NEW YORK
CITY BAR

COUNCIL ON JUDICIAL ADMINISTRATION

ROGER JUAN MALDONADO
CHAIR
1370 AVENUE OF THE AMERICAS
7TH FLOOR
NEW YORK, NY 10019
Phone: (212) 246-2400
Fax: (212) 765-4212
rmaldonado@balberpickard.com

STEVEN N. BLIVESS
SECRETARY
1370 AVENUE OF THE AMERICAS
7TH FLOOR
NEW YORK, NY 10019
Phone: (212) 246-2400
Fax: (212) 765-4212
sblivess@balberpickard.com

March 29, 2011

John McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street
New York, N.Y. 10004

Re: Proposed Rule 151: Case Assignments and Campaign Donations

Dear Mr. McConnell:

As chair of the Council on Judicial Administration ("the Council"), I write on behalf of the New York City Bar Association ("the City Bar") to offer the following comments and concerns regarding proposed Rule 151 of the Rules of the Chief Administrator.

The City Bar has a deep and longstanding interest in promoting and sustaining the highest standards of integrity among New York State judges. The City Bar's members include thousands of attorneys practicing in the New York State courts who share a profound interest in ensuring that the judges before whom they appear uphold --- and are perceived to uphold --- the highest standards of the profession. The judges who are City Bar members also share this same interest.

It has long been the position of the City Bar that the idea that no action is necessary, because judges are not corrupted by campaign contributions, fails to account for the public perception that judges are influenced by such contributions. This public perception undoubtedly corrodes respect for the justice system. *See* ABCNY Report, "Contributions to Campaigns of Candidates For Surrogate, and Appointments by Surrogates of Guardians Ad Litem, 54 The Record 64 (1999), and Fund for Modern Courts report, "A Heightened Recusal Standard for Elected New York Judges Presiding Over Cases, Motions or Other Proceedings Involving their Campaign Contributors," April 21, 2010. Although the Legislature could eliminate the perception by either adopting a merit appointment

system or a program to publicly finance judicial elections, absent such legislation it is appropriate to institute a court rule on this subject.

Proposed Rule 151's simplicity avoids many of the pitfalls which provoked the City Bar's criticism of the Feerick Commission's proposal in 2004, *see, Comments of the Association of the Bar of the City of New York on Proposed Amendments to Chief Administrator's Rules and Disciplinary Rules, Feb. 13, 2004,* and which provoked the Council's informal criticism of the Fund for Modern Courts' proposal last fall. For example, we expressed fear that the 2004 proposal, requiring attorneys to disclose their campaign contributions and their clients' contributions to the judge assigned to the matter, would create the potential for needless and burdensome ancillary motion practice. Because proposed Rule 151 will be implemented by court administrators, individual judges will not be forced to entertain and decide recusal motions based on campaign contributions. Judges who choose to remain ignorant of their campaign contributors will not be forced to learn about them. Because lawyers do not have to make numerous recusal motions, the chance that lawyers will antagonize and endanger their future relationships with a judge is removed.

For these reasons and subject to the concerns and recommended revisions discussed below, the Council supports the majority of the provisions of the proposed rule.

We address each paragraph of the rule in turn.

(a) No case shall be assigned to a judge or justice, other than in an emergency, or as dictated by the rule of necessity, or when the interests of justice otherwise require, if such assignment would give rise to a campaign contribution conflict as defined in subdivision (b).

While Rule 151 addresses contributions before assignment, it is silent on the issue of an attorney or litigant making a contribution during the course of litigation. The New York State Bar Association Ethics Opinion #289 (1973) provides, "...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." We recommend that lawyers be reminded of their ethical obligation in the proposed rule as judges are reminded of theirs in subsection "e."

Still we are concerned about "judge shopping" -- i.e. a litigant does not like the judge's rulings against that litigant's interest in pending litigation and the litigant makes a donation to that judge's campaign to force the reassignment of a new judge. We propose that the supervising judge, when he or she becomes aware of a contribution made by an individual litigant during the course of litigation, be specifically authorized to take appropriate action, which may include reassignment or not, or any other remedy the supervising judge deems appropriate. This provision would be in place only during the course of litigation. If a litigant makes any contribution in any amount, then it would be up to the supervising judge, in consultation with the trial judge or justice if necessary, to fashion a remedy. It would be incumbent upon the supervising judge to do his or her best to resolve the matter by fashioning a remedy without involving the judge or justice. Otherwise, the judge or justice would

become aware of the amount of a contribution in apparent violation of long-standing opinions issued by the Advisory Committee on Judicial Ethics, the City Bar, and other organizations.[1]

We also agree with the Brennan Center for Justice that the supervising judge should notify the parties prior to reassignment of a pending case under this provision, and that the non-contributing party should have the option to waive a campaign contribution conflict identified by the supervising judge. This is the most effective means to deter and prevent this form of judge-shopping.

