1991

Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety

Bradley A. Siciliano

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol20/iss1/6

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

ATTORNEY CONTRIBUTIONS IN JUDICIAL CAMPAIGNS: CREATING THE APPEARANCE OF IMPROPIETY

INTRODUCTION

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.¹

With these words begins the Model Code of Judicial Conduct (hereinafter the Code). As Canon 1 indicates, the purpose of the Code is to ensure the integrity of the judicial system. However, one area in which the Code seems to fall short is judicial elections. There has been substantial debate concerning issues surrounding judicial elections.² Much of that debate has centered on the issue of campaign donations to judicial candidates.

¹ MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990) [hereinafter CODE]. Note that judges are not only subject to the Code of Judicial Conduct, but to the Code of Professional Responsibility for lawyers as well. In re Lawrence, 335 N.W.2d 456, 460 n.8 (Mich. 1983).

² In 1990, the A.B.A. adopted a new Model Code of Judicial Conduct. To date, only Wyoming has passed this new version, although twenty additional states are considering it. Most of the cases and the analysis presented in this Note concern the 1984 version. MODEL CODE OF JUDICIAL CONDUCT (1984) [hereinafter 1984 CODE]. Forty-seven states are still guided by the 1984 version. The primary focus of this Note is on Canon 7B(2) of the 1984 Code, which was left substantively intact in Canon 5C(2) of the 1990 Code. Any substantive changes between the 1984 and 1990 versions that affect this Note are so indicated.

² See, e.g., James J. Alfini & Terrence J. Brooks, Ethical Constraints on Judicial

217
financing for judges.\(^3\) Canon 5C(2) of the Code deals with this particularly troublesome issue:

> A [judicial] candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support . . . . A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.\(^4\)

Even more troubling than the notion of judicial campaign contributions are situations in which those contributions are made by members of the bar. Under Canon 5C(2) of the Code, members of the bar are permitted to make contributions to candidates for judicial office.\(^5\) Such contributions raise serious questions concerning conflicts of interest for judges. The distinction between judicial candidates and other elected officials on this point is important to recognize. Judges are expected to be impartial, while executives and legislators are not.\(^6\) Furthermore, such contributions appear to be in direct conflict with Canon 2B’s requirement that judges avoid even the appearance of impropriety.\(^7\)

This Note will examine the potential conflicts of interest that arise when lawyers are permitted to contribute to judicial candidates. Section I will examine the general campaign finance rules for judicial office.\(^8\) Section II will discuss the arguments for and against the policy that allows lawyers to contribute to judicial campaigns, and will examine some of the problems in implementing the Code, particularly the committee provisions.\(^9\) It will also look at some blatant abuses of the present system and offer some suggestions as to why they occur.\(^10\) Section III will first cover some of the proposals that have been offered to deal with the problems of fund-raising in judi-

---

4. CODE, supra note 1, at Canon 5C(2). The omitted portions of Canon 5C(2) will be discussed in detail in the remainder of this Note.
5. Id. "Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers." Id. Contributions may be made to both sitting judges and challengers. Id. at Canon 5E.
6. Victor J. Baum, Should Judges Know Who Gave to Their Campaigns?, 60 JUDICATURE 258, 259 (1977). For example, when one votes for either Jesse Helms or Jesse Jackson, he is not seeking impartiality.
7. CODE, supra note 1, at Canon 2B.
8. See infra notes 14-29 and accompanying text.
9. See infra notes 30-82 and accompanying text.
10. See infra notes 83-112 and accompanying text.
The problem of funding a judicial campaign presents one of the greatest conflicts between political necessity and judicial impartiality. If a judicial candidate raises money for his campaign, his impartiality might be questioned as a result of his having received money and having entered into the political arena. If he tries to preserve his integrity and maintain an appearance of impartiality by refusing to raise funds, he is destined to lose the election.

Under the Code, a candidate, including an incumbent judge, must establish a campaign committee to solicit and receive campaign contributions since he may not solicit directly, or accept, such contributions. Furthermore, the candidate may not appoint himself to the campaign committee. Instead, he must appoint committees of responsible persons who will establish campaign committees to solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate’s campaign and obtain public statements of support for his or her candidacy.

One problem with the 1984 CODE was that only judges, and not their unsuccessful challengers, were held to it. Mark A. Grannis, Note, Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich. L. Rev. 382, 384 (1987); see also CODE, supra note 1, at Canon 5E. Furthermore, judicial disciplinary agencies have jurisdiction only over judges, and not their non-judge opponents, for ethical violations occurring during the campaign. Alfini & Brooks, supra note 2, at 680-81. In California, there is no enforcement body with the authority and the inclination to enforce the CODE against non-incumbents. Smoler & Stokinger, supra note 3, at 373. However, the Los Angeles Bar Association did form an election committee to investigate complaints against judicial candi-
committee, since this would circumvent the provision's goal of prohibiting personal solicitation on the part of the candidate.\textsuperscript{17}

There are several purposes behind requiring the establishment of campaign committees. The main purpose of this requirement is "to insulate candidates from personal contact with contributors that may lead to allegations of bias when a contributor appears before the [recipient] judge."\textsuperscript{18} It is also intended to resolve the dilemma between the candidate's need to raise funds and his need to remain unbiased.\textsuperscript{19} In addition, the committee is supposed to reduce the pressures of campaigning for judicial office.\textsuperscript{20}

Not only do committees keep candidates from contact with contributors, but they also work to shield candidates entirely from the identity of contributors. To protect the candidate further against later allegations of judicial impropriety, the 1984 Code recommends that the names of the contributors not be revealed to the candidate.\textsuperscript{21} This recommendation, combined with the requirement of a committee, suggests that candidates are also prohibited from attending fund-raisers held on their behalf.\textsuperscript{22} However, this proposition has not been uniformly accepted.\textsuperscript{23} In addition, state disclosure rules have essentially rendered useless this aspect of the Code's policy of keeping contributors' identities from judges' attention.\textsuperscript{24} All fifty states require the reporting of campaign contributions and the names of the

\begin{footnotes}
\item[17] Alfini & Brooks, supra note 2, at 701. However, candidates are generally permitted to solicit campaign contributions from immediate family members. Smoler & Stokinger, supra note 3, at 360.
\item[18] Alfini & Brooks, supra note 2, at 700.
\item[19] Smoler & Stokinger, supra note 3, at 356.
\item[20] Id. It is not entirely clear how the use of a committee reduces campaign pressures, since even non-judicial candidates have committees.
\item[21] 1984 CODE, supra note 1, at 7B(2) commentary: "Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate."; see also Smoler & Stokinger, supra note 3, at 356.
\item[22] Smoler & Stokinger, supra note 3, at 360. In one instance, a judge sent a video tape of himself to a fund-raiser held on his behalf, thanking all the attendants, and thereby avoiding a breach of anonymity of contributors. Macmanus, supra note 15, at 3.
\item[23] See, e.g., Alfini & Brooks, supra note 2, at 716 (it has either been rejected or excepted to). One survey showed that 74\% of judges questioned felt that judges should be permitted to attend fund-raisers. Smoler & Stokinger, supra note 3, at 392.
\item[24] Alfini & Brooks, supra note 2, at 719. Note that some judges have suggested that they prefer disclosure so that they will be able to recuse themselves in cases in which a contributor appears before them. Smoler & Stokinger, supra note 3, at 403.
\end{footnotes}
contributors whose donations exceed specified amounts. Perhaps as a consequence of these disclosure laws, the 1990 Code does not contain the requirement that candidates must be shielded from the identities of their contributors. The revised Code ignores the issue of whether candidates should know who their contributors are.

