and what standard of review?

There was universal agreement that the subject of recusal warranted reform efforts. First, it came as surprise to most Task Force members when we discovered that our rules of civil and appellate procedure did not already contain procedural guidelines for practitioners. Second, most of the debate centered around which judge should hear and decide a recusal motion, particularly at the circuit court level. We heard from national and local experts that a "best practice" would be to create a procedure that allowed for an efficient re-assignment of the recusal motion to a different judge, such as the current administrative judge for the district. As part and parcel of that discussion, we heard a lot about accelerated appeal processes, and moving to a *de novo* review standard

from the current *abuse of discretion.* Ultimately, a very strong majority [16 votes] recommends that the trial judge to whom the motion is made should continue to rule on the motion. The same number supported an accelerated/interlocutory appeal. Most of the same Members [14 votes] agreed that moving to *de novo* review was warranted, though there was strong opinions to the contrary [2 votes].

E. Recusal – no automatic recusal based on specified dollar amount of campaign contribution.

There were serious concerns expressed regarding the potential adverse impact of campaign contributions on the judiciary, and, on the public's perception of the judiciary. National and state experts shared various approaches, with the strengths and weakness of each. Difficulty in application was stressed. Even trying to reach a consensus as to "the dollar amount" requiring an automatic recusal was beyond our grasp. Concern of "gaming the system" was expressed, whereby an attorney contributes to a specific judge's campaign for the sole purpose of manipulating a recusal. Ultimately, a very strong majority [16 votes] determined that an automatic recusal was not the best approach. The Members [16 votes] were of the opinion that a disclosed campaign contribution should simply be one more factor that the judge weighs as making their discretionary decision.

VII. Supreme Court Update

The Task Force is aware that, pursuant to the authority granted the Supreme Court by Amendment 28 to the Arkansas Constitution, the Court on March 31, 2016, formed its own Committee on Judicial Election Reform. As Chair of that Committee, Justice Karen R. Baker, by letter of April 6, 2016, requested that Mr. Walker, as the Bar's President, keep the Committee aware of this Task Force's efforts and that members of the Court's Committee be allowed to attend Task Force meetings if desired. Mr. Walker, by letter of April 14, 2016, welcomed the communication from Justice Baker and assured her that any member of the Court was welcome to attend Task Force meetings, and further assured that the Court's Committee would be provided with a copy of this Task Force's Recommendations.

CONCLUSION

The Task Force's proposals range from improvements to the rules governing the conduct of judges and attorneys, including procedural rules, to substantial legislative efforts attacking "dark money", and even to a constitutional amendment to provide for the nominating commission/appointment process for justices of the Supreme Court. Each of these efforts will require the sustained attention and support of the Bar Association and its members. We know we have an interested audience with the Supreme Court if we will do our part. As to the legislative and constitutional dimensions, we recognize that the Bar can play a leadership role, but success

will require a concerted public educational effort. Its worth noting that 1994 was the most recent time a state (Rhode Island) created a judicial nominating commission by constitutional amendment, but at the same time, no state has *ever* moved away from a constitutionally based commission/appointment process once adopted by its citizens.

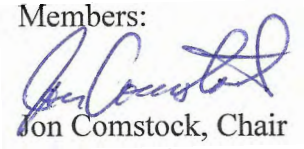
While learning of the variety of processes taken by other states, and hearing of "best practices," we genuinely tried to come up with approaches for which we had confidence were right for Arkansas and all of our fellow citizens.

There were certainly differences of opinion among Task Force Members, as noted in the Discussion section above. This Report and Recommendation represents the majority view (but informs you as to the minority view as well). It does not represent the universal view of all participating on all issues. Indeed, we recognize there will be differences among members of the Bar generally, and the House of Delegates specifically. All Members of the Task Force however shared a universal consensus that we "should do what we can" to assure a fair and impartial judiciary for the future of Arkansas. We think doing nothing jeopardizes that future.

We submit this Report and Recommendations for your respectful consideration.

Submitted this 1st day of June, 2016.

