NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #10

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Court Structure and Operations.

Attached is a report from the Committee on Court Structure and Operations regarding the implementation of Part 151 of the Rules of the Chief Administrative Judge. Originally adopted in 2011, Part 151 addresses potential conflicts of interest created when a judge is assigned to a case in which the parties, their attorneys, or their attorneys' law firms have made contributions to the judge's campaign, prohibiting the assignment of a matter to a judge when certain conflict criteria are met. It is not a recusal rule. Procedurally, the Office of Court Administration compiles a list of campaign contributions, updated on a monthly basis, which helps court clerks identify conflicts (the Part 151 Report). If a clerk's office finds a conflict, it notifies opposing counsel and provides an opportunity for counsel to waive the conflict. If the conflict is not waived, the clerk reassigns the case.

In 2013, the committee surveyed court clerks to assess the implementation and effectiveness of Part 151. The committee found a general understanding of and agreement with Part 151. However, the committee has concluded that Part 151 would benefit from clarification and modest changes in implementation. The committee's recommendations are as follows:

- Clarify, through a "Frequently Asked Question" listing on the OCA website, or by an amendment to Part 151, that "law firm or firms" does not include contributions from the firm's members.

- Examine the methods used to track campaign contributions so that potential litigants are readily identified and explore a method to provide a search function in a more expansive database.

- Examine whether there is a need to track non-direct methods of contribution, such as hosting parties or PAC contributions.

- Develop a method for the Part 151 Report to synchronize with existing or anticipated case management systems to reflect changes in parties, notices of appearance, and consents to change attorneys.

- Track attorneys through their OCA registration so that their contribution travels with them for purposes of the Part 151 Report.

- Broader circulation of an article authored by Chief Administrative Judge A. Gail Prudenti, preparation of a NYSBA article on Part 151, or other form of continuing education.

- Continued periodic training on Part 151 for court clerks.

- Adopt a method to revise the Part 151 Report to include all campaign contributions from all sources, regardless of contribution amount, so that all attorneys, firms and litigants are properly tracked.

This report was circulated for comment in November 2013. The Committee on Procedures for Judicial Discipline has indicated that it does not wish to comment.

The report will be presented by Stephen P. Younger, co-chair of the committee, and committee member Kenneth A. Manning.

REPORT on
Rules Governing the Assignments of Cases Involving Contributors to Judicial Campaigns

Report by the Committee on Court Structure and Operations
(October 2013)

From: NYSBA Committee on Court Structure and Operations

Date: September 17, 2013

Re: Part 151 Analysis

Overview

This analysis examines the implementation, enforcement, and effectiveness of 22 NYCRR § 151.1 ("Part 151"), which address the potential conflict of interest created when a judge is assigned to a case in which the parties, their attorneys, and/or their attorneys' law firms have contributed to the assigned judge's campaign. It includes the background of Part 151, the regulation's contribution guidelines, and a survey of Office of Court Administration ("OCA") District Executives' experience with Part 151.

Background

Part 151 was promulgated by Court of Appeals Chief Judge Jonathan Lippman in response to growing concerns over judges receiving campaign contributions from attorneys and litigants who frequently appear before them. These concerns over "pay to play" in the court system sparked debate over the judiciary's impartiality.

To address similar concerns, other states have enacted statutes, rules, or canons of judicial ethics designed to address the potential conflict of interest created

when campaign contributors come before elected judges as parties and attorneys. Some states require recusal once contributions cross a certain threshold. California, for example, amended its Code of Civil Procedure to require judicial disqualification where a party or attorney contributes more than $1,500 either to support the judge's last election or in anticipation of an upcoming election. *See* Cal. Civ. Proc. Code § 170.1(a)(9). The Alabama Code contains a similar provision. *See* Ala. Code § 12-24-2(c). Utah and Arizona incorporate equivalent recusal rules in their codes of judicial conduct. *See* Utah Code Jud. Conduct Rule 2.11(A)(4); Ariz. Code Jud. Conduct Rule 2.11(A)(4). Mississippi's Code of Judicial Conduct contains an analogous canon, permitting parties to move for recusal where an opposing party or attorney is a "major donor" to the presiding judge (*see* Miss. Code Jud. Conduct Canon 3(E)(2)), with "major donor" defined as one whose contribution to the judge's most recent campaign exceeded a specified threshold (*see id.* at Terminology, "major donor," subsection (c)).