Finally, it is recommended that each jurisdiction set time limitations as to when solicitations for contributions may be made. The Code recommends no earlier than one year before the election and no later than ninety days after the election. Generally, in retention elections, judges may not receive contributions unless there is an active opposition. While the constitutionality of these time limitations has been challenged, they have been upheld.

II. ATTORNEY CONTRIBUTIONS TO JUDICIAL CAMPAIGNS
   A. Arguments For Attorney Contributions

As stated above, the Model Code of Judicial Conduct permits judicial campaign committees to solicit campaign contributions and public support from members of the bar. Such contributions are generally permitted even when the contributing attorney appears before the judge from time to time, so long as they are not so large as to create the appearance of an expectation of preferential treatment. Some jurisdictions permit such contributions even when the attorney is before the judge at the time that the contribution is made, so long as there is no stated quid pro quo. In fact, the local bar is often

25. Smoler & Stokinger, supra note 3, at 374. In addition to professional standards in elections, judges and lawyers are also subject to state statutes on campaign finance and other related matters. Alfini & Brooks, supra note 3, at 679.
26. CODE, supra note 1, at 5C(2). "A candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year." Id.
27. Id. However, some jurisdictions, such as Texas, place no time limits whatsoever. Alfini & Brooks, supra note 2, at 707.
30. CODE, supra note 1, at 5C(2). See supra note 5 and accompanying text.
32. Id. at 709.
the most obvious place for judges to seek campaign funds, since attorneys are more likely to come into contact with judges, both professionally and socially. It has even been suggested that such activity on the part of attorneys is not only permissible, but should be encouraged.

There are several practical arguments in favor of allowing attorney contributions to judicial campaigns. The first is that the informed opinions of attorneys should be brought to the public’s attention, and that the bar should actively show support for or against judicial candidates. It is said that attorneys are the best appraisers of judicial candidates’ qualifications, since it is they who work with the candidates. It is also argued that the contributions are often small in dollar amounts and are made by many attorneys, and that they therefore pose no threat of prejudicing the judge. Finally, lawyers provide most of the contributions to judicial campaigns. Consequently, without attorney contributions, judicial candidates would have a more difficult time raising sufficient amounts of money to inform the electorate adequately.

While these arguments work logically to support allowing attorneys to contribute to judicial candidates, a fundamental philosophical premise underlies permitting the practice; that is, the law should “not

34. Muir, supra note 12, at 34.
35. Id.
36. Alfini & Brooks, supra note 2, at 709. Of course, this argument takes only litigators into account. However, this Note is generally concerned with litigators, since corporate attorneys and tax attorneys do not stand to gain from contributing to a judge’s campaign because they most likely would not have to argue cases before the judge.
37. Stuart Banner, Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 STAN L. REV. 449, 480 (1988). For example, if many attorneys that appear before a certain court make $50 contributions, no one will believe that they were trying to buy favor with the judge. Id. Some judges even restrict themselves to small contributions from attorneys. Shaman, supra note 14.
39. Id. While such reliance arguments are often made to justify accepting certain kinds of contributions, e.g., Political Action Committee money, it has been shown that judges can win without the usual avenues of support. In Chicago, a city known for its political machine, thirty-five of thirty-eight judges running for re-election were successful despite their having broken with their political parties, not having held individual fund-raisers, and not having established campaign committees to raise funds. Mark A. Lyon, Chicago Judges Independent Retention Effort Succeeds, JUD. CONDUCT REP., vol. 8, no. 3, at 1 (1986). Two of the unsuccessful judges had been publicly cited as possible targets of federal investigations. Id. The third unsuccessful judge was the target of a vigorous campaign against his election by the police department. Id.
suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."40 "As long as [a] judge avoids alliances with people and issues that would affect his objectivity, his qualifications to preside generally should be presumed."41

Supporters of attorney contributions accuse their opponents of possessing a cynical attitude of distrust.42 They suggest that proper motives should be ascribed to lawyers' support of judicial candidates.43 They argue further that prohibiting such contributions would limit the freedom of association of lawyers.44 Finally, they argue that the political reality of judicial elections is that candidates must be able to raise money in order to be elected.45

B. Holes and Modifications Weaken Code

While Canon 5C(2) might work in theory, reality has undermined the Code's ability to ensure that no conflicts of interest will arise when attorneys contribute to judicial campaigns. This has resulted from lenient interpretations of the Code, as well as from local modifications of the Code.

Several parts of Canon 5C(2) have been loosely interpreted to allow judges and contributors to partake in conduct that the Code, on its face, seems to prohibit. To begin with, it is generally accepted that lawyers may serve on a judge's election committee even though a judge may not directly solicit his contribution.46 If the Code prohib-

41. Muir, supra note 12, at 35. Judges may find it in their best interest to avoid contributions from ideological or issue-oriented groups. Alfini & Brooks, supra note 2, at 712. Examples of these might be the John Birch Society or the American Civil Liberties Union.
42. See Muir, supra note 12, at 36.
43. Id.
44. Id. at 35-36.
45. Alfini & Brooks, supra note 2, at 712. While it may appear that judges need campaign contributions to run for office, this argument fails to account for the practice of judges in some jurisdictions of giving their campaign funds to political parties that support their candidacies instead of using the funds for their campaigns. Shaman, supra note 14. This practice alone is questionable, conjuring up images of the political machines of Tammany Hall and Boss Tweed in New York City, and Joseph Margiotta in Nassau County. The practice also shows that the contributions really are not necessary to run a campaign, since being elected to judicial office has more to do with political affiliation and party loyalty. See infra note 65.
46. Alfini & Brooks, supra note 2, at 701.
its the judge from directly soliciting support, how could it then permit an attorney to work for the judge’s committee, campaigning and soliciting? The judge will certainly be more aware of an attorney who is playing a major role in running his campaign than of an attorney who makes an average-sized contribution.