Members:



Jon Comstock, Chair
Theresa Beiner, Associate Dean
Robert Cearley, Attorney
Bob Estes, Attorney
David Guthrie, Circuit Court Judge
Scott Hardin, Attorney
Paul Keith, Attorney
Mark Killenbeck, Professor
Marie-Bernarde Miller, Attorney
Mary Spencer McGowan, Circuit Court Judge
Brant Perkins, Attorney
Troy Price, Attorney
Brian Ratcliff, Attorney
Matthew Shepherd, State Representative
Justin Tate, Governor's General Counsel
Guy Wade, Attorney
David H. Williams, Attorney

Arkansas Bar Association

Tradition. Integrity. Trust.

March 8, 2016

VIA EMAIL ONLY: jon@joncomstock.com

Jon Comstock
P.O. Box 555
Rogers, AR 72757-0555

RE: Task Force on Maintaining a Fair and Impartial Judiciary

Dear Jon:

Enclosed you will find the names of the members of this Task Force with phone numbers included.

I really appreciate you agreeing to chair the Task Force.

While I will leave it to you and the members of the Task Force to determine the full scope of the recommendations that should be made to the House of Delegates, I would like for the following issues to be addressed:

1. Whether Judges in Arkansas should continue to be elected or whether an appointment process would be more appropriate.

2. If an appointment process is recommended, should it apply to all Judges or only Appellate Judges?

3. If an appointment system is recommended, how should the appointment process be structured?

4. Should some specific level of financial contribution to a Judge's campaign cause automatic recusal of that Judge regarding cases involving the contributor?

5. What safeguards can be used in order to best protect the judicial election process from the influence of "dark money"?

As you know, the House of Delegates would like recommendations by the June 18, 2016 meeting. Therefore, if you could get recommendations to me by June 1, 2016 that would give us time to

ATTACHMENT A TO REPORT

review those recommendations and determine whether any additional review by the Task Force would be needed prior to presentation of a report to the House of Delegates on June 18.

Thank you for agreeing to lead this very important project.

Yours truly,

Eddie H. Walker, Jr.
President

EHW: gb
cc: Karen Hutchins

Task Force on Maintaining a Fair and Impartial Judiciary
(Appointed March 8, 2016)

Jon Comstock, Chair 479-659-1767

Associate Dean Theresa Beiner	501-324-9961
Robert Cearley	501-372-5600
Bob Estes	479-521-4900
Judge David Guthrie	870-864-1968
Scott Hardin	479-530-5459
Paul Keith	870-367-2438
Professor Mark Killenbeck	479-575-3320
Marie-Bernarde Miller	501-372-0800
Brant Perkins	870-931-5800
Troy Price	501-212-1313
Brian Ratcliff	870-862-5523
Representative Matthew Shephard	870-862-2087
Judge Mary Spencer McGowan	501-340-5602
Justin Tate	501-682-8040
Guy Wade	501-370-1556
David H. Williams	501-372-0038

Library – Each of these is noted on the Task Force's ACE site and may be accessed by the request of any Bar member.

Bankrolling the Bench: A Report by the Brennan Center, Justice at Stake, and the National Institute on Money in State Politics

Fair Courts: Setting Recusal Standards, the Brennan Center.
Improving Judicial Diversity, the Brennan Center.

Merit Selection and Composition of Nominating Commissions, the American Judicature Society.

Judicial Selections in the States, National Center for State Courts
Judicial Discipline and Disability Commission, Arkansas
Federalist Papers, No. 78 (excerpt)

Judicial Disqualification Based on Campaign Contribution, National Center for State Courts, Center for Judicial Ethics.

The Price of Justice: Elected Judges or Appointed Judges
Proposed HJR, Regular Session 2015, 90th General Assembly, by Rep. Shepherd

Judicial Campaign Finance: Can the Independence, Integrity and Impartiality of the Judiciary Survive Unlimited Stealth PAC Expenditures in Judicial Elections, by Tim Cullen, The Arkansas Lawyer.

Justice Karen Baker's research on Judicial Election Campaign Practices

Judicial Selection Reform: Keeping Arkansas Courts Fair and Impartial, Justice At Stake.

Selection & Retention of State Judges, Methods From across the Country, Institute for the Advancement of the American Legal System

The Necessity of Judicial Independence: Merit-Based Selection for Arkansas' Court of Last Resort, Arkansas Law Review.