Other states take a more flexible approach, requiring judges to recuse themselves if the election support they received from parties or litigants creates a reasonable question about their impartiality, determined by enumerated factors. *See*, *e.g.*, Ga. Code Jud. Conduct Canon 3(E)(1)(d); Tenn. Code Jud. Conduct Rule 2.11(A)(4) & cmt. 7.

Part 151 is different, as it is a purely administrative rule. It is not an ethical or recusal rule, nor is it a mandate for voluntary attorney disclosure. Part 151

does not create a private right of action to remedy a violation, or involve the participation (or knowledge) of the judges it affects.[1]

Analysis

Part 151 went into effect on July 15, 2011. It provides: "[n]o matter shall be assigned to a judge, other than in an emergency, or as dictated by the rule of necessity, or when the interests of justice otherwise require" when conflict criteria are met. *Id.* § 151.1(a)(1). Part 151 specifically provides that an assignment in violation of its provisions due to administrative error or oversight does not diminish the authority of the assigned judge; give rise to any right, claim, or cause of action; impose any additional ethical obligations upon the judge; or diminish the judge's obligation to consider recusal. *Id.* § 151.1(a)(2)(i)-(iv). Nor does the rule diminish a party's right to request recusal. *Id.* § 151.1(a)(3). Furthermore, Part 151 does not apply to post-assignment campaign contributions to the presiding judge as such contributions would only affect later assignments to that judge.

[1] A New York Law Journal article, written by Joel Stashenko, printed on November 21, 2011, states: "[j]udges violating the contribution rules will face the same punishments as those violating other judicial canons, including removal." We have found no support for this assertion.

Procedure:

OCA periodically compiles a list of campaign contributions (the "Part 151 Report") from public documents filed with the New York State Board of Elections ("Board of Elections"). The Part 151 Report helps Court Clerks identify conflicts and provides attorneys with information relevant to a request for recusal. *Id.* § 151.1(c)(1). The Part 151 Report is available on OCA's website, and is provided to each District office. The Part 151 Report is updated on a monthly basis. To compile the Part 151 Report, OCA personnel review public filings and track law firm, attorney, and non-attorney contributions to judicial campaigns. Contributions that exceed the conflict threshold remain on the Part 151 report for two years.[2]

When reviewing campaign finance public filings, OCA personnel must determine whether contributing individuals are attorneys and, if so, the law firm with which they are associated. OCA makes these determinations at the time the Board of Elections discloses campaign contributions. OCA reported that administrative costs preclude it from periodically updating contributing attorneys' firm membership. OCA has begun sending notification letters to contributing attorneys, informing them that court records will reflect the contribution to ensure compliance with Part 151. To date, no recipient has informed OCA that the notification letter contained an error; most recipients express curiosity about Part 151.

[2] The Part 151 Report currently does not list donations totaling less than $800.

After random judicial assignment, the Clerk's office reviews cases to determine if an attorney, law firm, or litigant presents a Part 151 conflict. Clerks are to repeat this assessment whenever a new attorney appears in a case.

Waiver:

If the Clerk's office finds a Part 151 conflict, it notifies opposing counsel (but not the assigned judge) and provides a waiver form to be returned within twenty days, should opposing counsel choose to waive the conflict. Unless the Clerk's office receives an executed waiver, it reassigns the case.

Window Period:

Only contributions to judicial campaigns that occur within the "window period" count towards Part 151's threshold amount. The "window period" begins

> nine months before a primary election, judicial nominating convention, party caucus, or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy.

22 NYCRR § 100.0(Q). The window period ends six months after the general election, for general election candidates, and six months after the primary election, convention, caucus, or meeting for non-general-election candidates. *Id.* After July 15, 2011, all

campaign contributions during the "window period" count towards Part 151's conflict threshold. 22 NYCRR § 151.1(e).

Conflict Period:

If a contribution exceeds Part 151's conflict threshold, the resulting conflict lasts for two years after the Board of Elections first publishes the contribution, or, if the candidate was not then in office, for two years after the candidate assumes judicial office. *Id.* § 151.1(a)(3). If a contributor's aggregated contributions exceed the conflict threshold, the two-year conflict period runs from the date of the last contribution or when the judge takes office, whichever is later. *Id.* § 151.1(a)(3)(ii).