Another example of a loose interpretation of Canon 5C(2) comes from an advisory opinion in Florida that interpreted the Code to permit a judge to write a personal letter to an attorney, soliciting his vote and his “active” support, but that prohibited him from asking specifically for money or sending a return receipt. The line of distinction between money and support appears to be very thin. In fact, support in many instances could be even more valuable than money. For instance, an endorsement from a popular, high-profile attorney could swing an election. In addition, such an attorney might have the ability to draw the contributions of others, even though he does not contribute himself.

Local rules also serve to frustrate the goal of shielding the judge from possible conflicts of interest. In Michigan, there is a $100 limit on solicited contributions from attorneys, but no limit on unsolicited contributions. In Kentucky, there are time restrictions on solicited contributions, but none on unsolicited ones. Arizona’s Code provides that candidates are to refrain from soliciting funds, but are permitted to refer prospective contributors to their committees. Another jurisdiction forbids a candidate from soliciting or accepting contributions himself, but permits him to suggest sources to his committee. Each of these local exceptions serves to defeat the purpose of the main rule. The initial restriction is construed very narrowly to enable an attorney to give, and a candidate to receive, money outside the prescribed limits.

47. Id. at 708 (citing Fla. S. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-1 (1978)). It is not clear whether the Committee was rejecting the distribution of a generic brochure with a receipt for contributions on the back.

48. See Muir, supra note 12, at 35.

49. Alfiniti & Brooks, supra note 2, at 714 (citing MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7B(2)(c)).


51. Smoler & Stokinger, supra note 3, at 371 (citing ARIZ. REV. STAT. ANN., SUP. CT. RULE 81 (Supp. 1985)).

52. What are the Boundaries of Proper Judicial Campaign Conduct?, JUD. CONDUCT REP., vol. 6, no. 1, at 5, 6 (1984).

53. For example, the main purpose behind preventing judges from soliciting contributions...
C. Committee Provision Falls Short of Its Goal

While the provision of the Code requiring non-disclosure is defeated by state statutes requiring disclosure, the goal of shielding candidates from contributors through committees is defeated by reality. Committees have failed to insulate judges from the strains and politics of judicial elections.

An anecdote best illustrates how the rules are ineffectual in shielding judges from the election process. In one instance, a Florida judge delivered a tirade against an attorney during trial because the attorney had opposed her election to a higher court. While the judge was removed from the case, the instance points to how the system fails. Since the judge was obviously aware of who her opponents were, it is likely that she knew which attorneys supported her. Furthermore, although in this case the judge’s hostility was overt, it would have been worse if she had concealed it.

This incident clearly shows that committees and the suggestion of non-disclosure fail to prevent conflicts of interest. Judicial candidates cannot disentangle themselves from the financial aspects of a campaign, even with an effective committee as a shield. Unintentionally, the candidate will inevitably learn the identities of contributors. Campaign volunteers and committee members often make contributions. Supporters seen at fund-raisers, news coverage of fund-raisers in high-profile races, and general discussion all serve to notify candidates of the sources of their financial support.

D. Arguments Against Attorney Contributions

A candidate for judicial office “must raise funds for his campaign yet remain free from any appearance of impropriety or influ-
ence by those who have contributed to his campaign."60 However, it is unrealistic to presume that a candidate will not personally solicit or accept contributions, and will not learn the names of his contributors.61 Even the most ethically conducted campaigns involve a series of exceptions to the Canons that warp their spirit and add nothing to the public respect for our judicial system.62

Campaign fund-raising ties judges to a political process in which they should not take part. As Canon 1 states, "[a]n independent and honorable judiciary is indispensable to justice in our society."63 "The judiciary should remain an apolitical institution separate and distinct from the political branches of government," and free from the tainting aura of political favoritism.64 The judiciary would be better able to perform its function if it were free from the pressures of financial support.65 "It is . . . impossible for a judge to accept money to meet . . . campaign expenses without losing at least some of his impartiality."66

The independence of sitting judges is further compromised by their need for financial support at election time, particularly when that support comes from attorneys.67 Accepting campaign contributions from attorneys works against the ideal of an impartial judiciary.68

60. Smoler & Stokinger, supra note 3, at 354.
61. Id. at 363. A survey showed that 46% of judges polled felt that they should not know who contributed to their campaigns. Id. at 393. This might suggest that they think it will influence judges. The fact that 54% of those surveyed felt they should know who contributed raises concerns about whether these candidates make any effort, or at least do not make their best effort, to keep contributors anonymous.
63. CODE, supra note 1, at Canon 1. “Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” In re Murchison, 349 U.S. 133, 136 (1955).
64. Papier, supra note 28, at 750-51.
65. Id. at 755. However, the need for financial support may not be as great as it is made out to be. One successful candidate decided, after campaigning for several months, that it was unlikely that the electorate would ever become informed about judicial candidates or the offices to which they aspire. Spaeth, supra, note 56, at 11. He concluded that his successful campaign was more connected to his party affiliation, the help of party faithfuls, his ethnic makeup, and the ethnic makeup of those already sitting on the bench, than to his campaign. Id. at 14-16, 18.
67. Papier, supra note 28, at 748. However, one judge suggests that if anything, subconsciously, he bends over backwards to be fair to the non-contributor, to the point that he may actually be biased against the contributor. Smoler & Stokinger, supra note 3, at 403.
68. See Spaeth, supra note 56, at 14. In addition to raising questions of impartiality, allowing attorney contributions leaves attorneys susceptible to pressure from judges to contribute. Andrew L. Johnson, Lawyer Judicial Campaign Contributions Revisited, 50 CLEV. B.J. 2
Judges themselves admit that the presence of contributors before them causes a certain tension. A contribution of any size might affect the professional relationship that should exist between a lawyer and a judge.

Serious doubt is cast upon the motives of attorneys who contribute to judicial campaigns. While lawyers claim that they contribute to elect a higher quality judiciary, substantial contributions are made to judges who are running unopposed, who are certain winners, and who are certain losers. Contributions are often sent to both sides in a race, or to the winner after the election. Furthermore, particular types of attorneys stand to gain if judges are elected who are more sympathetic to the kinds of clients that they represent.

In light of such practices, it is no wonder that people question the motives behind attorney contributions. “The idea is to further the giver’s goal—to curry favor with the judge.” “It’s a form of bribery.” While these are some comments that have been made by the general public, attorneys, too, have their doubts about such contributions. As a response, lawyers often feel pressured to contribute in order to level the playing field.

However, attorneys countering other attorneys’ contributions with contributions of their own is not the solution to the potentially cor-

---

(1978). Thus, coercive behavior may flow in both directions.

69. See Smoler & Stokinger, supra note 3, at 402. “It makes me feel uncomfortable dealing with them in court. Perhaps it would be better if we didn’t know where the contributions came from.” Id.