Judicial Selection Processes, Arkansas Bureau of Legislative Research
Essay "Selection of Judges" by Associate Justice Robert Brown

Presentation by David Stewart
Presentation by Mark Killenbeck
Presentation by Scott Trotter
Judicial Recusal: It's Time To Take Another Look Post - Caperton, Justice Robert Brown, Arkansas Law Review

Judicial Merit Selection: Making the Case and Building Better Campaigns, Justice At Stake.

The O'Connor Judicial Selection Plan, Judicial Nominating Commissions and the Selection of Supreme Court Judges, Goals and Principles for Judicial Nominating Commissions, Model Code of Conduct for Judicial Nominating Commissions, by the Institute for the Advancement of the American Legal System (IAALS).

House Bill – Draft – 90th General Assembly, Second Extraordinary Session, 2016, by Rep. Clarke Tucker

Multiple papers available through the internet also noted.

June 1, 2016

FINAL

Task Force on Maintaining a Fair and Impartial Judiciary's

Resolution No. 1

Whereas, the Task Force on Maintaining a Fair and Impartial Judiciary has studied in earnest whether or not there should be a change in the manner in which members of the judiciary are selected in Arkansas;

Whereas, the Task Force concludes that the most effective way to assure a fair and impartial judiciary as related to the selection of justices to the Arkansas Supreme Court, is for the Constitution to be amended to replace the current non-partisan election process, and to provide for the selection of justices through a nominating commission/appointment process (commonly referred to as "merit selection");

Whereas, the Task Force recommends the following:

Now, Therefore, Be It Resolved:

The House of Delegates hereby adopts as a part of its legislative proposals for the next legislative session, an amendment to the Constitution to provide for the selection of justices to the Supreme Court through a nominating commission/appointment process (commonly referred to as "merit selection"), replacing the current non-partisan election process.

FINAL

Task Force on Maintaining a Fair and Impartial Judiciary's

Resolution No. 2

Whereas, the Task Force on Maintaining a Fair and Impartial Judiciary has recommended in its Resolution No. 1 that Arkansas transition from a nonpartisan election for justices on the Supreme Court, to a nominating commission/appointment process;

Whereas, the Task Force studied and considered a wide range of variations in the structure of similarly formed commissions, and the functioning of the appointment process in other states;

Whereas, the Task Force developed a consensus as to many, but not all, of the structural components as to the general formation and workings of the nominating commission, and the appointment process;

Whereas, the Task Force recommends the following:

Now, Therefore, Be It Resolved:

The House of Delegates hereby adopts as a part of its legislative proposals for the next legislative session, proposed legislation that would assure that any nominating commission/appointment process for justices of the Supreme Court contain at least the following components:

a. The membership of the nominating commission shall be sufficiently broad-based and diverse, with a majority being attorneys, such that the public has confidence in the independence of its work. Consistent with that goal, the make up of the commission should draw on the wisdom and expertise of groups and authorities that represent the full spectrum of interests and constituencies with knowledge of and expertise in the judiciary and the judicial process, including, if deemed appropriate, the ability on the part of such entities to nominate and/or appoint members of the nominating commission. The actual configuration should be determined after consideration of various practices used in other states, with the goal of achieving the most effective and independent commission for Arkansas – to further assure a fair and impartial judiciary.

b. Members shall be required to be knowledgeable of the role and characteristics that should be exemplified by a member of the judiciary, and agree to be bound by a specific Code of Ethical Conduct.

c. Members shall be provided specific training as to their role, their Ethical Code, and the role and judicial characteristics that should be exemplified by a member of the judiciary.

d. Members shall serve staggered terms of office.

e. The Commission shall be governed by a comprehensive set of rules of procedure, which shall include, but not be limited to the following:

   i. The Commission proceedings shall generally be fully transparent and open to the public, subject to right of the Commission to conduct deliberations in a private executive session.
   ii. Applicants for judicial appointment shall complete an application form adopted by the Commission.
   iii. The public shall have prior notice of the applicant interviews, which the public shall be allowed to attend.
   iv. Any applicant shall be required to give consent for a comprehensive background check.

f. The Commission shall, after the interview process, submit the names of 3 qualified applicants to the Governor for consideration.

g. The Governor shall make a selection from the 3 names submitted by the Commission.

h. Strict timelines shall govern the entire process, and default outcomes shall be provided, in the event of a failure of any party to fulfill their role within the time stated. For instance, the Governor shall have a time period within which to make the selection/appointment. In the event that the Governor fails to timely appoint, then there shall be a default decision-maker, such as the Commission itself or the Chief Justice of the Supreme Court.

