2011

Campaign Contributions, Campaign Involvement, and Judicial Recusal

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In his article, Professor Ron Rotunda concludes that no demonstrable linkage exists between campaign contributions and judicial decisionmaking. The Illinois and Michigan studies reveal that only 5-10% of campaign funds come from litigants or their attorneys; that contributions from the candidates frequently exceed those from interested parties; and that contributors are commonly dismayed by the decisions of the candidates they supported.

But entirely apart from the issue of demonstrable linkage is the question of public perception. Is the public justified in believing that campaign involvement may influence judicial decisionmaking? Is the public at ease with the amount of money raised in fundraising of judicial elections? The Illinois and North Carolina polls cited by Professor Rotunda indicate that a substantial majority of respondents believe that campaign contributions influence judicial decisions. Apart from the oft-proposed merit-selection plan, is there an alternative?

In Arkansas, we elect judges, and all indications are that we will continue to do so. Attempts to change to some variation of a merit-selection plan have been rejected. The proposed Constitution of 1970 included a partial merit-selection plan.¹ This Constitution was soundly rejected by the people. Although the merit-selection plan was not the determining factor in the defeat, it certainly did not generate popular support.

¹Vincent Foster Professor of Legal Ethics & Professional Responsibility, University of Arkansas School of Law. I met Ron Rotunda when I was a visiting professor at the University of Illinois in 1978. Nine months later, we, along with Phil Carroll of Little Rock, Mike Mahony of El Dorado, and Firestone Tire corporate counsel, gathered at the Holiday Inn in El Dorado. That meeting was in connection with Firestone Tire & Rubber Co. v. Little, 269 Ark. 636 (1980), which affirmed the Arkansas procedural doctrine that the timely answer of a defendant inures to the benefit of a defaulting co-defendant.

Accordingly, the proposed Constitution of 1980 simply asked the people to later vote on whether to have a judiciary selected by merit. But the entire Constitution again failed.\textsuperscript{2} Despite calls for a merit-selection plan,\textsuperscript{3} the revised Article VII contained in Amendment 80 retained the popular election of trial and appellate judges. It passed in 2000. If anything, support for the merit-selection plan has likely declined in recent years in light of the perceived judicial activism observed in other states. The focus has shifted to avoidance of the abuses of judicial elections.\textsuperscript{4}

The focus of my commentary is how the impact of judicial contributions and involvement in judicial campaigns should affect judicial recusal. Let me begin with an actual example. In December 2007, I received a postcard invitation: “Please come show support for the Re-Election of Chief Justice Jim Hannah.” Holiday refreshments were to be provided; it was described as “although not a Christmas party but close to it.” The event was hosted by six prominent northwest Arkansas law firms and two banks. Here is the dilemma: If, within a reasonable period of time after the reelection party, the banks appear in litigation before the Chief Justice, is he required to recuse? If the firms appear before him, is he required to recuse?

Consider also the more recent judicial elections to the Arkansas Supreme Court. The public campaign filings of newly elected Justices Courtney Henry and Karen Baker reveal that attorneys, firms, and Arkansas corporations contributed the maximum gifts allowed by law to the justices’ campaigns.\textsuperscript{5} Attorneys were prominent supporters of their campaigns. In which instances are the justices required to recuse?

\textsuperscript{2} See Calvin R. Ledbetter, Jr., The Proposed Arkansas Constitution of 1980, ARK. HIST. Q. 53, 53 (Spring 2001). The 1970 Constitution was supported by 43% of the electorate; the 1980 Constitution, by only 37%. Id.


\textsuperscript{5} Campaign reports are available on the webpage of the Secretary of State. http://www.sos.ar.gov.
Some historical perspective may be helpful. The Code of Judicial Conduct was adopted in Arkansas in 1973; it was revised in 1993; and the current version became effective in 2009. From the beginning, the Arkansas Code of Judicial Conduct has provided that a judge is to recuse when the impartiality of the judge might reasonably be questioned. Likewise, the case law has provided that the impartiality of the judge is raised by the judge sua sponte or in response to a party’s motion. The issue of recusal is considered solely by the judge. Nothing requires the judge to seek the advice or guidance of fellow judges; nothing requires a judge to explain a decision to withdraw or not to withdraw.