70. Spaeth, supra note 56, at 14. This practice may be subject to evils other than to partiality on the bench. In one case, a judge took the contributions from attorneys and litigants and appropriated them for his own personal use. In re Certo, N.Y. Comm. of Jud. Conduct, Dec. 28, 1982 (unreported determination). The judge was found to have undermined the public confidence in the judiciary by such misappropriation. Id. The issue of the use of excess funds also raises certain ethical questions. Smoler & Stokinger, supra note 3, at 361.

71. Grannis, supra note 16, at 402-03.


73. Grannis, supra note 16, at 408.

74. Banner, supra note 37, at 438 (pointing out that plaintiffs' attorneys win more cases if judges are sympathetic to accident victims). In one instance, an attorney financed a challenger’s victorious campaign after losing a large verdict in the incumbent’s court. Afterwards, he boasted, “I think that message has gotten across pretty substantially . . . .” Id. at 460.

75. Baum, supra note 6, at 258.

76. Id.

77. Id. “My client knew that the opposing lawyer contributed $400 to the judge’s campaign. My client does not believe the judge called the shots impartially. He is angry with me for not having moved to disqualify the judge. Every close call went against us. I have some doubts myself.” Id.
rupting influence of attorney contributions to judges. Instead, serious effort in regulating judicial elections is needed. "There can be little doubt that a state has a compelling interest in preserving the democratic process and insuring fair elections . . . ."78 A state also has an obligation under the Constitution to insure a fair trial to litigants in our nation's courts.79 The judicial system and the right to a fair trial must be insulated from crude forms of political pressure.80 While depriving judges of attorneys' contributions might appear onerous, the Code expresses that judges must expect to be subject to restrictions that might be considered burdensome to ordinary citizens.81 Furthermore, the Supreme Court has held that certain infringements on First Amendment rights are permissible when the state interest is the preservation of fair elections.82

E. Blatant Abuses of the Present System

While it would be unfair and inaccurate to suggest that all contributions by attorneys to judges, or even a substantial number thereof, are tainted, some serious abuses of the system have occurred.83 Generally speaking, the most offensive conduct that has been permitted has occurred in Texas.84 In Texaco, Inc. v. Pennzoil Co.,85 lead counsel for Pennzoil donated $10,000 to the trial judge's campaign only two days after filing an answer with the judge,86 and also served on the judge's steering committee.87 To make matters worse, the attorney was a liberal Democrat, while the judge was a conservative Republican.88 The court held that this did not create the

79. See generally Grannis, supra note 16.
80. Papier, supra note 28, at 765.
81. See CODE, supra note 1, at Canon 2A commentary.
82. See Stoner, 379 F. Supp. at 712.
83. Note that, for restrictions on campaign conduct to be valid, there need not be a showing that all parties who are, in fact, restricted need to be restricted. Stoner, 379 F. Supp. at 712-13.
84. See infra notes 85-94 and accompanying text. It has been suggested that the reason why Texas has the worst record is the high cost of its state-wide campaigns. L.A. DAILY J., Dec. 24, 1987, at 4. The system puts judges at the mercy of attorneys for money. This has led to "shameless" conduct by both attorneys and judges. Texas judges have become too beholden to attorney contributors to give fair hearings to the attorney's opponents. Id.
The questionable donations did not stop at the trial level. Representatives of Texaco donated $72,700 to seven justices on the Texas Supreme Court, which was hearing the appeal. Attorneys for Pennzoil, in turn, donated more than $315,000 to the justices. The case resulted in an award of $10.53 billion to Pennzoil.

While Texaco, Inc. v. Pennzoil Co. was litigation of gargantuan proportions, such apparently unethical behavior also occurs in smaller cases, such as J-IV Investments v. David Lynn Machine, Inc. In that case, the jury found for the plaintiff, finding the defendant liable for fraud. The defendant filed for a judgment notwithstanding the verdict. Before the judge had made a decision on the motion, the defendant's counsel made a contribution to the judge's re-election campaign. Two months later, the judge granted the judgment notwithstanding the verdict for the defendant. The higher court held that retroactive recusal was not required as a result of the contribution, stating that the Texas courts have repeatedly rejected the notion that campaign contributions create the impression of bias.

Certainly, Texas is not the only jurisdiction where the policy of permitting attorney contributions to judges has gone astray. In a Michigan case, a judge personally contacted attorneys for the purpose of soliciting campaign contributions, disregarding the prohibition from doing so, but assured them that it would have no impact on their cases. His punishment was a public reprimand. In an unreported

89. J-IV Inv., 784 S.W.2d at 108 (discussing Texaco, Inc., 729 S.W.2d at 842-44).
90. Alfini & Brooks, supra note 2, at 671.
91. Id. Three of the Justices were not even up for re-election. Id. Pennzoil won the suit, though no direct connection is drawn to the contributions. Banner, supra note 37, at 451 n.14.
92. See Shaman, supra note 14. This is the largest award in the history of the United States. Id. Before the case reached the Supreme Court, the parties settled for $3 billion. L.A. Daily J., Dec. 24, 1987 at 4. Joe Jamail, Pennzoil's attorney, is estimated to have received $600 million as his fee. Id. It would appear that he had a large stake in the outcome.
93. J-IV Inv., 784 S.W.2d at 107.
94. Id. Note that the significance of the decision becomes even greater when considering the extreme rarity of granting a jnov.
95. In re Hotchkiss, 327 N.W.2d 312 (Mich. 1982).
Alabama case, a judge kept a “hit list” of all the attorneys and firms that supported his opponent. The judge denied all of these attorneys’ motions for recusal when they appeared before him. Though the judge was ultimately suspended, the case illustrates the dangers of permitting such contributions.

While these are extreme examples, and there is no indication that such behavior is pervasive, they do suggest that a substantial danger exists that both judges and attorneys abuse the system on a more subtle level.

F. An Uncertain Standard

One frequent complaint by the judicial community is that the standards that they are expected to follow are very unclear. One reason is that the Code contains many terms and provisions without clear definitions or standards. Another reason for the lack of clear guidelines for judges is that attorneys fear the consequences of challenging a judge, and often choose to let pass potentially unethical behavior.

One example of the Code’s lack of a clear definition is found in the words “appearance of impropriety.” The “appearance of impropriety” is an uncertain standard, and at least one commentator has argued that judges should be provided with a solid definition so that they can maintain the appropriate level of conduct required by those words. The absence of clear standards makes the judge’s conscience crucial in preventing controversies that sometimes arise over a judge’s objectivity. Unlike the Code of Professional Responsibility for lawyers, the Code of Judicial Conduct lacks a detailed commentary to guide judges. Some have called for advisory opinions so that judges have some place to turn with questions of ethics before charges are filed.