FINAL

Task Force on Maintaining a Fair and Impartial Judiciary

Resolution No. 3

Whereas, the Arkansas Rules of Civil Procedure and Arkansas Rules of Appellate Procedure ("Rules") do not address procedures for consideration of disqualification and recusal of judges and for appeals of decisions by judges that deny requests for recusal;

Whereas, the Task Force on Maintaining a Fair and Impartial Judiciary studied the need to amend such Rules to address disqualification and recusal;

Whereas, the Task Force also studied amendments to the Arkansas Code of Judicial Conduct ("Canons") that bear on the issue of disqualification and recusal of judges.

Whereas, the Task Force also studied amendments to the Canons pertaining to gifts for judges; reimbursement of expenses and waivers of fees or charges for judges; political activities and campaign committees of judges; and judges addressing matters and proposals affecting the judiciary when appearing before legislative and executive bodies and consulting with legislative and executive officials; and timely decision making by judges;

Whereas, the Task Force also studied amendments to the Code of Professional Conduct ("Code") and corresponding changes to the Rules of Civil and Appellate Procedure ("Rules"), pertaining to disclosure of campaign contributions when appearing before a member of the judiciary in a contested matter;

Whereas, the Task Force determined that it would improve judicial campaigns if candidates for office would voluntarily subscribe to a Pledge of conduct that would help maintain the professionalism of judicial campaigns;

Whereas, the Task Force has drafted and recommends the attached amendments to the Rules, Canons and Code, on such subjects, or suggests further study as to on one subject as noted, and recommends the attached Pledge for judicial candidates:

Now, Therefore, Be It Resolved:

Subpart 1:

The House of Delegates directs that a petition be filed on behalf of the Arkansas Bar Association with the Arkansas Supreme Court stating that the attached proposed amendments to the Rules, Canons and Code, as drafted by the Task Force, are (a) illustrative of amendments appropriate to maintain a fair and impartial judiciary, and (b) appropriate to be considered by the standing committees of the Arkansas Supreme Court that study, address and obtain public comment on such proposed amendments.

Subpart 2:

As to the Task Force Recommendation to require disclosure of campaign contributions when appearing before a member of the judiciary in a contested matter, the House of Delegates directs its own Professional Ethics Committee, Judicial Committee and Jurisprudence and Law Reform Committee to review the Task Force recommendation that the Code of Professional Conduct and the Rules of Civil and Appellate Procedure be so amended; and to determine what specific Code and Rule changes would be appropriate to implement this Recommendation, and to report on same to the next meeting of the House of Delegates.

Subpart 3:

The House of Delegates recommends that any candidate for judicial office sign and agree to the terms of the attached Pledge, with the understanding that any asserted violations would be managed by the Arkansas Judicial Campaign and Education Committee, Inc., not the Bar Association.

SUBPART 1:

RULE 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) ~~[Reserved]~~The judge is aware of (a) contributors to the judge's campaigns for judicial office or (b) contributors to the judge's opponents in the judge's campaigns for judicial office, including amounts contributed, and based on such knowledge the judge cannot be impartial in the proceeding.

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

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

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), shall, if requested by any party, ~~may~~ disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) A trial judge shall comply with Rule XXX of the Arkansas Rules of Civil Procedure regarding recusal and disqualification. An appellate judge or justice shall comply with Rule XXX of the Arkansas Rules of Appellate Procedure regarding recusal and disqualification.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, 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.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[4A] The fact that a lawyer in a proceeding, or the lawyer's law partner, or a litigant, contributed to the judge's campaign, or publicly supported the judge in his or her election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and the proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge's impartiality under paragraph (A).

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or (4) an interest in the issuer of government securities held by the judge.

RULE 3.2 Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, the administration of justice, or matters or proposals affecting the judiciary;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals

affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

RULE 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from ~~friends,~~ relatives~~, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 2.11~~;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of a judge residing in the judge's household, but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

(1) gifts incident to a public testimonial_ or a gift made in connection with a special occasion for the judge, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship of the donor and the judge; and

(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge.