In addition to the general rule of recusal when the impartiality might reasonably be questioned, the Code also contains four specific instances when a judge “shall disqualify himself or herself”: personal knowledge of the judicial matter, financial involvement with the parties, family relationships, or prior involvement with the case as an attorney. Arkansas case law is extensive in each of these situations.

As for illustrations of when the impartiality of the presiding judge might reasonably be questioned, consider the following scenarios: (1) the defendant is the University of Arkansas, and the judge is a Razorback supporter; (2) the defendant is the School of Law, and the judge is a law school graduate, financial contributor to the law school, and occasional lecturer at the law school; (3) the dispute involves Christmas light displays, and

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10. Gray v. Univ. of Ark., 883 F.2d 1394 (8th Cir. 1989) (trial judge who was a partner of a law firm with a member of the Board of Trustees five years earlier was not required to recuse).
11. Katz v. Looney, 733 F. Supp. 1284 (W.D. Ark. 1990) (judge refused to disqualify himself based upon an allegation that he and “all or at least most of the defendants” were “extremely good friends” because no reasonable person could believe that his impartiality would be affected due to casual acquaintances with some of the defendants).
the judge has previously visited the display; and (4) the judge has an association with advocacy groups who have taken positions in the litigation.

Issues of impartiality, bias and prejudice are, initially, subjective matters that are particularly within the heart and knowledge of the trial judge. Whether a judge has become so biased that he should disqualify is a matter generally left to the judge’s discretion. An appellate court will reverse only upon an objective demonstration of prejudice that was communicated to the litigants. Absent an abuse of discretion, the appellate court will not reverse a decision not to recuse.

As adopted by the American Bar Association in 1990, the Model Code of Judicial Conduct inserted, for the first time, a provision on campaign contributions and judicial recusal. With little discussion, that provision was not recommended to the Arkansas Supreme Court; the Arkansas Bar Association Committee on the Code of Judicial Conduct believed that the size or nature of campaign contributions was not an issue in Arkansas.

The 2007 version of the Model Code of Judicial Conduct contains language similar to the 1990 Code. Model Rule 2.11(A)(4) provides that recusal is required if:

(4) The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than [$][insert amount] for an individual or [$][insert amount] for an entity

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12. Osborne v. Power, 318 Ark. 858, 890 S.W.2d 570 (1994) (judge who had seen the Christmas lights display had discretion whether to recuse).
13. Patterson v. R.T., 301 Ark. 400, 784 S.W.2d 777 (1990) (chancellor’s association with certain advocacy groups presented the appearance of bias and prejudgment and required reversal of the decree).
19. Note: the author was the co-chair of the 1991-92 Arkansas Bar Association Committee on the Code of Judicial Conduct, and the chair of the 2007-09 Task Force. Some of the comments contained herein are based upon discussions in the meetings of the committee and the task force.
[is reasonable and appropriate for an individual or an entity.]\(^{20}\)

The Task Force decided, as in 1993, that such a provision concerning a specific dollar amount was inappropriate at this time\(^{21}\) despite the increasing cost of judicial elections.\(^{22}\)

Based on its shared knowledge of Arkansas elections, the Task Force found no clear connection between campaign involvement and judicial decisions. However, given the judicial elections in other states,\(^{23}\) the Task Force felt that specifically alerting judges to the concern, and focusing attention on it in a nondisciplinary manner was appropriate. Accordingly the Task Force recommended a unique Arkansas addition to the Code, which was approved by the Arkansas Bar Association and the Arkansas Supreme Court. Comment [4A] to Rule 2.11 reads:

The fact that a lawyer in a proceeding, 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 others factors known to the judge may raise questions as to the judge’s impartiality under paragraph (A).

Note the three differences between the proposed Model Rule and the adopted Arkansas comment: (1) the Rule contains a dollar amount; the comment does not; (2) the Rule ignores campaign participation or involvement; the comment covers it; and (3) the Rule is mandatory and enforceable; the comment is not.