96. Id.
98. See id.
99. See infra notes 100-12 and accompanying text.
100. Muir, supra note 12, at 36.
102. Muir, supra note 12, at 36.
104. John Flynn Rooney, Ethics Advisory Opinions for Judges Urged, Chi. Daily Law Bull., Sept. 8, 1988, at 1. Some efforts have been made to deal with ethical questions. For
While many attorneys are reluctant to challenge judges' conduct, cases have been brought. These cases offer some clue, though sometimes confused, as to what is acceptable or unacceptable behavior on the part of judges. In one case, a judge was sanctioned for appointing members of his former firm to represent indigent parties before the court at the public's expense. The judge also appointed an attorney who had given him free legal services. Another judge was sanctioned for accepting a loan from an attorney, even though it would have been permissible if the check had been made out to his committee, the attorney never personally appeared before the judge, and the judge offered to recuse himself in the four cases involving the lender's firm. In 1987, the Texas Commission on Judicial Conduct, for the first time in its twenty-two year history, reprimanded a Supreme Court justice. The justice had singled out two cases upon the request of an attorney who had made a $20,000 contribution to his campaign, while cases were supposed to be transferred on work load. It is important to note that, as a general rule, hearing the case of a contributor is not a violation of the Code, nor is hearing a case of a potential opponent or his family members.

It appears from the above discussion that actual misuse of the example, the Los Angeles Bar Association set up an Election Committee to respond to complaints against the candidates within seventy-two hours. State News, supra note 16, at 5. The committee would make recommendations within seven days, releasing them to the candidates and the media. Id.

It should be noted that, in drafting the 1990 Code, the A.B.A. expanded the commentary, included a Terminology section, and advocated the establishment of advisory boards. See CODE. However, both the commentaries and the Terminology section remain inadequate, and the suggestion of advisory boards is not actually part of the Code.

105. In re Lawrence, 335 N.W.2d 456, 458 (Mich. 1983) (holding that appointments were prejudicial to the administration of justice).

106. Id. at 459 (noting that such appointments created the appearance of a quid pro quo).


109. Id. In addition, the justice's staff was also cited for unethical behavior. Id. at 6. It has been suggested that a code of conduct be drafted for officers of the court. They are presently covered under the same code as judges. CODE, supra note 1, at Application of the Code of Judicial Conduct.

110. This is the general rule. A rare deviation from this rule is discussed infra notes 139-55 and accompanying text.

111. Alfini & Brooks, supra note 2, at 714.

112. Pierce v. Charity Hosp., 550 So. 2d 211 (La. Ct. App. 1989) (attorney and judge's spouse had both been considering running for the same position, and had both wanted the same law firm to run their campaign).
powers given to the court is required before a judge is considered to have acted inappropriately. On the other hand, the potential for bias is not enough, absent actual proof, to challenge successfully the actions of a judge.

III. IMPROVEMENTS ARE NEEDED

It is clear that the Model Code of Judicial Conduct falls short in many areas regarding judicial elections. It is not possible to shield judges effectively from the identities of the sources of their contributions. Furthermore, attorney contributions at best create the appearance of impropriety and, at worst, amount to buying the influence of judges.

Realistic provisions need to be implemented to remedy the problems of attorney contributions to judicial campaigns. Many proposals have been suggested to reduce the influence or potential conflicts arising from attorney contributions, and some have even been implemented. In particular, there are two plans that would best solve the problems of attorney contributions to judicial candidates. The first recommendation is that judges should recuse themselves when a contributing attorney appears before them. The second recommendation is to prohibit attorney contributions altogether.

A. Some Suggestions

Several plans have been offered to deal with the problems of judicial elections and fund-raising. Some work to shield candidates from the knowledge of the identities of the sources of their funds, or to relieve the pressure in obtaining those funds. Some offer a change in the entire manner by which we select judges.

One proposal that has been offered is the establishment of a trust fund that would accept attorney contributions and pass them on to candidates without revealing the sources.113 This plan was proposed in Dade County, Florida (The Dade Judicial Trust Fund)114 and in Detroit, Michigan (The Fair Plan).115 The two plans called for attor-

113. Smoler & Stokinger, supra note 3, at 364. It has also been proposed that attorney contributions be limited to a certain amount and channeled through the bar association. Johnson, supra note 68, at 2-3. For a more complete discussion of this proposal, see Banner, supra note 37, at 476-78.
115. Barbara Schulert, 'Fair Plan' for Campaign Gifts Delayed in Detroit, 60 JUDICA-
ney to make, and for judges to receive, contributions only through the trust funds.\textsuperscript{116} Under the Fair Plan, attorneys could earmark contributions to specific candidates, something not permitted under the Dade Judicial Trust Fund.\textsuperscript{117} While enthusiastically endorsed, both plans ultimately failed.\textsuperscript{118} After two elections, interest in the Dade plan dropped off. The Fair Plan was never implemented due to problems with the Internal Revenue Service.\textsuperscript{119}

Another proposal involves public financing of judicial campaigns.\textsuperscript{120} Public financing would eliminate the appearance of impropriety and the possible conflict of interest of contributors appearing before a judge.\textsuperscript{121} It would also open the door to more candidates, since funding would be available to all official candidates, not just those with the necessary connections or their own small fortunes with which to finance a campaign.\textsuperscript{122} Such a plan could be funded through a tax checkoff as is used for presidential elections.\textsuperscript{123}

Retention elections have also been suggested as a means of reducing the need for judicial candidates to turn to attorneys for campaign funds, and as a way of removing many of the political factors from judicial campaigns.\textsuperscript{124} Rather than have to run for re-election against an opponent, judges would only have to be approved by a certain percentage of the electorate to remain in office.\textsuperscript{125} In effect, the judge would be running only against his own record. Conseque-

\textsuperscript{116} Baum, supra note 6, at 258; Robert A. White, \textit{New Approach to Financing Judicial Campaigns}, 59 A.B.A.J. 1429 (1973). The plan was carried out on a voluntary basis. \textit{Id}. The Dade plan also had a requirement that a judicial candidate be approved by members of the bar to receive funds. \textit{Id}.

The plan was supposed to encourage qualified candidates to run by providing money. It was supposed to offer an alternative to a system that demeans the judicial office by forcing candidates to solicit from attorneys, and to eliminate the justifiable suspicion that is generated by lawyer contributors appearing before judges. \textit{Id} at 1430.

\textsuperscript{117} Schulert, supra note 115, at 194.

\textsuperscript{118} Smoler & Stokinger, supra note 3, at 364.

\textsuperscript{119} Schulert, supra note 115, at 194.

\textsuperscript{120} Banner, supra note 37, at 478.

\textsuperscript{121} Smoler & Stokinger, supra note 3, at 399.

\textsuperscript{122} \textit{Id}. Some sort of standard, such as a specified number of signatures from registered voters, would have to be implemented to determine whether someone was entitled to public financing.

\textsuperscript{123} \textit{Id}; Banner, supra note 37, at 478. However, such a proposal would be extremely expensive and the public might not support it. \textit{Id}.

\textsuperscript{124} Papier, supra note 28, at 754.