Individual Contributions:

Part 151.1(b)(1) provides that "a campaign contribution conflict shall exist when:

(i) an attorney appearing as counsel of record in a matter before a judge, or appearing in the matter as co-counsel or special counsel to such counsel of record; *or*

(ii) such attorneys' law firm or firms; *or*

(iii) a party in the matter:

individually has contributed $2,500 or more to such judge's campaign for elective office during the window period . . . ." *Id.* § 151.1(b)(1) (emphasis added).

The OCA memorandum to administrative judges states that a Part 151.1(b)(1) conflict arises when a judge receives a *single* contribution of $2,500 from the contributors listed above. While a single donation may be more easy to spot, Part 151.1(b)(3)(ii) provides that if a particular person or entity makes multiple contributions during the window period, those contributions are combined and treated as a single contribution. With multiple donations, the two year conflict period runs from the Board of Election's publishing the last donation or, if the candidate was not currently in office, for two years after the candidate assumes judicial office.

The Part 151 Report includes contributions below the applicable threshold, but only as low as $800; it omits all contributions of less than $800.

Part 151.1(b)(1)(ii)'s use of the phrase "law firm or firms" is a source of confusion. OCA representatives first reported that "law firm or firms" means any contributions made in a firm's name, as well as firm members' individual contributions. Thus, OCA would combine all contributions made by attorneys in a particular law firm with the firm's own contributions to calculate the "individual" contribution of the law firm. Part 151's plain language, however, does not indicate that firm members' contributions will count both for themselves, as individuals, and for their law firm. This reading also contradicts OCA's memorandum to administrative judges, which states: "for the purposes of calculating the $2,500 threshold for individual campaign contribution conflicts, an attorney's contribution will not be imputed to the attorney's firm." In a clarification by Ronald Younkins, OCA Executive Director, "law firm or

firms" contributions should include only those donations made in the name of the firm itself.

Collective Contributions:

Part 151 provides: "a campaign contribution conflict shall exist when the sum of all contributions to a judge's campaign for elective office made during the window period . . . by:

(i) an attorney appearing as counsel of record in a matter before such judge, and attorneys appearing in the matter as co-counsel or special counsel to such counsel of record; *and*

(ii) each such attorneys' law firm or firms; *and*

(iii) each client of each such attorney in the matter totals $3,500 or more."

Id. § 151.1(b)(2) (emphasis added). The Clerk's office aggregates contributions from one side of a matter—e.g., the plaintiff, the plaintiff's attorney(s), and the attorney's/s' firm(s)—to determine if they exceed the $3,499 threshold. Additionally, although Part 151.1(b)(2)(iii) refers to "each client of each such attorney" instead of the "party in the matter" language contained in Part 151.1(b)(1)(iii), Clerks aggregate all contributions made by either the plaintiff or defense "team."

The Part 151 Report includes contributions below the conflict contribution guidelines, but does not include contributions under $800. Therefore, there is the potential that a campaign contribution may not appear on the Part 151 Report, but

when aggregated with the donor's client or law firm (for collective contribution purposes), may create a conflict under the rules. Therefore, this conflict could not be properly addressed administratively.

Polling

Earlier this year, we began surveying the offices of the Court Clerks (or their Deputies), Surrogate Clerks, Criminal Court Clerks, Appellate Division Clerks, and New York City Civil Clerks. We developed the following questions designed to elicit the data needed to make a realistic assessment of Part 151's implementation and effectiveness:

1. What is the title of the individual responsible for reviewing for compliance with Rule 151? If there is more than one individual, please name all individuals.

2. Do you have a formalized procedure for recognizing and addressing Rule 151 conflicts? Was this created in-house or provided to you?

3. Have you received any formal training regarding Rule 151? If so, please indicate what training you received, including in what form (e.g. hand-outs or in-person training), and the date you last received training.

4. Have you received any updates or continuing training regarding Rule 151?

5. Who prepares the list of campaign contributions that identifies those for whom there is a Rule 151 conflict? Do you make your own calculations? Is this list updated? If so, how often?

6. If an attorney, law firm, or party is listed on the Rule 151 conflict list, regardless of campaign contribution amount, does that mean there is an automatic Rule 151 conflict?

7. Do your judges see the Rule 151 conflict list?

8. May a party or attorney waive a Rule 151 conflict? If so, how is that accomplished?

9. May a party or attorney bring a motion to disqualify a judge based on the opposing party's/attorney's contribution to a judge's campaign?

