CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
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CJEO Formal Opinion 2019-013

DISCLOSURE OF CAMPAIGN CONTRIBUTIONS IN TRIAL COURT ELECTIONS

Comments from the Public Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); Cal. Com. Jud. Ethics Opns., rule 5(b)(1), (e)).

The following are comments received by the committee on CJEO Draft Formal Opinion 2019-013 that were submitted with a statement waiving confidentiality or consenting to disclosure.

Superior Court of California
County of San Francisco

JEFFREY S. ROSS
JUDGE

December 26, 2018

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Dear Ms. Black and Committee Members:

Thank you for the opportunity to comment on CJEO Draft Formal Opinion 2018-013 (opinion) which addresses a trial court judge's disclosure requirements when the judge receives campaign contributions. As one of the four San Francisco Superior Court Judges who was challenged by four assistant public defenders in the June, 2018, I am grateful that the Committee is clarifying the trial judge's disclosure responsibilities.

My comment is limited to Section C. "What Information to Disclose," specifically the highlighted items in the following:

"C. What Information to Disclose

"The specific campaign contribution information a judge must disclose is contained within the Code of Judicial Ethics, the Code of Civil Procedure, and the Government Code. Canon 3E(2)(b)(i) provides a list of specific information that a judge must disclose. Section 170.1, subdivision (a)(9)(C) does not list applicable disclosure information. Instead, it states that a judge shall disclose any contribution from a party or lawyer in a matter that must be reported under Government Code section 84211, subdivision (f), which, in turn, does list specific information that a judge must disclose. Generally, Government Code section 84211, subdivision (f) is applicable to a candidate's reporting requirements in his or her campaign statements. However, the reference to the statutory provision within section 170.1, subdivision (a)(9)(C) makes the same language applicable to a judge's disclosures in relevant court proceedings.

"Combining the information that a judge must disclose as required by the canon and the statutes, a judge must disclose the following whenever he or she receives a contribution of $100 or more:

• The contributor's or lender's full name;

• The contributor's or lender's street address;
• The contributor's or lender's occupation;
• The name of the contributor's or lender's employer, or if self-employed, the name of the business;
• The amount of each contribution or loan and if the contribution is a loan, the interest rate for the loan;
• The date of each contribution or loan; and
• The cumulative amount of the contributor's contributions or lender's loans.

(Canon 3E(2)(b)(i); Gov. Code, § 84211, subd. (f).)"

The opinion concludes: "However, the reference to the statutory provision within section 170.1, subdivision (a)(9)(C) makes the same language applicable to a judge's disclosures in relevant court proceedings." I respectfully disagree with the committee's statutory interpretation. The statutory provision within section 170.1, subdivision (a)(9)(C) requires that "the judge shall disclose **any contribution**… that is required to be reported under subdivision (f) of Section 84211 of the Government Code." 170.1 defines the contributions which must be disclosed **not** the information about the contribution which must be disclosed. The committee concludes without authority that all of the information which the candidate must report pursuant to the Government Code must be disclosed pursuant to 170.1. Not only is there no authority for that proposition, it is both unnecessary and unwieldy.

The full disclosure—including the address, employment status and employer—is publicly available through the Fair Political Practices Commission. Once an interested party learns of the contribution she or he can easily access that information.

Making the address/employer disclosure requirement mandatory has ramifications which the committee should consider. From a privacy perspective, should every contributor's address, employment status and employer become part of the court's public record? Second, the amount of information which would be necessary would be unduly burdensome; given the public availability of the information adding that requirement outweighs any possible benefit.

The four San Francisco judges had one political committee and reported all of their contributions collectively as required by law. One thousand individuals contributed to our joint campaign. The four of us have been disclosing the names, dates and cumulative contributions as advised by our legal counsel and pursuant to § 170.1 We have not been disclosing the addresses, employment status or employers of our contributors. At least two of us make the disclosure by posting a campaign contribution disclosure statement outside our courtroom with the required information. Because we had one thousand contributors, the list is 22 pages long. Adding the address, employment

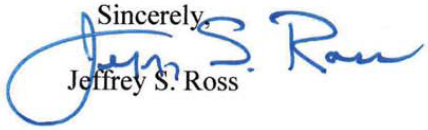
status and employer would more than double its length. Rather than facilitating disclosure, such a lengthy statement likely would impede access to the information.