~~; and (3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.~~

(D) For purposes of this Rule and for the Comments that follow, the term "relatives" shall include a spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any of these persons, unless the person is acting as an agent or intermediary for any person not covered by this paragraph.

COMMENT [1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between ~~friends and~~ relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of ~~friends or~~ relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from ~~friends or~~ relatives under these circumstances, and does not require public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code, including Rules 4.3 and 4.4.

[6] Under the prior version of Rule 3.13(B)(2), a judge could accept gifts, loans, bequests, and benefits from sources (including lawyers) who would already be subject to the judge's recusal. Because of the importance of the appearance of impartiality in the judiciary, and the impossibility of public disclosure of the extent of judge's social network, the Rule has been modified to prohibit such gifts, loans, bequests, and benefits from any source other than relatives.

[7] Under the prior version of Rule 3.13(C)(3), a judge could accept gifts, loans, bequests, and benefits from a source, even if that source or their interests were likely to come before the judge, so long as the gifts, loans, bequests, and benefits were disclosed. Under this revision to the Rule, such gifts, loans, bequests, and benefits are forbidden. A judge's duty to uphold the appearance of impartiality is of greater importance to the judiciary than any gift a judge might receive from a lawyer or potential litigant who may appear before the judge.

RULE 3.14 Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, except from a political organization, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15. For purposes of this Rule, a political organization includes local, state, and federal political parties, labor

unions, chambers of commerce, political action committees, any committee or organization that contributes to candidates for local, state or federal office or that expends money to influence the election or defeat of such candidates, and any organization that seeks through lobbying as defined by Ark. Code Ann. § 21-8-402(10) to influence administrative or legislative actions. However, for purposes of this Rule, a political organization shall not include the American Bar Association or a national or state-wide lawyer association.

COMMENT

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

[4A] Reimbursement of expenses from governmental entities need not be reported under Rule 3.14 [C] or Rule 3.15.

RULE 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(1) act as a leader in, or hold an office in, a political organization;

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;

(5) solicit, directly or indirectly, the efforts of any invidual, committee, or organization independent of the judge's campaign that expends money in efforts to influence the outcome of the election in which the judge is a candidate;~~[Reserved]~~

(6) publicly identify himself or herself as a candidate of a political organization;

(7) seek, accept, or use endorsements from ~~a~~ political organizations or elected officials;

(8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;

(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;

(10) use court staff, facilities, or other court resources in a campaign for judicial office;

(11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

(C) For purposes of this Rule and for the Comments that follow, "political organization" includes local, state, and federal political parties, labor unions, chambers of commerce, political action committees, any committee or organization that contributes to candidates

for local, state or federal office or that expends money to influence the election or defeat of such candidates, and any organization that seeks through lobbying as defined by Ark. Code Ann. § 21-8-402(10) to influence administrative or legislative actions.

COMMENT

GENERAL CONSIDERATIONS

[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

PARTICIPATION IN POLITICAL ACTIVITIES

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3).

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. Judges are permitted to request a ballot in a party's primary without violating this Code.

[6A] Judges are permitted to attend or purchase tickets for dinners or other events sponsored by a political organization.

[7] While groups retain the right to make endorsements of judicial candidates, to further the compelling state interest of maintaining a fair and impartial judiciary, this Rule

prohibits a judicial candidate from "seeking, accepting, or using" such endorsements. Likewise, judicial candidates are forbidden from "seeking, accepting, or using" endorsements from elected officials who were elected as the nominee of a political party. However, a judicial candidate is free to speak to a political organization or elected official about the judicial candidate's campaign if the communication does not seek an endorsement. One of the purposes of Amendment 80 was to insulate the judiciary from partisan politics. These restrictions on a judicial candidate's use of politically-motivated endorsements are in furtherance of this important purpose.

STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE

[87] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[98] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate's opponent, the candidate may disavow the attacks, and request the third party to cease and desist.

[109] Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case.

[110] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

RULE 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judicial candidate in a public election shall:

(1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;

(2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.

(B) A judicial candidate in a public election may, unless prohibited by law, and not earlier than 365 days before the first applicable election:

(1) establish a campaign committee pursuant to the provisions of Rule 4.4;

(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

(3)[Reserved]

(4) attend or purchase tickets for dinners or other events sponsored by a political organization as defined in Rule 4.1(C);

(5) seek, accept, or use endorsements from any person or organization other than a ~~partisan~~ political organization as defined in Rule 4.1(C); and

(6)[Reserved].