\textsuperscript{125} Id. at 749-50. An analogy can be made to a Prime Minister's "vote of confidence" in a parliamentary system such as those of Great Britain and France.
ly, judges would not need to raise as much money as in a contested election.126

A strong argument can also be made for a merit selection system. Several variations on this idea have been offered. Probably, the most popular is the Missouri Plan.127 Under that proposal, a nonpartisan committee of judges, lawyers and lay-persons would produce a list of candidates and send it to an appointive power.128 Once appointed, the judge would face a retention election after a term of a certain number of years.129 A variation of this plan would require the electorate to approve the appointment before the appointed judge took office.130

All of the above proposals, except the trust funds, work to reduce not only the likelihood of judicial impropriety from attorney contributions, but also other potential sources of impropriety. They also manage to keep the democratic process a part of the selection or maintenance of the judiciary.

B. Recusal as a Solution

Under the Code of Judicial Conduct, recusal is required if a judge's impartiality might reasonably be questioned.131 The line that determines when recusal is required and when it is not required is very fine.

Generally, it seems that recusal is most often required if an attorney is involved in proceedings to which the judge is a party. This is true whether the attorney is working for or against the judge. Recusal has been required when the judge's attorney appears before the judge.132 It has also been required if any attorney is participat-

126. However, this is not always true. For example, a highly publicized and expensive campaign was successfully run to oust the Chief Justice of the California Supreme Court, Rose Bird. Mary Ann Galante, California Justices Face Own 'Executions,' NAT'L. L.J., Nov. 3, 1986, at 1.
127. Smoler & Stokinger, supra note 3, at 367.
128. Id. The appointive power could be the governor or legislature.
129. Id.
130. Spaeth, supra note 56, at 19-20.
131. CODE, supra note 1, at Canon 3E(1). "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Id. In one case, Supreme Court Justice Frankfurter recused himself from a case involving a challenge to the practice of radio broadcasting on public buses. Public Util. Comm'n v. Pollak, 343 U.S. 451, 466-67 (1952). Frankfurter was so bothered by the practice that he feared his subconscious feelings might have an impact on his final judgment. Id.
132. Alfiniti & Brooks, supra note 2, at 702. However, this attorney-client relationship generally is not considered to last ad infinitum. See id. at 703.
However, in one set of circumstances, a judge might be required to recuse himself even though the attorney is not involved in any proceedings involving the judge. This strict rule is applied where a judge and an attorney have a running feud.¹³⁴

However, the potential for favoritism by itself is generally not enough to require recusal.¹³⁵ Personal friendship with a judge is not sufficient grounds for involuntary recusal.¹³⁶ Nor is it required when an announced candidate appears before an incumbent judge.¹³⁷ Until 1989, no opinion had ever stated that a contribution by an attorney was sufficient in itself to require recusal.¹³⁸

C. Breakstone v. Mackenzie

In September of 1989, in a landmark decision, a Florida appellate court held that a $500 contribution by counsel to the judge’s spouse’s judicial campaign was a reasonable basis for the opposing party to fear prejudice, and was legally sufficient grounds to disqualify the trial judge from the case.¹³⁹ The fact that the contribution was to the judge’s spouse did not lessen the fear.¹⁴⁰ The court’s decision “properly elevates reality above theoretical nicety . . . . In the real world the facts of these cases . . . would give the appearance of partiality—justifying a recusal—notwithstanding the judge’s genuine ability to maintain neutrality.”¹⁴¹

¹³³. Muir, supra note 12, at 36.
¹³⁴. Id. at 36-37 (noting that such a feud must be well documented in the motion for recusal).
¹³⁵. See supra notes 100-12 and accompanying text.
¹³⁶. Muir, supra note 12, at 36.
¹³⁷. Id. at 35 (citing Parsons v. Motor Home of Am., 465 So. 2d 1285 (Fla. Dist. Ct. App. 1985)).
¹³⁸. See Alfini & Brooks, supra note 2, at 702. See infra notes 139-55 and accompanying text. In amending the Code in 1990, the A.B.A., for the first time, suggested that attorney contributions may be relevant in disqualification under Canon 3E. CODE, supra note 1, at Canon 5C(2) commentary.
¹³⁹. Breakstone v. Mackenzie, 561 So. 2d 1164, 1166 (Fla. Dist. Ct. App. 1989); Muir, supra note 12, at 34. The Florida Supreme Court ultimately vacated the Court of Appeals’ ruling that a $500 contribution created legally sufficient grounds to disqualify a trial judge, but upheld its order disqualifying the trial judge under the particular facts of the case. Mackenzie v. Breakstone, 565 So. 2d 1332 (Fla. 1990).
¹⁴⁰. Breakstone, 561 So. 2d at 1169.
¹⁴¹. Id. at 1173 (Ferguson, J., concurring). This “may sometimes bar trial by judges who have no actual bias . . . . But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” In re Murchison, 349 U.S. 133, 136 (1954) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).
The *Breakstone* holding extends to situations in which a litigant or an attorney at bar has contributed $500 or more to the campaign of a judge or a close relative of the judge.\(^{142}\) This holding neither requires the judge to disclose the fact that a campaign supporter is appearing before him, nor suggests that the judge must disqualify himself in all of the contributor's firm's cases.\(^{143}\) In addition, the holding is restricted to cases in which counsel moves for recusal.\(^{144}\)

The court's comprehensive decision stated that no judge, under any circumstances, is warranted in presiding over a trial if there is even a question as to his neutrality.\(^{145}\) If the attested facts are reasonably sufficient, it is not for the trial judge to say that they are not.\(^{146}\) The disqualification procedure is designed to assure the appearance and reality of impartial adjudication.\(^{147}\) This procedure is enhanced by disclosure requirements that let the electorate know who made what contribution so that it can decide any actual or potential conflicts of interest.\(^{148}\)

The court was concerned with the possibility of *quid pro quo* relations and the creation of the appearance of influence or corruption.\(^{149}\) The issue is not one of policy but, rather, of the right to a fair trial.\(^{150}\) Concern for such a right constitutes a compelling state interest, which permits the abridgement of fundamental First Amendment rights.\(^{151}\) The court went on to challenge suggestions that this would have a chilling effect on contributions and support, saying that it defied both logic and experience.\(^{152}\)

The *Breakstone* decision departs from earlier Florida decisions that had suggested that a judge's impartiality would survive a campaign contribution.\(^{153}\) It is also inconsistent with an Ethics

\(^{142}\) Muir, *supra* note 12, at 34.

\(^{143}\) *Id.* at 37.

\(^{144}\) *Breakstone*, 561 So. 2d at 1173.

\(^{145}\) *Id.* at 1167.

\(^{146}\) *Id.* at 1167-68 (holding that, as long as the attested facts are not frivolous, they are sufficient).

\(^{147}\) *Id.* at 1168. This helps in "avoiding the undesirable situation which could be presented by inquiry into the existence of an actual prejudice." *Id.*

\(^{148}\) See *Id.* at 1171.