Because judges are required to make the disclosure for two years after the election, formalizing the draft opinion as is would impose a new ethical obligation on judges who were elected within the past two years. Given the number of contributors to these elections in the past two years, adding this obligation would impose an extraordinary and unnecessary burden. Where the public benefit is de minimis, I believe that the additional disclosure is not required nor warranted.

Please consider revising the opinion to eliminate the disclosure of the contributor's address, employment status and employer.

Thank you for considering this comment.

Sincerely,



Jeffrey S. Ross

Waiver of Confidentiality: Yes

ESTABLISHED 1929

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The Voice of the Judiciary

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Ms. Nancy Black
Committee Counsel
Supreme Court of California Committee
on Judicial Ethics Opinions
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January 9, 2019

Re: CJEO Draft Formal Opinion 2018-013

Thank you for your work on this important topic.

The California Judges Association would like to take this opportunity to submit the following comments.

While we agree with the conclusions drawn in Draft Opinion 2018-013, we believe the Opinion leaves unanswered a few questions. We request that you consider these additional questions and the issues they raise for addition to the Opinion:

The statement from page 9 of the Opinion raises concerns.

"For example, if the judge is aware that a party appearing before the judge contributed to a political action committee that is raising funds on behalf of the judge or in opposition to the judge's opponent, the judge should disclose this contribution. A judge should also consider whether to disclose when the judge is aware of a contribution from a non-party who has an interest in the outcome of the proceeding."

CJA believes this is an overly broad statement. How would a judge be aware of a PAC contribution? Would the judge need to disclose all the contributors and contributions to CJA's JET-PAC? JET-PAC raises money and issues funds to judges who are challenged in an election or facing a recall.

Further, how would a judge know that a non-party has an interest in the outcome of the proceeding? The proposed language appears vague. Perhaps an example would be helpful.

Also, there's a typo on page 17: "The disclosure obligation beings one week after receipt of the first campaign contribution. (Canon 3E(2)(b)(iii).)" This should be "begins."

These comments were drafted by the CJA Ethics Committee on behalf of CJA. Thank you for your consideration. CJA waives confidentiality and consents to CJEO's public disclosure of our comments.

Cordially,

Judge Paul A. Bacigalupo
CJA President

Waiver of Confidentiality: Yes.

To: Supreme Court of California Committee on Judicial Ethics Opinions

Fr: Mark I. Harrison

Re: Comment on Judicial Ethics Draft Formal Opinion 2018-013

Da: January 10, 2019

I respect and appreciate the work of the Committee and am grateful for the invitation to comment on Draft Formal Opinion 2018-13. With the exception of of one potentially fatal flaw, the opinion appears sound and constructive. The potentially fatal flaw is the failure of the Committee to explicitly address the growing phenomenon of "dark money" in judicial election campaigns.[1] As a result of its failure to address the issue of "dark money", the Committee fails to state with any specificity what "reasonable efforts" a judge is required to make "to obtain current information regarding contributions . . . received by his or her campaign . . . "

Based on the draft opinion, the Committee would require the judge to disclose detailed information about every contributor to his or her campaign as well as detailed information about the contribution. However, nothing in the draft opinion acknowledges that a growing percentage of contributions to judicial campaigns are from contributors who purposely conceal their names by contributing to entities which are not required to disclose the identity of the original contributors who provided the money to support a specified judicial candidate(s). These contributions are now euphemistically described as "dark money" precisely because the identity of the initial source of the funds is not known to the ultimate beneficiary of the contributions. And if the ultimate beneficiary is a judge, concealing the source effectively negates the ability of the judge to disqualify himself or herself when appropriate.

It is well known that this phenomenon is the result of the decision of the Supreme Court of the United States in ***Citizens United v. FEC***, 558 U.S. 310 (2010). Without regard to one's view about "dark money" contributions to candidates for the legislative and executive branches of government, it is undeniable that "dark money" contributions to judicial candidates effectively nullifies the ability of the candidate or parties to litigation pending before the judge to know whether the disqualification of the judge is mandated based on existing rules of judicial conduct governing disqualification and recusal.