(C)[Reserved].

COMMENT [1] Paragraph (B) permits judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than 365 days before the first applicable election. See definition of "judicial candidate," which provides that a person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes or engages in solicitation or acceptance of contributions or support. This rule does not prohibit private conversations with potential supporters by a potential candidate as part of an effort to "test the waters" for a future candidacy. It does prohibit establishing a campaign committee earlier than 365 days before the election date.

[2] Despite paragraph (B), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11), and (13).

[3][Reserved]

[4] In nonpartisan elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization.

[5] Subject to the 365 day limitation, judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations. (Cf.

Rule 4.1, Comment 6A, Judges are permitted to attend or purchase tickets for dinners or other events sponsored by a political organization.)

[6][Reserved]

[7][Reserved]

RULE 4.4 Campaign Committees

(A) A judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions as are permitted by state law.

(2) not to solicit or accept contributions for a candidate's current campaign more than 180 days before the applicable election, nor more than 45 days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions.

(C) Any campaign fund surplus shall be returned to the contributors, contributed to a nonprofit organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or turned over to the State Treasurer as provided by law.

COMMENT

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions. Judicial candidates also are prohibited from soliciting, directly or indirectly, the efforts of any individual, committee, or organization independent of the judge's campaign that expends money in efforts to influence the outcome of the election in which the judge is a candidate. See Rule 4.1(A)(5).

[2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[2A] The forty-five day post-election restriction applies both to contested and non-contested elections. Once a candidate's campaign has ended, the candidate should

only raise funds for 45 more days. For example, if three candidates participate in a judicial election, the candidate who is eliminated may raise funds for only an additional 45 days. However, the two remaining candidates may continue to raise funds through the runoff election and 45 days thereafter.

[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law.

[3A] ~~To reduce potential disqualification and to avoid the appearance of impropriety,~~ Jjudicial candidates may ~~should, as much as possible, not~~ be aware of those who have contributed to the campaign, but must comply with Rule 2.11 when considering if such awareness results in the appearance of impropriety and disqualification.~~.~~

RULE 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law. Without good cause, a judge shall not delay deciding a matter assigned to the judge and shall not delay any process that leads to deciding a matter. An appellate judge or justice shall not delay drafting a majority or dissenting opinion, or delay providing comment on a draft majority or dissenting opinion, except for good cause unrelated to avoiding a timely decision on the appeal.

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

[2] Judges must not use delay to provide an advantage to any side in litigation, and appellate judges and justices must not use delay to avoid deciding cases that present difficult, controversial, or unpopular issues.

Subpart 2:

Proposed Requirement for Attorney and Client Disclosure – No red-line edits available

The Task Force recommends that the House of Delegates directs its own Professional Ethics Committee, Judicial Committee and Jurisprudence and Law Reform Committee to review the Task Force recommendation that the Code of Professional Conduct and the Rules of Civil and Appellate Procedure be amended to require disclosure of campaign contributions when appearing before a member of the judiciary in a contested matter; and to determine what specific Code and Rule changes would be appropriate to implement this Recommendation, and to report on same to the next meeting of the House of Delegates.

Subpart 3:

The House of Delegates recommends that any candidate for judicial office sign and agree to the terms of the attached Pledge, with the understanding that any asserted violations would be managed by the Arkansas Judicial Campaign and Education Committee, Inc., not the Bar Association.

PLEDGE
ARKANSAS JUDICIAL ELECTIONS CAMPAIGN COMMITTEE

I, _____, am a **Judge/Judicial Candidate** for the 20__ election for the position of _____. In order to help ensure professionalism and fairness in judicial campaigns, I pledge and promise that:

1. I have read the Arkansas Code of Judicial Conduct and will abide by and comply with the letter and spirit of that Code.

2. I will not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of my judicial office.

3. I will not make any false or misleading statement during the campaign. I will be personally responsible for the content of all statements and campaign materials relating to my judicial campaign issued by me or my campaign committee including, but not limited to, newspaper, radio or television advertising, website, social media or other electronic communication, press releases, brochures, fliers, sample ballots, yard signs or other material.