10. If a case is assigned in violation of Rule 151, must the case automatically be reassigned to another judge?

11. Have you ever encountered a campaign conflict? If so, how many?

12. Have you ever encountered a party, attorney, or law firm abusing Rule 151? If so, please explain, without identifying the individual or case.

13. If a Rule 151 conflict arises, what is the process for reassigning the case?

14. Do you have any suggestions to make Rule 151 more effective?

Our initial survey did not generate a meaningful response. Thereafter, Ronald Younkins, OCA Executive Director, provided us with contact information for

fourteen OCA District Executives from the Third through Tenth Judicial Districts, along with five OCA representatives in the New York City Civil Court. The survey of the District Executives and OCA representatives revealed a general understanding and agreement with Part 151. Those surveyed indicated:

a. The District Executive and the Chief or Deputy Court Clerks are responsible for ensuring compliance with Part 151.

b. They were informed about Part 151 when it was promulgated, there have been teleconferences with OCA headquarters about Part 151, they have received memoranda from OCA on the topic, and can go directly to Ronald Younkins with any questions.

c. Some Districts have created "in-house" procedures to identify and/or address campaign conflicts. These "in-house" procedures are not formalized in writing and are subject to change.

d. They acknowledge that they receive the Part 151 Report created and distributed by OCA. Some of the District Executives pass along the Part 151 Report to the Court Clerks, while others do not distribute it to Clerks in counties that the Part 151 Report does not affect.

e. They acknowledged that if an individual, attorney or law firm appears on the Part 151 Report, it does not necessarily mean there is a conflict because there is a $800-$2,400 column shown on the report. This column is used if the District

Executives/Clerks need to aggregate contributions. Some District Executives require that they be contacted by the Court Clerks if aggregation needs to occur.

f. All but one surveyed agreed that the assigned judge does not see the Part 151 Report and is not notified about a conflict.

g. There is a general understanding of the waiver process, although the vast majority have not issued a waiver (i.e., there has been no conflict found).

h. Most were unfamiliar about motions to disqualify a judge based on campaign contributions.

i. Only two surveyed recall having encountered campaign conflicts. The majority of conflicts were reassigned. Others surveyed indicated that they did not believe conflicts occurred even in contested elections because of the way the elected judge was assigned when elected (e.g., the judge was assigned to the family court part and the contributors do not practice family law or the judge was assigned to another county in the district).

j. There were no suggestions to make Part 151 more effective.

The survey of District Executives and a few Court Clerks, however, does not provide us with complete data about whether Part 151 is working in the field as designed, or how it has been implemented.

Conclusions and Recommendations

Since beginning our review of Part 151, the Hon. Gail A. Prudenti has authored an article regarding Part 151 and its implementation (copy attached). Judge Prudenti's article is an excellent summary of Part 151 for practitioners, Judges, and Clerks alike. Judge Prudenti concludes that Part 151's implementation has been smooth and successful. In addition to Judge Prudenti's article, we have had the benefit of the perspectives and experiences of both Ron Younkins, Chief of Operations, and John McConnell, Esq., Counsel. Based on all of the information that we have gathered, we believe that Part 151 would benefit from clarification and modest changes in implementation. Accordingly, we offer the following conclusions and recommendations:

1. **Conclusion**: There should be a clearer definition under Part 151 that the phrase "law firm or firms" does not include the contributions of the firm's members.

   Recommendation: Clarifying, through the use of Frequently Asked Questions on the OCA website, or an amendment to Part 151, that "law firm or firms" does not include contributions from the firm's members.

2. **Conclusion**: Confusion surrounds whether litigant conflicts are being identified or tracked. Currently, OCA policy provides for tracking of litigants. The work is done manually, and it is unclear whether it is being done in every case.

Recommendation: Examine the methods used to track all judicial campaign contributors on OCA's Part 151 Report, so that potential litigants are readily identified. A method to provide a search function in a more expansive database should be explored.

3. **Conclusion**: Part 151's mechanism is better-suited to large counties, where substitute judges are plentiful, than rural counties, where alternate judges are scarce.

Recommendation: No action recommended.

4. **Conclusion**: Part 151 addresses only direct financial contributions by attorneys, law firms, and litigants. It does not account for other methods of contribution, like hosting a fundraiser, except for capturing the indirect costs, such as providing food and beverages, that are required to be reported to the Board of Elections, and hence, show up on the Part 151 report.

