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Lawyer Contributions to Judicial Election Campaigns

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LAWYER CONTRIBUTIONS TO JUDICIAL ELECTION CAMPAIGNS

By Barry Temkin¹

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The question presented is whether it is ethical for a lawyer to make a campaign contribution to a judge before whom the lawyer's firm sometimes appears, or before whom the lawyer is appearing in a pending case.

A related question is whether the lawyer must disclose to an adversary a past campaign contribution to the campaign of a judge before whom the lawyer and adversary both appear after the election.

Code provisions: DR 7-110 (A), EC 7-34, EC 2-37, Code of Judicial Conduct, 22 NYCRR 100.5.

Summary and Conclusion: A lawyer may make a campaign contribution to a judge, but should not make the contribution directly to the candidate or to a member of the candidate's immediate family. Rather, such contributions should be to the candidate's duly constituted election committee.

The lawyer should not disclose the fact of the donation to the judge, and lawyers who have cases pending before the judge should abstain from making any campaign contributions, direct or indirect. A lawyer should not make a campaign contribution to a judge before whom the lawyer herself has a pending case. There is no prohibition in the Lawyer's Code on contributing to the campaign of a judge before whom the lawyer's partner has a pending case.

A lawyer who has previously made a campaign contribution to a (then) judicial candidate may appear before that candidate once elected. Generally speaking, a lawyer has no affirmative duty to disclose a prior campaign contribution to an adversary who is presiding over a case between the lawyer and the adversary. However, the contributing lawyer should disclose the fact of the prior contribution to adversary counsel where the nature or degree of campaign involvement may support a concern for the appearance of impropriety. And if the contributing lawyer played an active role in the judge's campaign, such as campaign manager or treasurer, the lawyer should avoid appearing before that judge for a period of two years after the election.

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Some of the opinions in this area are fact specific, so lawyers should exercise great caution in proceeding in this area. Moreover, the law concerning contributions to judicial campaigns is in a state of change and flux. While the United States Supreme Court has upheld the system of judicial elections in New York, the Chief Judge's Commission to Promote Public Confidence in Judicial Elections, chaired by former Fordham Law School Dean John Feerick (Feerick Commission) has made several proposals to change the judicial election process. These include creating a government commission to screen all judicial candidates, which has been implemented in New York. See 22 NYCRR Section 100.5 (a) (7) (Establishing Independent Judicial Election Qualifications Commissions.) However, other Feerick Commission recommendations are still under consideration, including public financing of elections and transparent disclosure of all campaign contributions. A proposal to limit campaign contributions to \$500 per contributor was not implemented.

Thus, this analysis takes place under the long shadows cast by the Feerick Commission, the Lopez-Torres case in the U.S. Supreme Court, and the Assembly Bill proposed by Assemblywoman Weinstein, which would have implemented most of the Feerick Commission recommendations.

Analysis

This article is concerned with the perspective of a lawyer who seeks to contribute to the campaign of a judicial candidate. It seeks to provide guidance to lawyers.

May a lawyer make a contribution to the campaign of a judge before whom the lawyer's firm frequently appears? Indeed, it is not unusual for lawyers to contribute to the campaigns of judges before whom they generally appear, and such contributions are permitted by the Lawyers' Code of Professional Responsibility (Code). According to DR 7-110 of the Code: "A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with the Code of Judicial Conduct." (DR 7-110 (A)). The Code's Ethical Considerations add that "the impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans." EC 7-34. Accordingly, no gifts or loans may be made to a judge or judicial candidate except as permitted by the Code of Judicial Conduct, 22 NYCRR Section 100.0 et seq.

The Lawyer's Code's Ethical Considerations add a related concern with respect to all political contributions, as opposed to DR 7-110, which applies only to judicial candidates and judges. A lawyer should avoid making campaign contributions to any political candidate who "may be in a position to influence the award of a legal engagement . . ." (EC 2-37) The Lawyer's Code "prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement."

(EC 2-37; see also DR) So a lawyer may not solicit or make a contribution to any candidate, judicial or otherwise, as a quid pro quo for awarding the lawyer legal work.