The "discussion" accompanying the draft opinion states (at p. 9) that

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[1] "One of the most striking aspects of the 2015-16 (judicial election) cycle was the sharp rise in outside spending – most of it non-transparent – by political action committees, 'social welfare organizations' incorporated under 501(c)(4) of the Internal Revenue Code. * * * During 2015-16, outside spending by interest groups was a record $27.8 million – over $10 million more than the prior record from 2011-12." Bannon, Lisk and Hardin, "*Who Pays for Judicial Races*", Brennan Center for Justice and National Institute on Money and State Politics, p.; 7 (2016)(www.brennancenter.org)

> Indirect monetary contributions are contributions or loans that the judge is aware of *or reasonably should be aware of* that are made by a p0arty, lawyer, or law office or firm that appears before the judge to a third party in support of the judge or in opposition to the judge's opponent. (emphasis added).

As noted earlier, the draft opinion states that "(T)he judge shall make reasonable efforts to obtain current information regarding contributions . . . received by his or her campaign and shall disclose the required information on the record." But neither the opinion nor the discussion explain what "reasonable efforts" the judge should make to "obtain current information regarding contributions". It is absolutely clear, however, that the "reasonable efforts" required of the judicial candidate should include a specific demand by the judge that every organization contributing to his or her campaign must disclose the names of contributors to the organization who specified that the contributions should be transmitted to the judicial candidate. Without knowing who was the original source of the funds contributed to his or her campaign, the judicial candidate will have no way of knowing whether the information should be disclosed on the record or more fundamentally, whether the judge is subject to disqualification because of the contributions.

A recent federal case, *Hale v. State Farm Insurance Co*., raised this issue squarely.[2] In *Hale*, it was alleged by the plaintiff class that "dark money" had a critical impact on the decision of a Supreme Court judge which favorably affected State Farm in the Supreme Court of Illinois. State Farm had asserted in pleadings submitted to the state Supreme Court, *some under oath*, that its role and financial support for the judicial candidate who voted in favor of State Farm was relatively small. But the evidence developed by plaintiffs' expert about State Farm's contributions through various "dark money" organizations to the campaign of the judge in question was compelling. And the plaintiffs, in the context of a federal RICO case, intended to demonstrate at trial that State Farm had previously misled the court about the significant extent of its contributions via "dark money" to the campaign of the judge whose vote allegedly overturned the $1.04B verdict against State Farm. State Farm was apparently sufficiently concerned about the risks it faced at trial that it settled the case the day the jury trial was scheduled to commence. State Farm paid $250MM to the plaintiff class rather than risk a verdict

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[2] *Hale v. State Farm Insurance Co. Mark Hale, Todd Shadle and Laurie Loger, on behalf of themselves and all others similarly situated, plaintiffs v. State Farm Mutual Automobile Insurance Company, Edward Murnane, and William G. Shepherd*, , [Case No. 3:12-cv-00660-DRH-SCW]; In the interest of full disclosure, I was retained by counsel for the plaintiff class to serve as the judicial ethics expert in the case. I also served as Chair of the ABA Commission to Revise the Code of Judicial Conduct (2004-07).

subject to trebling and to the publicity that might reflect badly not only on State Farm but on the Illinois judiciary as well.

In *Hale*, the judge at the center of the controversy testified that he had his staff review the public filings of contributions to his campaign. The amount of contributions disclosed in public filings, i.e., in which the names of the contributors were disclosed, was miniscule compared to the contributions to the campaign through "dark money" organizations in which the names of the original contributors were not disclosed. Discovery in the *Hale* case showed that approximately 74% of the total received by the judge's campaign came from "dark money" organizations which were not required to disclose the identity of the original source of the money – *State Farm, its officers and lawyers* – who ultimately contributed to the judge's campaign.

If the plaintiffs' allegations were true, i.e., that State Farm had contributed directly and indirectly through "dark money" organizations, 74% of the funds collected by the campaign of the judge who allegedly cast the deciding vote in favor of State Farm and if that judge and parties were aware of State Farm's "dark money" contributions, the judge would have surely disqualified himself or obviously would have been subject to disqualification. However, since neither the parties nor the judge were aware of the "dark money" contributions by State Farm, there was no timely factual basis of which the judge was aware -- while a candidate or after his election -- which warranted his disqualification from the case.