Recommendation: Examine whether there is a need to track non-direct methods of contribution, such as hosting parties or PAC donations.

5. **Conclusion**: Part 151's initial conflict inquiry is a snapshot taken at the outset of a case; it does not address the fluidity with which attorneys, firms, and parties join and leave cases as litigation progresses. We understand that OCA policy is to examine joinder of new parties, triggering a new conflict inquiry. It is not clear that this is being done in all cases.

Recommendation: Develop a method for OCA's Part 151 Report to synchronize with the existing or anticipated case management systems to reflect changes in parties, notices of appearance, and consents to change attorney.

6. **Conclusion**: The Part 151 Report does not track attorneys' movement to new law firms.

Recommendation: Track attorneys through their registration with OCA, so that their contribution activity travels with them for purposes of OCA's Part 151 Report.

7. **Conclusion**: The Part 151 Report is not synchronized with case management.

Recommendation: See Recommendation to "5," above.

8. **Conclusion**: It is doubtful that attorneys fully understand the waiver system, or its intent—preventing lawyers from intentionally creating conflicts with judges who are perceived as unfavorable.

Recommendation: Broader circulation of Judge Prudenti's recent article, preparation of a Bar Association article addressing the waiver system, or another form of continuing education.

9. **Conclusion**: Each Judicial District seems to have a slightly different understanding of Part 151 and how it works.

Recommendation: Continuing periodic training on Part 151 for Court Clerks.

10. **Conclusion**: Districts and staff members in areas without contested judicial elections may not be fully aware of the Part 151 requirements.

Recommendation: See Recommendation to "9," above.

11. **Conclusion**: Because current OCA policy is not to track amounts under $800, there is the potential for abuse by attorneys, law firms, or litigants. While OCA has not, to date, found significant changes in giving strategies, all contributions by individuals, attorneys, and law firms need to be tracked on the Part 151 Report to ensure that combined or collective campaign contribution conflicts are properly identified.

Recommendation: Adopt a method to revise OCA's Part 151 Report to include all campaign contributions from all sources, regardless of contribution amount, so that all attorneys, firms, and potential litigants are being properly tracked.

Acknowledgements:

For research and drafting of the report: Kenneth A. Manning, Esq., Amanda L. Lowe, Esq., Spencer L. Durland, Esq., and Phillips Lytle LLP; Terryl L. Brown, Esq., and Harris Beach, LLP.

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Attachment:

Assignment of Cases Involving Contributions to Judicial Campaigns

By A. Gail Prudenti (*New York Law Journal*, July 19, 2013)

Assignment of Cases Involving Contributions to Judicial Campaigns, New York Law Journal
By A. Gail Prudenti

Throughout its history, a cornerstone of our Judiciary's constitutional mission has been the application of the rule of law in a fair and even-handed manner—a fundamental commitment to impartiality requiring that we prevent even the appearance of bias or outside influence in our courtrooms.

In New York, as in many states, this commitment has long coexisted with another fundamental feature of democratic government: the periodic election of nearly 1,000 of our state's judges, often in expensive contested campaigns.

For more than 150 years, campaigns and the financial contributions which fund them, including contributions from attorneys and firms who might later appear before the judge, have been a commonplace feature of the constitutionally established process of judicial selection. We have long required that our judges remain uninformed of and unaffected by such contributions, and they have done so admirably. Nevertheless, the occasional assignment to judges of cases involving contributors gives rise to a disturbing public appearance of conflict and impropriety.1 This problem is even more pressing in the digital age, when contribution information is universally accessible at the click of a mouse.

In July 2011, the Administrative Board of the Courts2 sought to address this problem by adopting Part 151 of the Rules of the Chief Administrator (22 NYCRR Part 151, effective July 15, 2011). Issued after extensive public comment, this rule was designed to assure that recently elected or reelected judges would not be assigned to hear cases involving lawyers and parties who contributed substantial sums to their campaigns. To our knowledge, it marked the first time that a court system in the United States had attempted to address the campaign contribution issue by administrative means, with neither participation by the judge nor the necessity of motion practice by the parties. At the time, the reaction from the legal community to this new rule was uniformly positive: New York was praised for addressing this issue head-on and taking steps to protect public confidence in the integrity of the judicial system. With the benefit of two years of experience under the rule, we thought it might be useful to review its provisions, explain its implementation, and assess its impact across the state.