The principle articulated in EC 2-37 would appear, in my view, to apply to a lawyer who hopes to be awarded a judicial appointment, such as guardian, receiver, special master or conservator. Can EC 2-37 be read even more broadly? What if a lawyer appears regularly before a judge, and hopes to receive favorable rulings in exchange for a large campaign contribution? Are favorable rulings analytically distinct from obtaining new business as a quid pro quo? Is it different when the contributions are blind to the judge, as required by advisory opinions of the state commission on judicial conduct? These are all difficult questions, susceptible of more than one answer.

Since the Lawyer's Code, as mentioned, incorporates the Code of Judicial Conduct, it is appropriate to consider the CJC's provisions, and their implications.

The Code of Judicial Conduct.

The Code of Judicial Conduct (CJC) has six grounds for disqualification of a judge from a case, none of which explicitly involves a lawyer's campaign contribution to the judge. Briefly stated, the grounds for judicial recusal include personal bias, an economic interest in the outcome of the case, an interest in a party, a family member as an interested party or attorney for a party, and being a witness to disputed facts. (Code of Judicial Conduct Canon 3 (E)), 22 NYCRR 100.3; Jeremy R. Feinberg, *Judicial Ethics in New York State*, NY Professional Responsibility Report, NYPRR October 2007. The CJC's commentary suggests other instances of potential judicial disqualification, such as when a judge is negotiating for employment with a law firm which appears before her. [Cmt. 3.21](3E(1)).

The Code of Judicial Conduct, in Canon 4, provides that judges may not engage in business transactions with lawyers who frequently appear before them:

- (l) A judge shall not engage in financial and business dealings that:
 - (a) may reasonably be perceived to exploit the judge's judicial position,
 - (b) involve the judge with any business, organization or activity that ordinarily will come before the judge, or
 - (c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

22 NYCRR 100.4 (D) (1). Thus, a judge may not engage in frequent financial or business transactions with lawyers who appear in the judge's court. In addition, a judge may not accept gifts or loans from parties who are likely to appear before the court, or whose interests are likely to come before the court. 22 NYCRR 100.4 (D) (5) (h).

Solicitation of Campaign Contributions

CJC Canon 5 governs judicial campaign activities. Judicial candidates may not personally solicit or accept campaign contributions to their own campaigns. “A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions,” but, rather, may do so through campaign committees. 22 NYCRR 100.5(A)(5); State Commission on Judicial Conduct Op. 07-88 (2007); NY State Eth. Op. 289 (1973).² A judicial candidate’s campaign manager may ethically solicit campaign contributions from lawyers. While judicial candidates and their immediate families may not directly solicit campaign contributions, the judge’s campaign committee, “may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate’s campaign and obtain public statements of support for his or her candidacy.” 22 NYCRR 100.5(A)(5). The commentary to CJC Canon 5 says that judicial candidates should instruct their campaign treasurers to “solicit or accept only contributions that are reasonable under the circumstances.” [5.10]

Some commentators have observed that judges may generally accept campaign contributions from lawyers who appear before them. See, e.g., James E. Moliterno, *Cases and Materials on the Law Governing Lawyers* (2d Ed.) at 822 (“A judge is not disqualified when an ordinary judicial election campaign contributor of the judge is a party or a lawyer in a matter. The contributions are relevant to the disqualification analysis, but are not per se disqualifying.”) The New York State Bar Association Committee on Professional Ethics wrote in 1973 that lawyers may contribute to the campaigns of judges before for whom the lawyers appear, provided that there is no discussion of the case in the course of the solicitation:

3. SOLICITATION OF LAWYERS. Contributions may be solicited and accepted from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation.⁷ Because lawyers may be

NY State 289 (1973).³ However, the state bar qualified its opinion by stating that a lawyer may not contribute to the campaign of a trial judge before whom the lawyer has a pending case:

However, contributions should not knowingly be accepted on behalf of a candidate for a trial court from lawyers who then have cases before the candidate. Moreover, no lawyer should contribute to the campaign of a candidate for a trial court before whom the lawyer has a pending case.⁹

² The ban on soliciting contributions also applies to members of the judge’s immediate family. (NY State Ethics Op. 289).

³ However, a judge may not accept a contribution from a party to a pending case before the judge.