4. Based upon my personal examination of campaign advertisements or communications relating to election, including advertisements sponsored by 527 groups, Super PACs, or third parties, I will publicly disavow advertisements that falsely impugn the dignity, integrity, or independence of my opponent for judicial office.

5. I will not personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 of the Arkansas Code of Judicial Conduct.

6. I will not seek, accept, or use endorsements from a partisan political organization.

NAME: _____

DATE: _____

ATTACHMENT TO RESOLUTION 3

16

Please refer to page 6 of the Attachments. Comments 6 and 7 should both be amended to include the following statement: "The prohibition for anyone other than a relative is itself modified to allow for a gift made in connection with a special occasion for the judge, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship of the donor and the judge as per amendments to (C)(1)."

June 1, 2016

FINAL

Task Force on Maintaining a Fair and Impartial Judiciary's

Resolution No. 4

Whereas, the Task Force on Maintaining a Fair and Impartial Judiciary gave consideration to what are the characteristics that members of the Bar Association, and we believe the public, want to see and expect from a member of the judiciary;

Whereas, the Task Force concludes that the most effective way to provide education to the membership of the Bar and the public generally, on this subject, would be for the Bar to adopt a comprehensive listing of those characteristics we believe necessary to achieve a fair and impartial judiciary;

Whereas, the Task Force further concludes that the Bar and the Supreme Court should collaborate further as to an active and routine public education program on the judiciary;

Whereas, the Task Force drafted and recommends the following:

Now, Therefore, Be It Resolved:

The House of Delegates hereby adopts a listing of those judicial characteristics believed necessary to maintain a fair and impartial judiciary, as attached, for the purpose of helping the public understand the role of the judiciary, and what characteristics they should look for in each judicial officer.

Additionally, the House of Delegates directs the Bar Association to collaborate with the Supreme Court to develop, or supplement existing programs, to provide a proactive education campaign on a routine basis that educates the general public of the role of the judiciary and core values and characteristics they bring to the bench; and that all judges be encouraged to participate in this effort.

Judicial Characteristics

Yes. The judicial characteristics of a Judge are:

Characteristics Desired in Individual Judges

Fairness and Impartiality

Judges must be fundamentally fair and impartial.
Judges must approach each case with an open mind.
Judges must avoid actual bias and the appearance of bias, *as understood by the ordinary citizen.*
Judges must be willing to reconsider personal points of view.
Judges must be honest and even-handed.

Competence

Judges must have excellent analytical ability.
Judges must demonstrate excellent substantive legal knowledge, or a willingness to learn at the earliest opportunity.
Judges must undertake the research necessary to gain command of the facts and the issues presented.

Judicial Philosophy

Judges must be principled and intellectually curious.
Judges must be collaborative and open to new learning to achieve deliberative excellence.
Judges must recognize the impact and consequence of a decision but not allow these factors to drive the decision.
Judges must appreciate stability in the law and precedent, while recognizing the need for change *in appropriate circumstances*.
Judges must have sufficient decisional independence to decide issues in ways that contravene majority opinion, if such decisions are consistent with existing law.

Productivity and Efficiency

Judges must attend to tasks.
Judges must demonstrate a strong work ethic.
Judges must strive to achieve timely docket management without sacrificing due process.

Clarity.

Judges must have excellent written and oral communication skills.
Judges must communicate in a straightforward and precise manner, and provide reasoning for decisions.

Demeanor and Temperament

Judges must be patient and even-keeled.
Judges must be collegial and humble.
Judges must be respectful and courteous.
Judges must command respect from the community and from those who enter the courthouse.
Judges must work to make the courtroom a comfortable place for those who enter it, while acting as necessary to maintain appropriate respect and decorum at all times.

Community

Judges must share the fundamental values to which communities should aspire – values such as respect for individual rights, democratic government, and the rule of law.
Judges must be members of their community – not completely isolated from them.
Judges must be encouraged to engage in community service activities when those activities do not contravene or appear to contravene their decisional independence.
Judges must take an active role in the community to promote the values and principles of the judicial system.
Judges must build public understanding of the legal system and public confidence in the judicial branch through appropriate communications and attendance at community events.

Separation of Politics From Adjudication

Judges must not engage in partisan politics, which threatens independent decision-making and erodes public confidence in the judicial system.