In general, Part 151 restricts the assignment of cases where participating litigants, counsel or firms have made significant campaign contributions to the assigned judge within the previous two years. More specifically, the rule provides that cases will not be newly assigned or reassigned to any judge for whom the case raises a "campaign contribution conflict." Pursuant to section 151.1(B)(1), a conflict arises when a judge receives a contribution of $2,500 or more from:

• an attorney appearing or listed as counsel of record, or serving as co-counsel or special counsel to such attorney; or

• the law firm of such attorneys; or

• a party in the matter.

Significantly, a contribution of $2,500 or more by an individual attorney raises a conflict only where that attorney appears before the judge. On the other hand, a contribution of the same amount in the name of a law firm creates a contribution conflict between the judge and every attorney in that firm who might appear before her. (An individual or firm cannot avoid the consequences of the rule by making several smaller contributions that together total $2,500 or more: those several contributions will be added together for conflict assessment purposes.)

Under Rule 151.1(B)(2), a conflict also arises when a judge has received $3,500 or more in the aggregate from the following separate contributors:

• an attorney appearing as counsel of record; and

• attorneys serving as co-counsel or special counsel to such attorney; and

• the law firm(s) of such attorneys; and

• a client or clients of the attorney(s) in the matter.

In aggregating contributions under this part of the rule, Part 151 does not count the personal contributions to a judicial candidate by attorneys who do not actually appear before the judge, even if they are partners or colleagues of an attorney who is appearing.

Thus, the contributions of firm members whose practice does not involve litigation or who practice exclusively in the federal courts, or who simply choose not to appear in a matter will have no impact on Part 151 calculations. Likewise, the contribution of a corporation or other artificial entity will not be imputed to any person or other entity and a personal contribution will not be imputed to any other person or entity. Therefore, contributions by family members, coworkers, employers, subsidiaries, etc., are not imputed and aggregated under Part 151.

However, a contribution in the name of a law firm will be counted in every matter in which the firm appears (See appendix).

Under the rule, a campaign contribution conflict lasts for two years from the date that the State Board of Elections first publishes a report of the contribution. For first-time judges, it ends two years after the assumption of judicial office. If a contributor makes multiple contributions to a judicial campaign, the conflict period is extended to last two years after the BOE reports the last of those contributions.

The reassignment of a case upon discovery of a campaign contribution conflict is not automatic. If that were the case, enterprising attorneys or parties could "judge-shop," and avoid appearances before a disfavored judge simply by contributing to her election at the conflict amount. Instead, Part 151 provides that other parties in the case must be informed of the conflict, and given the opportunity to waive it and accept the judicial assignment.3

Miscellaneous Features

Several additional features of the rule are noteworthy. First, Part 151 addresses case assignments and reassignments; it is not a recusal rule. See Rule 151.1(A)(3). Parties may continue to seek recusal of a judge by motion at any time, under familiar recusal principles. Moreover, the rule does not add to the ethical obligations of a judge or judicial candidate under the Rules Governing Judicial Conduct. See Rule 151.1(A)(2)(c).4 In addition, the rule provides that a case may be assigned to a judge despite a Part 151 campaign contribution conflict in the event of emergency, or where no other eligible judge is available to hear the case, or where the interests of justice so require. See Rule 151.1(A)(1).

Finally, an assignment made to a judge erroneously, notwithstanding a conflict under Part 151, remains valid; and the rule creates no right, remedy or cause of action for any party or counsel. See Rule 151.1(A)(2)(b).

Implementation Process

Following the promulgation of Part 151 in 2011 came the challenging task of its implementation. This was a three-step process.

First, working closely with BOE, Office of Court Administration technology staff devised a computer protocol to download election contribution data, screen it for information relating to judicial campaigns, and produce a report listing candidates, districts, contributors, contributions, and contribution dates. That protocol is now followed every month, to assure that contribution information remains current.

Next, OCA staff developed a process for reviewing that data to identify individual attorney contributors and law firms. This step is not specifically required by the rule, but reflects an obvious truth: while Part 151 applies to all contributors to judicial campaigns, attorney and law firm contributors are far more likely than other contributors to appear before the court. Consequently, identifying lawyer contributors greatly facilitates the identification of potential conflicts under the rule.