We believe that this proposal would not offend the First Amendment, as such a provision does not bar any contribution.[2] We believe this proposed authority is supported by the Supreme Court decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208, 77 USLW 4456 (2009), that an extremely large contribution ($3 million, in that case) denies the adversary due process if the judge who received the contribution is not recused.

(b) For purposes of this Part, a campaign contribution conflict shall exist where an attorney or party in a case has contributed $2500 or more individually (or $3500 or more collectively, by multiple plaintiffs or defendants, or by an attorney and his or her law firm) to the assigned judge or justice's campaign for elective office within two years prior to such assignment.

We consider the rule to be unclear as to members of the firm and associates who are not working on the litigation before the judge. The subsection should be clarified to state clearly that a law firm donation of over $3,500 within two years binds the entire law firm; a law firm and a member or associate's donation aggregating over $3,500 within two years binds the member or associate; and an individual attorney's donation of over $2,500 within two years binds that individual attorney. Otherwise, contributions made by multiple individual members of the law firm would not be aggregated. This bright line rule would make it clear that an entire firm would not be disqualified by reason of members' individual contributions, and would avoid judges being inappropriately drawn into this issue, taking their focus away from the substance of the case.

In addition, we suggest that the dollar amounts in the rule should be periodically adjusted for inflation, just as judicial salaries will be periodically adjusted by the new pay commission.

(c) An assignment in violation of this rule shall not diminish the authority of the assigned judge or give rise to any right, claim, or cause of action by any person.

We are concerned that the rule does not clearly provide that an administrative error assigning a matter to a judge where one party or attorney contributed more than the threshold of $2,500 for an individual, or $3,500 for a firm, does not lead to automatic recusal. It should be clarified to say so, and to provide that in such situation, the supervising judge would fashion a remedy or penalty, the

---

[1] See, e.g., Advisory Committee Opinion 87-27 and Advisory Committee Opinion 02-06, which states that the Code of Judicial Conduct's ban on a judicial candidate's personal solicitation of campaign funds "carries with it an implicit recognition that a candidate should remain ignorant" of who contributed to the campaign. It would, of course, be illogical to suggest that a judge could possibly be in violation of the Code because he or she was informed of a contribution by a supervisor. Nevertheless, in view of the seeming tension between the new rule and the older opinions, we feel it would be wise for the Office of Court Administration to ask the Advisory Committee to update and clarify its opinions.

[2] Of course, the Rule must be read in conjunction with existing provisions of the Election Law which prohibit any campaign contributions in excess of specified limits. The contribution limits for judicial campaigns are determined by a statutory formula that takes into account the number of enrolled party members, or registered voters, in the candidate's electoral district.

supervisor doing his or her best to resolve the matter without the judge or justice and only in consultation with the judge or justice as a last resort.

(d) The Chief Administrator of the Courts, with the advice and consent of the Administrative Board of the Courts, shall take such further steps as may be necessary to give effect to this Part, including establishment of a timetable for its orderly implementation.

We believe this part of the rule is necessary to address the specific concerns of smaller counties which are not addressed in this letter.

We are concerned about the logistics for implementing such a rule in Civil Court and Criminal Court as these are not courts which use individual assignment systems ("IAS"). Cases are assigned to one judge on Monday and another on Tuesday. Assuming that a contributions check is done on a daily basis in each part of the court, what will happen if an over-the-limit contribution is discovered? Will that case be assigned immediately to another judge? Will another judge be called to the courtroom to handle the case or the litigants sent to another courtroom to find the new judge? Is this a recipe for disaster where so many litigants are unrepresented? Perhaps application of the rule should be limited in lower courts in which judges are assigned at random to situations in which the litigants or attorneys appear before a judge for hearings, trials or dispositive motions, rather than to routine calendar call and appearance parts.

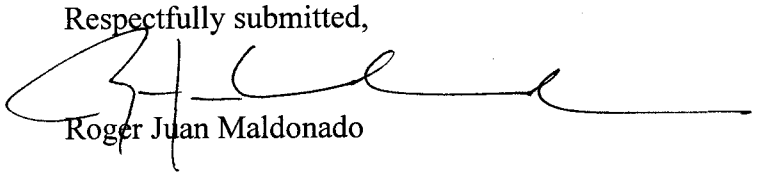
As for Supreme Court, which is an IAS court, we believe the supervising judge with the assistance of a well trained clerk will be able to easily implement the rule.

(e) A judge shall be mindful of sections 100.3(E)(1) and 100.3(E)(2) of the Rules of the Chief Administrator, given the ready public availability of records of campaign contributions through the Internet and other current technologies and the impact of such information upon public perceptions of judicial neutrality.

Rule 100.3(E)(1) provides that a judge will disqualify himself or herself if the judge's impartiality might be reasonably questioned. Rule 100.3(E)(2) provides that judges shall keep informed about their own economic interests. We propose, consistent with our prior comments, that this subsection be clarified to confirm that judges do not have the affirmative duty to look into who contributed more than $2,500 to their campaigns, unless campaign contribution conflicts are brought to the direct attention of the affected judge.

Thank you for your consideration.

Respectfully submitted,



Roger Juan Maldonado