\(^{149}\) *Id.* at 1168.

\(^{150}\) *Id.* at 1172.

\(^{151}\) *Id.* at 1168; see also *infra* notes 183-87 and accompanying text.

\(^{152}\) *Breakstone*, 561 So. 2d at 1172; Muir, *supra* note 12, at 34.

Committee's unanimous decision that a judge need not recuse himself when a supporter is before him. However, the court noted that perceptions of legal ethics have undergone a dramatic evolution to a stricter standard over the past thirty years. While the Florida Supreme Court ultimately disagreed with the Court of Appeals, Breakstone v. Mackenzie represents an historic recognition of that evolution on the part of the judiciary.

D. One Step Further

While Breakstone certainly raises the standard as to what meets the "appearance of impropriety," it still falls short of the public's expectations. However, it does provide a framework that can be built upon to further the integrity of the judicial system. Several improvements can be made upon the decision in Breakstone to create a clear and effective standard of recusal when attorney contributors appear before a recipient judge.

The essential element of a recusal rule would be disclosure. It has been suggested that disclosure of contributions should be made not only to the Secretary of State, but also to the court, so that lawyers can view the records and decide whether to make a motion for recusal. While it might not be objectionable to require the lawyer to do the extra work and check the record himself, the judge should be required to make the disclosure himself. In the event that the judge is unaware of the contribution, the contributing attorney should make the disclosure.

154. See Muir, supra 12, at 35. The Committee also unanimously rejected a suggestion that a judge has a duty to disclose, for the record, the identities of his contributors and workers. Id.
155. Breakstone, 561 So. 2d at 1770.
156. See Muir, supra note 12, at 35.
One judge made a practice of informing opposing counsel that the other attorney had contributed to his campaign and asking if he wanted the judge to recuse himself. Smoler & Stokinger, supra note 3, at 403. He said that counsel usually refused the offer, thinking that the judge would bend over backwards in their favor. Id.
159. This would ensure that the relationship is out in the open, and would work toward ensuring public confidence in the system. Otherwise, judges might be able to hide behind the possibility that the attorney did not check the record.
160. The reason for this is that the judge could say he was unaware of the contribution and thus did not disclose it. This would be difficult to prove. Requiring the attorney to also disclose the contribution ensures that the relationship is revealed.
Once the disclosure has been made, regardless of the size of the contribution,\textsuperscript{161} the burden should be on the opposing counsel to move for recusal. However, the opponent might find no problem with the contribution, and consent to the judge's sitting on the case.\textsuperscript{162} Thus, recusal should not be required \textit{sua sponte},\textsuperscript{163} nor once disclosure has occurred, \textit{per se}. However, once the motion has been made, recusal should be \textit{per se} required.\textsuperscript{164} The option to move for recusal should also be open to attorneys who were supporters of the judge's opponent.\textsuperscript{165} However, if the campaign is active at the time of the appearance, the judge should automatically be disqualified from hearing the case, the appearance of impropriety being too great to dispel.\textsuperscript{166}

The above suggestions should be applied when the attorney has been a contributor in the past. The rule should apply for one election cycle after the contribution.\textsuperscript{167} In addition, it should apply to those who have actively supported the judge—that is to say, campaigned or solicited contributions for him, as well as to those who have contributed money to his campaign.\textsuperscript{168}

\textsuperscript{161} It has been suggested that recusal should be required only for large contributions and contributions that are given with the intent of influencing the judge. Banner, \textit{supra} note 37, at 450. However, a \textit{dollar} limit would be arbitrary, and proving the intent behind a contribution would be extremely difficult to establish.

\textsuperscript{162} This would be similar to the requirement that a judge must disclose and recuse himself from a case in which his attorney appears, but may continue upon opponent's consent. \textit{See} Alfani & Brooks, \textit{supra} note 2, at 702.


\textsuperscript{164} It has been suggested that some \textit{prima facie} case be established before some independent body, similar to those discussed \textit{supra} note 104 and accompanying text. However, I have rejected this proposal because I believe that, once the motion has been made to disqualify a judge, combined with existence of the contribution, there is a situation in which the appearance of favoring the contributor, and disfavoring the movant, is created. The \textit{appearance} is the essential aspect.

It has been suggested that if one of the other parties may be prejudiced by the judge's disqualification, he need not step aside. Smoler & Stokinger, \textit{supra} note 3, at 408.

\textsuperscript{165} Attorneys who opposed a judge might be prejudiced more than those who supported the judge might be favored. \textit{See} \textit{supra} notes 54-55, 97-98 and accompanying text.

\textsuperscript{166} \textit{But see} J-IV Inv. v. David Lynn Mach., Inc., 784 S.W.2d 106 (Tex. Ct. App. 1990). The timing of a contribution may be a major factor in determining impropriety. Contributions during the election with a case pending, or after the election is already won, or far in advance of a re-election all raise serious suspicions of intent. Grannis, \textit{supra} note 16, at 404.

\textsuperscript{167} Banner, \textit{supra} note 37, at 488.

\textsuperscript{168} \textit{See} \textit{supra} notes 47-48 and accompanying text.
E. Criticisms of Recusal

While recusal might appear to be a simple solution to the problem of attorney contributions to judicial campaigns, there are arguments against it. The arguments against recusal are based on practicality as well as the absence of a need for a policy of recusal. A common charge is that a judge will not be biased because of small donations to his campaign and, thus, should not be required to recuse himself from such cases. It is argued that when a popular judge receives many small contributions from members of the bar, the judge will be disqualified in practically all cases that come before him, unless he presides in a large city. Opponents claim that the administrative burden would be too great and the “Rule of Necessity” would end the question of recusal. Another argument against recusal is that attorneys will have an incentive to contribute to the opponents of a judge whom they do not like so that they can force the judge off their cases.

However, these charges argue against themselves. If enough attorneys in a small community contribute to the same judge, the attorneys are not going to make a motion for recusal. There is no threat of prejudice if they have all contributed. Furthermore, opposing counsel needs to make the motion for recusal. If opposing counsel does not believe that a $25 contribution will prejudice his client, he will not make the motion.

F. Prohibition of Attorney Contributions

The most straightforward solution to eliminating potential bias resulting from attorneys’ contributions to judicial candidates would be simply to prohibit attorney contributions. Such prohibitions have
been implemented in some jurisdictions and successfully enforced. However, a policy of prohibiting attorney contributions might be subject to a constitutional challenge that it violates the First Amendment.

Courts have, however, upheld other campaign restrictions that appeared similarly burdensome. Among them are ceilings on individual contributions, requirements that judges resign to run for another office, restrictions on federal civil servants' qualifications as partisan candidates for public office, and restrictions on state civil servants' qualifications to run for any paid public office.