NY State 289. This distinction in NYSBA ethics opinion 289 is less than clear. In effect, it is problematic. While the governor appoints judges to the Appellate Division, these judges are elected as Supreme Court justices. Thus, there is an apparent contradiction in NY State Ethics Opinion 289, which permits contributions to judges before whom the lawyer has pending cases, except for “a candidate for a trial court,” which is the only elected judge in the state. Thus, NY State Ethics Opinion 289, in effect, suggests that a lawyer may never make a contribution to the campaign of a judge before whom the lawyer has a pending case. And that is, in my opinion, the most prudent rule; why should a lawyer contribute to a judge presiding over a pending case? A lawyer who makes such a contribution places the judge into a conflict, and the appearance is of buying justice.

Moreover, it does not make sense to limit the prohibition on making contributions to trial judges. After all, any judicial ruling is susceptible of influence, regardless of level of the ruling. An appellate judge who is running for reelection as a Supreme Court justice could be susceptible to influence as well.

NY State Ethics Op. 289 should be reevaluated on another level as well. Since any judge is equally susceptible of claims of influence or impropriety, it makes more sense to conclude that lawyers should not make contributions to the campaigns of any judge presiding over a pending case in which the lawyer represents a client. This much seems to be stated in the opinion; it should simply be clarified.

Accordingly a lawyer should not contribute to the campaign of any judge before whom the lawyer has a pending case.

Screening of Identities

While the judge’s campaign manager may solicit contributions from lawyers who appear before the judge, the New York State Bar Association Ethics Committee has opined that judges are required to “screen themselves from their contributors and to make diligent efforts to avoid learning the identities of the donors to their campaigns.” NY State 289; NY City Eth. Op. 882 (Judges should screen identities of contributors); New York City Eth. Op. 1994-7 (district attorneys and candidates for attorney general should screen identities of contributors). However, as the State Bar has acknowledged, the identities of contributors to judicial campaigns could be a matter of public record. Nonetheless, the state bar has opined that candidates should scrupulously avert their eyes from the identities or amounts of campaign contributions. NY State Eth. Op. 289. This is a compromise which has at least one loophole.

Conflicts, Disclosure and Recusal

Lawyers who contribute to and raise funds for judicial candidates may not appear before that judge during the campaign, while more active supporters, such as a campaign manager, may be barred from appearing for up to two years. See Jeremy R. Feinberg, *Judicial Ethics in New York State*, NY Professional Responsibility Report, NYPRR October 2007; NY Jud. Adv. Op.

03-64. This means, by implication, that a contributing lawyer's bar on appearing before the judge is limited to the period of the campaign. Thus a contributing lawyer, unlike a campaign manager or treasurer, may apparently appear before the judge immediately after the judge's swearing in, even though the contribution could have been just a short time prior.

The judge's duty of disclosure and recusal is discussed by the New York Advisory Committee on Judicial Ethics (ACJE) in Opinion 04-106, [http://www.nycourts.gov/ip/judicialethics/opinions/04-106 .htm](http://www.nycourts.gov/ip/judicialethics/opinions/04-106.htm). That opinion considers whether a judge must disclose to the parties and recuse himself from a case in which one of the lawyers attended a campaign fundraiser (and presumably made a contribution there) or is listed in a newspaper article as a campaign contributor. The ACJE concludes that recusal -- and disclosure -- are not automatically required under those circumstances. However, the inquiry does not end there, and the judge should consider a variety of circumstances, including the timing of the donation, whether the lawyer had a case pending at the time of the donation, the size of the donation, whether the lawyer's adversary made a contribution and other common-sense factors. Presumably, a lawyer who makes a nominal donation to a judge, perhaps as part of a series of donations to multiple candidates, would be in a different situation from a lawyer who makes the maximum legal contribution.

Apparently, AJCE Opinion 04-106 leaves these factors up to the discretion of the judge. This is a problematic resolution of the issue, since the Opinion assumes that the judge's campaign accepted a contribution from a lawyer who was either a past or current litigant before the court. It is discretionary with the judge whether to disclose the contribution to the adverse lawyer.

Lawyer's Perspective on Past Campaign Contributions

Now let's look at the same past contribution from the perspective of the contributing lawyer. As a general proposition, a lawyer need not automatically disclose to an adversary a campaign contribution or other support to the judge presiding over their case. See Nassau Co. Eth. Op. 22/87. By way of illustration, assume the following hypothetical. Two lawyers, A and B, appear before Judge X. Lawyer A made the maximum legal contribution to the judge's campaign, and her law firm bought an entire table at a fundraiser which was also attended by the judge. Lawyer A and her partners shook the judge's hand at the fundraiser, but had no discussions aside from the exchange of pleasantries. Lawyer A was also listed as a supporter on Judge X's campaign letterhead. The judge is reelected. Six months later, A and B appear before judge X in a contested case. X and A are aware of A's involvement in the campaign, but B -- and his client -- are not. Must A disclose the contribution to B?