Disqualification is not automatic but instead requires careful judicial consideration of relevant factors. To illustrate, the maximum statutory contribution of $2000 to the judicial

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23. The Task Force’s decision was prior to the Supreme Court decision in Citizens United. As Professor Rotunda and others have indicated, that decision increases the likelihood that interested business and other groups will contribute to judicial candidates.
campaign may not be viewed as significant. However, if the maximum amount is also given by the lawyer’s spouse, the lawyer’s children, and members of the lawyer’s firm, further questions should be asked. If the lawyer merely placed a judge’s bumper sticker on her automobile or allowed her name to appear in a newspaper advertisement for the judge, most individuals would probably conclude that these typical and commonplace election activities do not raise reasonable questions as to judicial impartiality. However, the answer would be significantly different if the attorney were the head of the judge’s campaign committee and responsible for raising funds.

Continuing with the illustrations, if the attorney appears before the judge three months after the judge assumes the bench, the issue is more relevant than if that appearance is three years after the election. The lawyer’s appearance before the judge in a routine child-custody case does not raise eyebrows. But if that lawyer, prominent in the campaign, appears in a high-profile personal-injury suit for the plaintiff with the potential of large attorney fees, or for the defendant in opposing the certification of a class, any judge should be particularly aware and considerate of the appearance of impropriety.

Consider the example from the beginning of this commentary; namely, the event in support of the reelection of Chief Justice Hannah. What factors may be relevant and should be considered? Was the Chief Justice in attendance at the party? Did he have a prior, perhaps long-standing relationship even before going on the bench, with these law firms? How much time has elapsed between the time of the holiday party and the appearance of any of these individuals before the supreme court? Did the attorneys have primary responsibility for the appeal, or were they merely on the brief? What was the nature and magnitude of the litigation?

Remember that in any of these borderline cases, the judge has an option that falls between the cautious and immediate step of recusal on the one hand, and a dogged and admirable determination to fulfill his judicial duties on the other. The judge is to 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.\textsuperscript{24} The option, authorized by Rule 2.11(c), permits the judge to state on the record both the basis for disqualification and his reasoned conclusion that he is able to impartially preside over the matters. If the parties and the attorney consent in writing to his continued presiding over the matter, the judge may preside. For example, the judge may disclose:

Please let the record show that the attorney for the plaintiff was the head of my election campaign last year, and contributed the maximum allowable amount to my campaign. However, despite that, I believe that I am able to fairly and independently preside over this matter, and I am certainly willing to do so.

If the matter is a relatively minor property dispute, with local parties and local attorneys, all may willingly consent. However, if the matter is a major products-liability case, with a national corporation as a defendant and out-of-state counsel admitted pro hac vice, the defendant, or defense counsel, may be reluctant to consent. The letter and spirit of the rule is that all parties and all lawyers must consent. A local lawyer may be willing to consent in order to avoid the risk of antagonizing the judge, whereas the party itself may be more concerned with the risk of judicial favoritism. Frank discussion between attorney and client is an essential prerequisite to any waiver under Rule 2.11(c). As the court has said in another judicial-recusal matter: if the judge's activities "create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired,"\textsuperscript{25} the judge should step aside.

In theory, a judge cannot be disciplined by the Arkansas Judicial Discipline and Disability Commission for failing to recuse because of campaign involvement. Placing the guideline

\textsuperscript{24} \textbf{Ark. Code of Jud. Conduct R. 2.11 cmt. 5 (2009).} More than a decade ago, Justice Brown wrote that "in practice, judges do appear to disqualify from cases involving their committee chairs," at least in the six months of the campaign itself. Brown, \textit{supra} note 4, at 39. Whether recusal also occurs after election is a different matter.

\textsuperscript{25} \textbf{Huffman v. Ark. Jud. Discipline and Disability Comm'n, 344 Ark. 274, 283, 42 S.W.3d 386, 392 (2001).} On March 19, 2010, the Judicial Discipline and Disability Commission admonished District Judge Mark Johnson of Sharp County, finding that he presided over a DWI case against a relative, thus violating Rule 2.11(A)(2)(a). \textit{Jud. DDC Case #09-261.}
into an advisory/exhortatory comment instead of an enforceable rule was certainly intended to remove the possibility of enforcement.