The lesson which *Hale* teaches is that if disqualification based on campaign contributions is to have any meaning and efficacy, judicial candidates must know the original source of "dark money" contributions in order to determine if the contributions require disqualification and/or disclosure on the record. In order to accomplish that goal, the opinion of this Committee should make clear that the "reasonable efforts" required of a judicial candidate to acquire information about contributors and contributions must include formal inquiries from the candidate to all "dark money" organizations from which the candidate receives contributions requiring those organizations to provide the names of the original source of the funds and the amounts contributed by that source for the benefit of the candidate.

I recognize that imposing this obligation on judges may dissuade potential contributors from making otherwise undisclosed contributions to "dark money" organizations for the judge's campaign. But if that practice is permitted to continue, the rules governing disqualification will increasingly become a "dead letter". So far as I am aware no state judicial ethics code currently requires judges to make the inquiry I am urging in this Comment. And I am also unaware of any state case or judicial ethics opinion which squarely addresses this problem. While there is no rule presently requiring judges to obtain information about the original source of campaign contributions from "dark money" sources, there are rules, cases and commentary which confirm the importance of disclosing contributions and "expenditures" to assure litigants the due process mandated by the Supreme Court of the United States in ***Caperton v. Massey***, 556 U.S. 868 (2009).

For example, the Model Code of Judicial Conduct includes rules which require judges to carefully assess whether attendance at seminars might reflect bias in favor of the sponsor but

more to the point, require judges to publicly disclose the amount of reimbursement by the sponsor for expenses incurred by the judge in attending the seminar. See Model Rules 3.14 and 3.15. Comment (3) to Rule 3.14 states: "A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person *to undermine the judge's independence, integrity or impartiality*." This is, of course, the same standard reflected in Model Rule 2.11 and 28 U.S.C. §455(a) which generally govern disqualification and in the judicial conduct rules of every state, including California, governing disqualification. This guiding principle is also adopted for the guidance of federal judges in Judicial Conference Opinion 67 (https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf). And the issue is also discussed at length in a pertinent, insightful monograph --- prompted by the decision in ***Caperton*** -- dealing with the potentially corrosive effect on due process of contributions to and expenditures for judicial candidates. Sample, James J. "*Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality* (2011) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662630

In the *Hale* case, *supra*, I learned that federal courts, which have no need to address this problem directly, have issued decisions which support the conclusion that it is incumbent on judges, not parties appearing before them, to determine whether there are any monetary or in-kind contributions which implicate 28 U.S.C. §455(a), the federal statute governing disqualification. For example, in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988) and *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 750-751 (7th Cir. 2015), the courts confirmed that .

* "[t]he onus is *on the judge* to ensure any potentially disqualifying information is brought to the attention of the litigants." *Listecki*, 780 F,3d at 750; (emphasis added).

* "[J]udges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside." *Liljeberg* , 486 U.S. at 862 n.9.

* "It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially disqualifying piece of information about every judge before whom they appear." *Listecki*, 780 F,3d at 750.

Significantly, 28 U.S.C. §455(a), the statute governing judicial disqualification in the federal courts is virtually identical to Rule 2.11 of the ABA Model Code of Judicial Conduct and the Model rule governing disqualification has been adopted, typically *in haec verba*, by the judiciary in most states.[3] The standard governing disqualification reflected in Rule 2.11 of the Model

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3 According to a status report dated August 22, 2016 issued by the Center for Professional Responsibility of the ABA, thirty-five (35) states (Ariz., Ark., Cal., Colo., Conn., Del., D.C., Ga., Haw., Idaho, Ind., Iowa, Kan., Me., Md.,

Code is not explicitly codified in Canon 3(E) of the California Code of Judicial Ethics but subparagraphs 3(E)(4)(b) and (c), when read together with Section 170.1(6)(A) (i), (ii) and (iii) of the California Code of Civil Procedure, effectively embody the standard articulated in Model Rule 2.11.

I realize that my recommendation is likely to be controversial and difficult to draft as an ethical rule that judges must satisfy. However, in my view, unless the Committee addresses the growing problem of "dark money", its pending Opinion 2018-13 will not effectively address, much less settle, the problem it is intended to resolve. It is my hope that this Comment is helpful to the Committee and would be pleased to respond to any questions from the Committee about this Comment.