The Lawyer's Code does not impose any affirmative obligation under these circumstances, as a general proposition, to disclose all contributions to an adversary. There is no provision in the Code that requires such a disclosure.⁴ The Nassau County Bar Association, in Nass. Eth. Op. 22-87 and 28-87, considered the question of whether a lawyer must disclose to an adversary the fact that the inquiring lawyer had previously supported the campaign of a judge presiding over a current case. The support was financial, and written, by permitting the lawyer to be listed on the

⁴ Indeed, the Appellate Division rejected the Feerick Commission's recommendation to amend the Code to require disclosure of lawyer contributions to judicial campaigns.

campaign letterhead. The committee answered that question in the negative, writing that it, “perceives no duty on an attorney to disclose to an adversary that he is supporting or opposing the appointment of a judicial candidate before whom the attorney may appear.” Nass. Co. 22/87 at 5.

The Nassau County committee permitted the supporting lawyer to appear before the judge “during the campaign, and in cases of a successful candidacy the supporter may later appear before a newly elected judge . . . “ (Id at 2)

However, the Nassau County Bar noted that disclosure is not discouraged “where the nature or degree of involvement may support a concern for the appearance of impropriety.” Yet the Committee did not affirmatively require disclosure of campaign support even under those circumstances.

Although the Nassau County Opinion relied heavily on and quoted extensively from the prior opinion of the New York State Bar Association, Eth. Op. 289, it inexplicably ignored a portion of the State Bar’s conclusion, namely, that a lawyer may not appear before a trial judge whose campaign the lawyer is supporting. Rather, the Nassau County Ethics Committee simply perceived “no duty on an attorney to disclose to an adversary that he is supporting or opposing the appointment of a judicial candidate before whom the attorney may appear.” Nass. Co. Eth. 22/87 at 4. But at least in the case of a candidate for trial judge, the NYSBA opinion seems to forbid such an appearance during the pendency of the campaign. (See also, Feinberg, supra at 4) (“If a lawyer actively supports a judge’s candidacy, however, such as by fund-raising or petitioning for the judge, the judge will be required to recuse when that lawyer appears during the campaign.”) So the Nassau County opinion, on its own terms, relies on a State Bar opinion to relieve a lawyer of disclosing a conflict which is impermissible under the same State Bar opinion. And the Nassau County opinion, like the ACJE Opinion discussed above, is problematic for other reasons as well.

Analysis and Critique of ACJE and Nassau County Ethics Opinions

The existing opinions by the AJCE and Nassau County Bar Association generally leave the issue of whether to disclose campaign contributions to the discretion of the trial judge. This is a very optimistic solution to the problem. In the first instance, the Feerick Commission concluded that, as a practical matter, it is difficult to shield the identities of campaign contributors to judicial campaigns. Indeed, most judges “believe that judicial candidates know who some, most or all of their campaign contributors are.” (Feerick Commission Report (2004) at 13).

Of course it is human nature for judges to personally believe and assert that they can be fair and impartial notwithstanding awareness of a past contribution. It is arguably asking too much of judges to admit that their integrity could be compromised by knowledge of receiving a campaign contribution. Many jurists would be likely to reason that, “My campaign accepted this money, it is not a significant amount, I am a fair and independent jurist, and I know that it would not affect my impartiality.” However, the judge at issue is probably not in the best position to make that analysis objectively, as it is a rare human who is likely to admit that his or her judgment is impaired by accepting a contribution.

Moreover, the empirical data are eye-opening. The Feerick Commission repeatedly cited a Marist College survey which found that 90% of sampled citizens and 45% of responding state judges believed that campaign contributions have at least some impact on judicial decisions. (Feerick Commission Report (2004) at 13, 35; http://www.courts.state.ny.us/press/pr2004_14_1.shtml) In other words 45% of judges believe that judges are influenced, to some degree, by campaign contributions.