However, in at least one instance, a judge has been disciplined for failing to recuse. A circuit judge who owned 12,000 shares of Wal-Mart stock with a value of approximately $700,000 presided over a request for a temporary restraining order sought by Wal-Mart against a labor union. After first attempting to find another judge to hear the emergency request, the judge granted the TRO in favor of Wal-Mart before subsequently recusing from further action in the matter. For his brief involvement in the case, the judge was given a letter of admonition, the lowest form of discipline, by the Arkansas Judicial Discipline and Disability Commission.26

Under the Code, disqualification is mandated only if the judge's economic interest in a party to the proceeding is greater than de minimis. Despite the argument that his ownership interest in Wal-Mart was de minimis in light of the value of Wal-Mart and that his interest could not be substantially affected by the litigation;27 the supreme court affirmed the admonition.28 The court focused on the more basic issue of appearances, particularly appearances in two contexts—the appearance of impropriety under Rule 1.2,29 and the appearance of partiality under Rule 2.11. Chief Justice Hannah, writing for a six-member majority, emphasized the judge's duty to avoid conduct that would "create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."30 Although the opinion also discussed the de minimis financial-ownership issue,31 the appearance issue controlled the case.

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27. The "de minimis" standard is defined in the Terminology section of the Arkansas Code of Judicial conduct.

28. Huffman, 344 Ark. at 285, 42 S.W.3d at 394.

29. The decision was based upon the earlier version of the Arkansas Code of Judicial Conduct of 1993. Although the Code numbers and rule numbers have changed, the basic principles have not. For simplicity's sake, I am using the current rule numbers.

30. Huffman, 344 Ark. at 283, 42 S.W.3d at 392.

31. See also Huffman, 344 Ark. at 283, 42 S.W.3d at 394-95 (Glaze, J., dissenting) (suggesting that the canons on disqualification because of a financial interest are confusing in light of the "substantially affected" language).
Prior to the adoption of Comment [4A] to Rule 2.11, the only somewhat-applicable guidance to the issue of campaign involvement and judicial recusal was Massongill v. County of Scott. In a taxpayer’s illegal-exaction suit, the plaintiff moved the circuit judge to recuse on the basis that the attorney for the defendants had served as the judge’s campaign treasurer. Concluding that he could preside impartially, the judge refused to recuse. Affirming, the supreme court stated that there is no duty to recuse when there is no prejudice, and since the plaintiff had not demonstrated bias or prejudice by the judge, the judge acted properly. However, in reversing on other grounds, the court “note[d] the potential for the appearance of impropriety in the relationship between the trial judge and appellees’ counsel.” It did not expressly require the judge to reconsider the decision not to recuse. Factors such as when the election was held, whether it was contested, and whether the defense attorney was actively involved in fundraising are not answered in the opinion.

Supposing these cases arise after the adoption of Comment [4A], how should a judge act? Without trying to be legalistic, the level of analysis and consideration might be considered as five steps:

1) Comment [4A] simply says to the judge: consider all these factors.

2) Case law generally says that a decision whether or not to recuse is addressed to the discretion of the judge.

3) Comment [5] to Rule 2.11 tells the judge to disclose the campaign involvement on the record “if the parties or lawyers might reasonably believe it is relevant to disqualification.”

4) Case law, particularly Huffman v. Judicial Discipline and Disability Commission, goes further and says that recusal is appropriate if the judge’s activities “create in reasonable minds a perception that the judge’s ability to carry out the judicial responsibilities with integrity, impartiality, and competence is impaired”

5) Finally, Caperton v. A.T. Massey Coal Co. reminds the judge that in unique situations, the failure to
recuse might amount to a denial of due process to the litigants.\textsuperscript{35}

CONCLUSION

We are fortunate that judicial-election controversies have been infrequent in Arkansas. Comment [4A] to Rule 2.11 properly places the initial burden on the judge to decide whether, in light of all factors arising out of a judicial campaign, the judge is capable of presiding with the requisite integrity, independence, and impartiality.

\textsuperscript{35} As Professor Rotunda points out, \textit{Caperton} involved such a rare combination of factors, that the position adopted by the five-member majority is unlikely to be applicable to other litigation.