G. The Constitutional Test

Courts have employed a two-tier test to determine whether or not a statutory restriction on campaign activities violates the First Amendment. First, there must be a significant and compelling state interest sought to be served by the statute. Second, the means chosen to further that interest must not unnecessarily infringe on First Amendment rights. A rule prohibiting attorney contributions might be able to pass both tiers.

Certainly, ensuring the administration of an evenhanded judicial system is a compelling state interest. If anything, there is a greater interest in ensuring fair trials than in protecting the integrity of civil servants by forbidding them from running for public office. In fact, courts have held that preventing judicial abuse of office and eliminating even the appearance of impropriety are valid state interests that justify a curtailment of First Amendment rights. While

175. See Johnson, supra note 68, at 2. This policy was later withdrawn. Id.
176. Baum, supra note 6, at 258. In addition, prohibiting attorney contributions would give special interest groups greater influence in judicial elections. Id.
177. Buckley v. Valeo, 424 U.S. 1 (1976) (upholding a $1,000 ceiling on individual contributions). While Buckley was not about judicial elections, some of its issues apply to judicial election regulations. See Grannis, supra note 16, at 411-12.
183. See Broadrick, 413 U.S. 601; United States Civil Serv. Comm'n, 413 U.S. 548. The integrity of civil servants is a vague concept. On the other hand, the right to a fair trial is one of the fundamental, bedrock rights of the Constitution of the United States.
184. See Morial, 565 F.2d at 302-03 (the threat of possible judicial abuse justified
judicial bias resulting from attorney contributions is usually viewed as an ethical question, it also is a constitutional question of due process and the right to a fair trial.\textsuperscript{185}

There is also a sufficient nexus between prohibiting attorney contributions and insuring an impartial judiciary. As has been discussed in earlier parts of this Note, attorney contributions possess significant potential to infringe on the right to a fair trial.\textsuperscript{186} Consequently, prohibiting attorney contributions would logically work to reduce potential sources of bias. Furthermore, this nexus appears to be greater than that between not allowing civil servants to run for elected office and the preservation of their integrity, which has been held to be a sufficient nexus.\textsuperscript{187}

Finally, prohibiting attorneys' contributions does not unnecessarily infringe upon attorneys' First Amendment rights. Certainly, the right to run for public office is one of the ultimate forms of expression, yet restricting that right has repeatedly been held not to infringe unnecessarily on First Amendment rights.\textsuperscript{188} The right to make monetary contributions to a candidate is a lesser form of expression than is running for public office. Prohibiting attorney contributions does not burden the right to vote or to speak.\textsuperscript{189} More importantly, it does not penalize any particular point of view.\textsuperscript{190} Furthermore, other avenues of speech and assistance remain open to attorneys.\textsuperscript{191} Finally, an argument can be made that prohibiting attorney contributions actually protects attorneys from pressures that judges may put on them for contributions, rather than infringe upon their right of requiring judges running for another office to resign from the bench).\textsuperscript{191}

\textsuperscript{185} Grannis, supra note 16, at 383.

\textsuperscript{186} See supra notes 60-98 and accompanying text. Where the practice possesses a substantial connection to unethical behavior like influence-buying and favoritism, infringements on First Amendment rights are permissible. See Stoner, 379 F. Supp. at 713-14 (discussing disclosure requirements).

\textsuperscript{187} If anything, running for public office seems to be a higher form of public service than being a civil servant, and thus the integrity of the civil service would be enhanced by its members seeking such higher positions.

\textsuperscript{188} Broadrick, 413 U.S. 601; \textit{United States Civil Serv. Comm'n}, 413 U.S. 548; Morial, 565 F.2d at 301.

\textsuperscript{189} See Morial, 565 F.2d at 301 (holding that a law requiring that judges resign before running for new political positions does not infringe on candidates' political rights).

\textsuperscript{190} See id. No candidate or attorney of a particular viewpoint is being deprived of any rights. All lawyers and all judicial candidates are affected. \textit{Id.} at 302.

Also note that because judicial offices are different from other offices, the state may regulate judges with that difference in mind without violating the Equal Protection Clause. \textit{Id.} at 304-06.

\textsuperscript{191} Johnson, supra note 68, at 2.
speech.' 192

While prohibiting attorney contributions might seem to be unfair to both lawyers and judges, this might simply be a price that one must pay to be a member of the legal community. Both judges and lawyers are subject to ethical codes193 to which most other professions are not subject. As professionals in a system to which people turn for justice, they must uphold and adhere to standards of conduct that might be burdensome to other citizens.194 Furthermore, judges in most jurisdictions are already prohibited from making contributions to political organizations and candidates.195 Prohibiting attorney contributions to judicial candidates is neither more onerous nor any more of an infringement on the First Amendment rights of attorneys. Although a more detailed constitutional analysis is beyond the scope of this Note, it is likely that a prohibition on attorney contributions could withstand a constitutional challenge.

CONCLUSION

This Note has discussed the potential dangers, both great and slight, that exist by permitting attorneys to contribute to judicial campaigns. While the Code calls for an independent and honorable judiciary, this goal has been achieved neither in reality nor in the public's perception. Permitting attorneys to make campaign contributions to judges adds nothing to achieve this goal.

Breakstone serves as an encouraging sign that the judiciary is aware that improvements need to be made, yet it falls short of its goal. The suggestions made are intended to raise the standard one step higher, and to make it a little more difficult to buy favor with a judge. The prohibition on attorney contributions goes even one step further. The compelling state interest of ensuring a fair trial, combined with the anecdotal evidence of impropriety, surely justify such a prohibition.

Despite these recommendations and the other proposals discussed, the process of electing judges still holds many dangers. Special inter-

192. Id.
193. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY; CODE, supra note 1.
194. CODE, supra note 1, at Canon 2A commentary.
195. 1984 CODE, supra note 1, at Canon 7A(1)(C) (except as provided for under 7A(2)). In one case, a judge's campaign contributions to a senatorial and gubernatorial candidate violated 7A(1)(C) and was prejudicial to the administration of justice. In re Wright, 329 S.E.2d 668 (N.C. 1985). The court held that a campaign committee was not the type of political organization encompassed by the exceptions of 7A(2). Id.
est groups and individual contributors, too, may try to buy influence with judges. While the purpose of this Note has been to focus on attorney contributions, these other dangers should not be ignored.

Ultimately, the best solution would be to eliminate judicial elections altogether and to follow the federal system of appointment. However, dramatic action would be required if such a plan were to be implemented. Instead, this Note has focused on plans that would be more feasible.

Bradley A. Siciliano

---

196. After successfully campaigning for a seat on the Pennsylvania Superior Court, one judge concluded that judges should not be elected. Spaeth, supra note 56, at 10-13. He felt that the electorate was just too uninformed. Id.

197. See, e.g., White, supra note 116 (stating that to change the way judges are selected in Florida would require changing the constitution).