This finding was repeatedly cited by the Feerick Commission in support of its recommendation to consider public funding of elections, and transparent disclosure of contributions. From this perspective, it would be reasonable, as a matter of attorney ethics, to require lawyers involved in adversary proceedings before a court to disclose past judicial campaign contributions to that judge to their adversaries. There is no reason not to require disclosure of the fact of the contribution to the other side. That is, after all, the whole point of the adversary system – to ensure that truth is approximated by putting forth competing viewpoints. An objective viewer, with nothing to gain or lose, might have a different perspective on the propriety of the situation. Yet AJCE Op. 04-106 and Nassau County Op. 22/87 both have the effect of depriving the non-contributing party of the ability to make an informed, objective assessment of the likelihood that the contribution could affect the judge's impartiality.

Imagine a hypothetical situation in which the losing party learns after the fact that the trial judge accepted a \$5,000 campaign contribution from the lawyer for the prevailing party. The losing party confronts her lawyer about this knowledge, and the lawyer admits that she herself was not aware of the fact of the contribution, nor was its disclosure required by New York law. The judge and counsel for the prevailing party were uniquely aware of the existence of this contribution. The judge did not feel the need to disclose this contribution, because he was not himself aware of the amount of the contribution, having been properly screened from the contribution list. However, the judge did see the prevailing lawyer at a fundraising event, and made the inference that the lawyer would not have showed up at the fundraiser if she didn't intend to open her checkbook. Since the judge was not personally aware of the amount of the contribution, the judge was not in a position to make a disclosure to the other side, and the judge was not required, under ACJE 04-106, to disclose the fact that the judge saw the lawyer at a campaign fundraiser.

Yet there was no opportunity for the losing lawyer to test the appropriateness of the relationship or the contribution. Moreover, there was no opportunity for the losing client to process and make an informed decision on this situation, in which the losing client may have lost an important property interest. The ACJE and Nassau County opinions do not do enough to promote confidence in the judicial system. There should be more guidance, if not to judges, then at least to lawyers, requiring them to disclose to their adversaries the fact of prior or current support for the judge before whom they appear. Accordingly, it is my opinion that the better rule is for a lawyer who appears before a judge to whom she made a recent campaign contribution to disclose the fact of the contribution to adverse counsel.

Analogy to Ban on Contributions From Parties

Parties with cases before a judge may not contribute to the judge's election campaign, presumably because they may be perceived as buying justice. See, NYSBA Ethics Op. 289 at 2.

But a lawyer who frequently appears before a judge can personally benefit as well. Imagine a hypothetical personal injury claim before a judge up for reelection. The judge is confronted with several important rulings which could affect the case's outcome. Assume further that the plaintiff has retained counsel on a contingency fee basis. The plaintiff, who stands to recover 2/3 of the ultimate award, is barred from contributing to the judge's campaign. The lawyer stands to recover 1/3 of the ultimate award, and should be barred from contributing by the same analysis.

Alternatively imagine a hypothetical lawyer, Lawyer A, with a lucrative practice representing a particular industry, say, widgets. Judge X has rendered important rulings enabling Lawyer A to maintain and grow his practice of bringing successful claims on behalf of widget manufacturers. Lawyer A has directly benefited from Judge X's rulings, and has a personal financial stake in keeping Judge X on the bench. By contributing to the judge's reelection campaign, Lawyer A is supporting a candidate who rules in his favor and whose rulings have enabled his past and future law practice. Lawyer A is permitted to contribute to the judge's campaign, but the lawyer's clients who sometimes have cases before the judge, may not. Yet the lawyer stands to benefit from the judge's rulings, sometimes to the same extent as the clients, or even more.

Imputed Conflicts

The next question is whether a lawyer is prohibited from contributing to the campaign of a judge before whom her partner has a pending case. This requires a more complicated analysis. For example, imagine a hypothetical 2 lawyer firm in a small legal community in which lawyer A makes a contribution to the reelection campaign of Judge X while lawyer B, her partner, has a pending case before the judge. Due to the small size of the community, and the small size of the firm, there is a close connection between the contribution and the pending representation. On the other hand, imagine a hypothetical national law firm in which a lawyer in the Los Angeles office makes a contribution to the campaign of his law school friend, a judge running for reelection in New York County. The lawyer's partner, a resident in the firm's New York office, has a case pending before the judge.

As the above hypothetical indicates, there are a variety of different scenarios which present a continuum of situations involving the judge in the contribution. A lawyer who acts with intent to influence a pending case before a judge is acting improperly. A lawyer from an out of state office of a national firm who makes a contribution without being aware of the pending case is, by definition, not seeking to influence the outcome of the case.