But the identification of attorneys and their firms is no simple task. The BOE does not record or report the profession of individual contributors, and generally does not identify their business address. Consequently, the BOE data provides no clue as to which contributors are lawyers or law firms. Moreover, New York attorneys frequently leave one law firm for another; firms are formed, merge and dissolve; and firm name changes are quite common.

To address these difficulties, the court system devised a several-step protocol. First, it identifies all major individual and firm contributors, currently defined as those who contribute $800 or more to a judicial candidate. Next, it compares information about individual contributors with data in the state's official lawyer registry, and identifies attorneys within that group. Finally, it employs the attorney database, supplemental listings, and the Internet to match each of these attorneys with their firm, as well as to identify law firm contributors.

Court staff then compile a report of major contributors for each active judge who is or recently was an election candidate, annotated to identify (1) attorneys and their firms; (2) law firm contributors; (3) the amount of the contribution; and (4) the date that the conflict period ends for each contributor. Before inclusion in the report, attorneys and law firms are notified by letter of these findings, reminded of the rule, and given the opportunity to correct errors in the court system's data.

This process also is repeated monthly. Thereafter, each report is circulated to court administrators and clerks in the courts where the affected judges serve. In addition, the lists are posted on the UCS website.5

Part 151 Report

Certain features of the collected data are useful in assessing the impact of the rule as well as the operational challenges of its implementation. Taking the most recent (June 2013) report as an example:

• 149 judges are currently listed on the report, including 121 state-paid judges and 28 town or village justices. Collectively, these judges received 1,524 contributions of $800 or more over the last two years. (Of course, judges who received contributions in amounts less than $800 are not on the report.)

• Slightly more than half these contributions were made by attorneys or law firms—766 to state-paid judges; 14 to town or village justices.

• Approximately 10 percent of the contributions (152 of 1,524) were $2,500 or more. Sixty four of these 152 (42 percent) were from attorneys or law firms.6 Needless to say, these latter contributions create the greatest likelihood of Part 151 conflict.

• 84 judges received fewer than six contributions of $800 or more; 32 judges received six to 10 such contributions in that amount; 33 received more than 10.

• 83 of the 149 listed judges (62 percent) received neither an individual contribution of $2,500 or more, nor multiple contributions that total $3,500 or more. The likelihood of a Part 151 conflict for these judges is exceedingly remote.

From these few statistics, and others drawn from a quick perusal of the report, we may make several observations about judicial campaign contributions and the impact of Part 151.

First, the rule primarily affects state-paid judges: the state's 2,200 town and village court judges appear rarely to receive contributions which create risk of a conflict. Second, relatively few attorneys and law firms have made contributions above the $2,500 conflict limit—although it is not clear whether the rule acted to curtail such contributions. Moreover, while a handful of judges received many significant contributions, the majority of listed judges received fewer than six contributions of $800 or more. Finally, notwithstanding the rarity of outright conflicts, the number of listed judges, the number and amount of contributions, together with the waiver provisions required by the rule, present a substantial implementation challenge to local court administrators.

Implementation

The implementation process is easily described in broad strokes: court clerks responsible for processing the assignment of new (or the reassignment of old) cases must review the most recent conflicts report prior to any assignment to a recently elected or re-elected judge; they must ascertain whether counsel or parties in the matter are on the list of contributors to the judge; and, if so, they must determine (through aggregation and addition) whether the case presents any contribution conflict under the rule. If a conflict is discovered the clerk must implement the waiver process, notifying the non-conflicted parties of the conflict in writing and giving them the opportunity to waive reassignment. If the conflict is not waived (or if no response to the wavier notice is received within 20 days), the clerks will administratively assign or reassign the case to a different judge. All of this is done without the knowledge or involvement of the affected judge.

The implementation process varies widely across the state depending on such local factors as the number and size of contributions received, and the type of court (e.g., criminal or surrogate). In some cases, such as where the judge received only a single contribution, the identification of conflicts is easy. In those cases where all contributions were from members of the judge's family, the normal recusal rules govern and no Part 151 issue arises.

The process is also uncomplicated in those cases where a judge received neither an individual contribution of $2,500 or more, nor multiple contributions that total $3,500 or more. In these cases the judge and the contributions received are listed pursuant to 151.1(C)(1), which provides that the Part 151 list should include contributions that, while not causing a campaign contribution conflict under Part 151, may be pertinent to a motion to recuse.