I hereby waive confidentiality with respect to this comment and consent to its public disclosure on the CJEO website.

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Waiver of Confidentiality: Yes.

Mass., Minn., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.D., Ohio, Okla., Or., Pa., S.D., Tenn., Utah, Wash., W.Va., and Wyo.) have approved a revised Judicial Code; ten (10) states have established committees to review their code (Alaska, Ill., Ky., La., N.Y., N.C., R.I., S.C., Tex., and Vt. and one (1) state (Miss.) has proposed final revisions to their Judicial Code.

Response - CJEO Draft Formal Opinion No. 2018-013

TITLE: Committee on Judicial Ethics Opinions Draft Formal Opinion 2018-013; Disclosure of Campaign Contributions In Trial Court Elections

Comments:

Thank you for the opportunity to comment on CJEO Opinion 2018-13. We have three major points.

Number 1

We have concerns about the paragraph at the top of page nine of the opinion regarding "indirect contributions" to third parties who support the judge or oppose the judge's opponent. The paragraph cites to the Advisory Committee Commentary to Canon 3E(2)(b), which references Canon 3E(2)(a). But there is no language in Canon3E(2)(a), Canon 3E(2)(b), or Code of Civil Procedure section 170.1(a)(9) requiring disclosures of contributions to third parties. Had the Supreme Court intended contributions to third parties who support the judge's candidacy or oppose the judge's opponent to be disclosed, the Court could have easily stated so in Canon 3E(2). Likewise, the legislature could have included contributions to third parties in section 170.1(a)(9). For contributions to third parties to be grounds for disqualification, the contributions would need to fall under Code of Civil Procedure section 170.1(a)(6)(A). However, contributions to a third party, of which a judge is not likely to be aware and has no duty to discover, would not necessarily lead a person to reasonably believe the judge is not impartial. In addition, if the contribution is to a political action committee that supports multiple candidates and causes, it may be impossible to determine if any particular judge was the intended beneficiary of the contribution. Such contributions would not necessarily lead a person to reasonably believe the judge is not impartial. The fact the judge must disclose the contribution from a political action committee provides sufficient transparency. Finally, while the Commentary to Canon 3E(2)(b) states that contributions to third parties "may" need to be disclosed, the opinion goes further, stating such contributions "should" be disclosed.

We believe Canon 3E(2) and section 170.1(a)(9) provide sufficient guidance on disclosure obligations. For these reasons, we propose the deletion of the paragraph on the top of page nine as it appears to expand the duties of a judge beyond what is required in the Canon 3E(2) and Code of Civil Procedure section 170.1(a)(9).

Number 2

We are concerned that the opinion could cause sitting judges who are judicial candidates to disclose contributions in a way that could create an inference that a sitting judge is soliciting contributions while court is in session. Requiring disclosures on the record in each proceeding could result in repeated disclosures of contributions by firms and individuals who appear often,

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RESPONSE TO: Supreme Court of California
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DEADLINE FOR COMMENT: Friday, January 18, 2019

creating an inference that the court is criticizing those who have not contributed. The opinion states at page twelve "the judge must ensure that any disclosures become a part of the written record of the proceeding." In high volume courtrooms, such disclosures could take significant time during multiple hearings and staff time creating written records in minute orders.

We propose the opinion be revised to allow disclosures in ways that do not create an inference of solicitation and do not consume an undue amount of hearing or staff time. For example, a judge could be permitted to make disclosures by reference to a readily-available website or by posting disclosures in a prominent place in the courtroom, without necessarily needing to identify contributors by name on the record.

Number 3

The first sentence of the first full paragraph on page 10 is not clear. It requires disclosure "when a party, lawyer, or law office or firm that appears before the judge has a role in the campaign or a relationship to judge [sic] or did so previously." The phrase "a relationship to the judge or did so previously" is vague. We suggest rephrasing to require disclosure "when a party, lawyer, or law office or firm that appears before the judge has or had a role in the campaign." Other types of non-campaign relationships that would require disclosure under other Canons are not the subject of this opinion.

Please note that these comments are from the Los Angeles Superior Court and not from any one person in particular.

We waive confidentiality under the CJEO rules and consent to disclosure of this comment by posting on the CJEO website for public review after the deadline for comments.

Waiver of Confidentiality: Yes.