Are such conflicts imputed to the partner of the lawyer who has the pending case before the judge? DR 7-110 does not directly answer this question, but rather only says that, "A lawyer shall not give or lend anything of value to a judge . . ." It further provides that "a lawyer may make a contribution to the campaign fund" in conformity with the Code of Judicial Conduct. Lawyers' Code, DR 7-110. Nor is this question answered by DR 5-105, which imputes to partners conflicts enumerated in several rules, but not 7-110. It appears that there is no direct answer in the Code. As a result, the conduct is not forbidden by the Code. Both the NYSBA

and Nassau County Bar Association Ethics Committees have suggested that disqualification for lawyer campaign activities is personal, not imputed.⁵

Jeremy Feinberg, on the other hand, has written that the disqualification of a judicial campaign manager or treasurer should be imputed to the entire law firm: “If an attorney holds a leadership position, such as campaign manager or finance chair, or continues to raise funds for a judge for the duration of the campaign, the judge also is required to recuse from any matter involving the attorney’s law firm, for the duration of the campaign.” Feinberg, *supra*, at 4. As mentioned above, the Lawyer’s Code incorporates by reference the CJC. Since the ACJE is empowered to interpret the CJC, its interpretations are certainly relevant to, if not necessarily binding on, lawyers who make judicial contributions.

Analysis and Conclusion

A lawyer may not, under the Code, make any contribution to a judge which would violate the Code of Judicial Conduct. NY State Ethics Opinion 289 states that a judge may not solicit campaign contributions, nor may her family. However, a duly constituted committee may solicit and accept campaign contributions on behalf of the candidate.

NYSBA Ethics Opinion 289 results in a number of awkward compromises, and is probably due for an overhaul. According to NY State Ethics Op. 289, a lawyer who regularly appears before the judge, or even a lawyer who has a pending case before the judge at the time, may ethically make a contribution to the judicial candidate, provided that the latter is not a trial judge. Since appellate judges are appointed in New York, after being elected, that proviso is circular. The better practice, and the apparent intent of NYSBA 289, is to prohibit any contribution from any litigants or their lawyers to a judge presiding over a pending case. Why should a judge ever accept a contribution from a litigant who stands to benefit from the judge’s ruling? Conversely, there are awkward issues raised by a lawyer who contributes to a judge whose rulings could benefit the lawyer. It is human nature for a litigant or lawyer with a case before the judge to expect influence in exchange for the contribution. It would certainly appear questionable for a judge to accept a large campaign contribution from a lawyer, and then rule in favor of the lawyer. A lawyer who contributes to a judge before whom she practices could create the appearance of buying justice.

The concept of screening judicial contributions by asking the candidates to avert their eyes from the donor list is not entirely satisfactory. The candidate’s campaign manager and treasurer are likely to be trusted friends and confidants. Most campaign managers are likely to have the discipline and self control to avoid divulging information from the contributor list to the

⁵ See, NYSBA 289 f.n. 18. (“A lawyer should not be considered to be involved in litigation if his firm is so involved by he has not personally participated and does not expect to personally participate in the litigation in any material way.”); Nass. Co. 22/87 (same).

candidate. But other campaign managers could betray the information, perhaps inadvertently, by a subtle expression, a chance gesture, or a change of tone of voice when a potential donor's name comes up in an unrelated conversation. And the candidate's advisor could continue to advise the candidate upon taking office, for example, by assuming a role as law secretary, in which case the advice given to the judge could be subtly and subconsciously influenced by the knowledge of the past campaign contributions. Moreover, as acknowledged in NY State Opinion 289 and ACJE 04-106, the identities of campaign contributors may be a matter of public record. The identities of campaign contributors could even legitimately become a campaign issue. A candidate's opponent might point out, for example, that a candidate for reelection favors a particular industry because she accepts campaign contributions from that industry. As a practical matter, the Feerick Commission found that most judges were in fact aware of whom their contributors were.

The rules should be clarified and tightened to unequivocally ban any contribution under any circumstances by lawyers whose firms regularly appear before the judge, or who have pending cases at the time of the contribution. And the Appellate Division should reconsider requiring lawyers to disclose prior campaign contributions to judges before whom they appear.

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