On the other hand, there are a handful of cases where judges have received many major contributions from attorneys—or where the affected court has a relatively close-knit practicing bars (e.g., Surrogate's Court), or a recently-elected judge sits in a high-volume part (e.g., TAP), or in counties where several judges are coincidently elected to the bench within a two-year period—implementation can be quite challenging.

In some cases the number and size of the contributions may warrant consideration in determining the judge's assignment during the two-year period of conflict. Since there is no single procedure for identifying conflicts and reassigning cases that could apply in all courts statewide, court administrators have worked with each court to develop processes tailored to local needs and resources.

When a contribution conflict is discovered and not waived by the parties, the court is left with several alternatives. In most cases, the matter will be returned to the wheel, and simply reassigned to another judge. In courts with only a single assigned judge or justice, or where caseload burdens or other factors make local reassignment difficult, the case may require special assignment of a judge from another court or district. In the rarest of cases, the matter may require reassignment to another venue.

Conclusion

Upon the second anniversary of its enactment, we are pleased to report that Part 151 has been implemented successfully and relatively smoothly, as a direct result of the close cooperation among the Board of Elections, the practicing bar, local court clerks and court administrators. Overall, attorneys and law firms appear to have a good understanding of the rule; its simple, bright-line formula has led to clarity and efficiency in implementation; its waiver provision has provided a reasonable means of preventing misuse of the rule and "judge shopping."

And while the rule has created a substantial new burden for court administrators in certain counties, that burden has been manageable. Above all, the enactment and implementation of Part 151 has marked a significant step forward in ensuring both the perception and the reality of a fair and impartial Judiciary in New York. As the chief judge observed in announcing the rule in his 2010 State of the Judiciary address:

By this new rule, the Judiciary in New York will be the first in the country to systemically address this problem at its source—determining as a matter of court system policy that judges will not hear matters involving lawyers and parties who have contributed substantial monies to their campaigns. We are not saying that lawyers and judges are doing anything wrong in making and receiving campaign contributions. To the contrary, campaign contributions are very much a part of the constitutionally established process by which we select most of our judges in New York. What we are saying, however, is that foreclosing even the appearance of impropriety is absolutely central to maintaining public confidence in the Judiciary. In this same spirit, our rule reminds judges to be mindful of existing judicial disqualification rules given the ready public availability of records of campaign contributions.

In a state that elects 73 percent of its judges in partisan elections, these changes will go a long way toward putting New York at the forefront of national efforts to promote public confidence in the independence, fairness and impartiality of the Judiciary.7

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Endnotes:

1. See generally, Charles Hall, ed., The New Politics of Judicial Elections, 2000-2009: Decade of Change,@ Brennan Center for Justice/Justice at Stake Campaign/National Institute on Money in State Politics (2010). Available at: http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf.

2. The Administrative Board of the Courts is comprised of the Chief Judge and the Presiding Justices of the four Judicial Departments of the Appellate Division. See, Judiciary Law §210(2). Its powers include the adoption of rules regulating practice and procedure in the courts. See, Judiciary Law §213(2).

3. This "waiver" option was included in the rule at the suggestion of several commentators, including the New York State Bar Association, the New York City Bar, and the Brennan Center for Justice.

4. The rule reminds judges to be mindful of the existing judicial disqualification rules in light of the ready public availability of information regarding campaign contributions. See Rule 151.1(A)(2)(d).

5. See, http://www.courts.state.ny.us/rules/chiefadmin/151-intro.shtml. This posting is required by 22 NYCRR '151.1(C)(1), which directs the Chief Administrative Judge to: "publish periodically a listing or database of contributions and contributors to judicial candidates, as disclosed by public filings, in a manner designed to assist the identification of campaign contribution conflicts under this Part, as well as contributions which, while not causing a campaign contribution conflict under this Part, may be pertinent to a motion to recuse."

6. Attorneys and law firms contributed between $2,500 and $4,999 to a judicial campaign on 44 occasions, between $5,000 and $10,000 on sixteen occasions, and $10,000 or more on only four occasions during this period. (Non-attorneys made 19 contributions of $2,500-$4,999; 50 contributions of $5,000-$9,999; and 19 contributions of $10,000 or more.)

7. Chief Judge Jonathan Lippman, "Pursuing Justice," State of the Judiciary, Feb. 15, 2011, p. 14.

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