June 1, 2016

FINAL

Task Force on Maintaining a Fair and Impartial Judiciary's

Resolution No. 5

Whereas, the Task Force on Maintaining a Fair and Impartial Judiciary has studied and considered the adverse impact of so-called "dark money" and campaign contributions generally on the confidence that members of the public and the Bar have that their judiciary is fair and impartial;

Whereas, the Task Force studied and considered a wide range of options as to reasonable steps that could be taken to reduce the adverse impact of spending on the selection process for judges at all levels;

Whereas, while the Task Force concluded, and has recommended to you, that the most effective way to mitigate this harm for the Supreme Court is to transition to a nominating commission/appointment process, the Task Force recognizes that non-partisan elections may continue to be the method of selection for the Supreme Court (as there is no assurance the nominating/appointment process will be adopted), and certainly will continue as to the Court of Appeals and Circuit and District Court Judges;

Whereas, the Task Force recommends the following:

Now, Therefore, Be It Resolved:

The House of Delegates hereby directs the Bar Association to seek modification of court rules, and executive action, and enactment in the next legislative session, legislation and rule changes that would support the following:

Subpart 1: Transparency in Judicial Campaign Advertising

Properly informed voters being essential to a democracy, the Arkansas Bar Association recommends to the Supreme Court of Arkansas, the Arkansas General Assembly, and the Governor of Arkansas that they take all lawful action necessary to obtain and timely disclose to Arkansas voters the identities of all persons, companies and associations of any kind, irrespective of whether a legal entity or not, who fund advertising for or against candidates for Judicial office in Arkansas (where elections remain the method of selection), or engage in any type of electioneering conduct with an interest in affecting the outcome of the election, together with the amounts contributed by each, and specifically including the same information for any person, company or association, irrespective of whether or not a legal entity, directly or indirectly contributing funds to any person, association of persons, or entity of any kind that actually carries out the procurement of such advertising. The purpose of this recommendation is to have the same disclosure requirements currently imposed by law on individual contributors applied to those persons, associations, and

companies, irrespective of whether a legal entity or not, who fund advertising for or against candidates for Judicial office in Arkansas, or contribute to any type of electioneering conduct with an interest in affecting the outcome of the election, so that the voters of Arkansas will be properly informed before casting their ballots in a Judicial race.

Additionally, the Task Force recommends that the Bar Association give active support to the spirit and intent of the effort to enforce disclosure of funds expended with the purpose to impact the outcome of judicial elections, as reflected in the submitted bill of State Representative Clarke Tucker.

Subpart 2: Equal Treatment for Contributors in Judicial Election Campaigns

We affirm that it is essential to securing and maintaining public confidence in the persons who may be elected to Judicial office in Arkansas, that all contributors who, directly or indirectly, contribute directly to a campaign, fund advertising for or against a candidate for Judicial office, or contribute to any type of electioneering conduct with an interest in affecting the outcome of the election, should be treated equally. We therefore recommend to the Supreme Court of Arkansas, the Arkansas General Assembly, and the Governor of Arkansas that the individual contribution limits presently applied by law to individual contributors to a candidate for a Judicial office be made applicable to any person, or association of person, company or any other entity, whether characterized as a legal entity or not, where the funding is contributed directly to a campaign, or funds are provided for advertising for or against a candidate for Judicial office, or funds are provided for any type of electioneering conduct with an interest in affecting the outcome of the judicial election.

Subpart 3: Judges Should Know the Identities of Contributors and Amounts of Contributions or Expenditures

It being essential to securing and maintaining the confidence of Arkansas citizens and litigants in the Courts of Arkansas, we recommend that the Arkansas Bar Association recommend to the Arkansas Supreme Court, Arkansas General Assembly and the Governor of Arkansas that they take all lawful action necessary to require the Judges of Arkansas to know the identities of all persons, association of persons, companies of any kind, irrespective or whether or not a legal entity, who made contributions or expenditures that directly or indirectly supported the election of those Judges through advertisement or otherwise, and the amounts contributed or expended by each.

Subpart 4: On-Line Filing of Campaign Finance Reports

We support on-line filing of campaign finance reports that will render them effectively and immediately real-time searchable by the public, with requirement that the timelines be modified to mandate most reporting to occur prior to the end of the campaign, so as to be most beneficial to the public.