

**2009  
NEVADA CODE  
OF JUDICIAL  
CONDUCT**

- ABA MODEL CODE**
- **TEMPLATE FOR CODE CHANGES**
    - PROVIDES UNIFORMITY WITH OTHER STATES WHERE CONSISTENT WITH NEVADA JUDICIAL POLICY
    - FACILITATES RELEVANT RESEARCH FROM OTHER STATES
    - PROVIDES COMMON SENSE APPROACH TO PROBLEMS OF JUDICIAL ETHICS

- FORMAT AND ORGANIZATION**
- **FOUR CANONS WITH NUMBERED RULES**
  - **CANON 1**
    - COMBINES OLD CANONS 1 AND 2
    - STATES GENERAL PRINCIPLES OF CONDUCT

- FORMAT AND ORGANIZATION**
- **CANON 2**
    - FOCUSES ON PROFESSIONAL DUTIES OF THE JUDGE
    - REPLACES CURRENT CANON 3
  - **CANON 3**
    - REPLACES CURRENT CANON 4
    - COVERS EXTRAJUDICIAL AND PERSONAL CONDUCT

- FORMAT AND ORGANIZATION**
- **CANON 4**
    - REPLACES CURRENT CANON 5
    - COVERS POLITICAL AND CAMPAIGN CONDUCT OF JUDGES AND JUDICIAL CANDIDATES

- SCOPE**
- **CANONS PROVIDE OVERARCHING PRINCIPLES OF JUDICIAL ETHICS**
  - **NOT DESIGNED OR INTENDED AS A BASIS FOR CIVIL OR CRIMINAL LIABILITY**
  - **COMMENTARY**
    - PROVIDE GUIDANCE REGARDING PURPOSE, MEANING, APPLICATION AND ASPIRATIONAL GOALS

### **CANON 2 SETTLEMENT**

- **ENCOURAGING SETTLEMENT**
  - CANON 2.6(B)
  - CANON 2.9(A)(4)
  - MINORITY REPORT CONCERNING CAUCUS-TYPE MEDIATIONS

### **CANON 2 COMMUNICATIONS**

- **EX PARTE COMMUNICATIONS**
  - EXPERTS IN THE LAW
  - OTHER JUDGES
  - SPECIALTY COURTS
  - SEE CANONS 2.9(A)(5) AND 2.9(B)

### **MORE CANON 2**

- **DISQUALIFICATION**
  - CANON 2.11
- **DISABILITY AND IMPAIRMENT—DISCIPLINARY RESPONSIBILITIES**
  - HONOR CODE

### **CANON 3**

- **TESTIFYING AS A CHARACTER WITNESS—CANON 3.3**
- **PARTICIPATION IN RELIGIOUS AND CHARITABLE ORGANIZATIONS**
  - CANON 3.7 COMMENT 3(A)

### **CANON 4**

- **POLITICAL ACTIVITY**
  - WHITE V. REPUBLICAN PARTY OF MINNESOTA AND THE “ANNOUNCE” RULE
  - CANON 2.10(B) CONTAINS PROMISES PLEDGES AND COMMITMENT CLAUSE—NO ANNOUNCE CLAUSE
- **JUDICIAL CAMPAIGN ACTIVITY**
  - COMMISSION URGED RECONSIDERATION OF CANON 4.2(C) BASED UPON CONSTITUTIONAL CONCERNS

### **CANON 2 DUTY TO SIT**

- **DUTY TO SIT**
  - GENERALLY IMPLIES THAT CLOSE CASES WITHOUT OVERT REQUIREMENT TO DISQUALIFY SHOULD BE RESOLVED IN FAVOR OF NON-DISQUALIFICATION
  - PROFESSOR STEMPEL WHITE PAPER RECOMMENDING ABANDONMENT OF DOCTRINE—APPENDIX E TO COMMISSION REPORT

**DUTY TO SIT**

- REJECTED COMMENT 2 TO RULE 2.7:
  - PREVIOUS NEVADA CASES AND THE FORMER CODE OF JUDICIAL CONDUCT HAVE RECOGNIZED A “DUTY TO SIT.”
  - PROPERLY UNDERSTOOD, THE TERM “DUTY TO SIT” MEANS ONLY THAT JUDGES SHOULD NOT DISQUALIFY THEMSELVES WITHOUT A VALID REASON THAT IS AT LEAST COLORABLY CORRECT AS A MATTER OF FACT AND LAW.

**REJECTED COMMENT 2 (CON’T)**

- RECOGNITION OF A “DUTY TO SIT” SHOULD NOT BE CONSTRUED TO SUGGEST THAT JUDGES SHOULD REFUSE TO DISQUALIFY THEMSELVES IN APT CIRCUMSTANCES OR THAT CLOSE CASES SHOULD ROUTINELY BE RESOLVED AGAINST DISQUALIFICATION.
- ON THE CONTRARY, CLOSE QUESTIONS SHOULD ORDINARILY BE RESOLVED IN FAVOR OF DISQUALIFICATION IN ORDER TO PRESERVE PUBLIC CONFIDENCE IN THE JUDICIAL SYSTEM.

**TROUBLE ON THE HORIZON**

- DUTY TO SIT AND CAPERTON V. A.T. MASSEY COAL COMPANY DECIDED BY THE U.S. SUPREME COURT IN JUNE 2009
  - DUE PROCESS CONSIDERATIONS

**CAPERTON VS. MASSEY COAL**

- CASE INVOLVED BUNDLED DONATIONS TOTALING OVER \$3 MILLION IN A JUDICIAL CAMPAIGN
- MAJORITY OPINION:
  - UNDER OUR PRECEDENTS THERE ARE OBJECTIVE STANDARDS THAT REQUIRE RECUSAL WHEN “THE PROBABILITY OF ACTUAL BIAS ON THE PART OF THE JUDGE OR DECISIONMAKER IS TOO HIGH TO BE CONSTITUTIONALLY TOLERABLE.” *Withrow v. Larkin*, 421 U. S. 35, 47 (1975).

**CAPERTON OPINION (con’t)**

- MORE MAJORITY OPINION:
  - THERE IS A SERIOUS RISK OF ACTUAL BIAS WHEN A PERSON WITH A PERSONAL STAKE IN A PARTICULAR CASE HAD A SIGNIFICANT AND DISPROPORTIONATE INFLUENCE IN PLACING THE JUDGE ON THE CASE BY RAISING FUNDS OR DIRECTING THE JUDGE’S ELECTION CAMPAIGN WHEN THE CASE WAS PENDING OR IMMINENT.

**CAPERTON OPINION (con’t)**

- MORE MAJORITY OPINION:
  - THE PROPER INQUIRY CENTERS ON THE CONTRIBUTION’S RELATIVE SIZE IN COMPARISON TO THE TOTAL AMOUNT CONTRIBUTED TO THE CAMPAIGN, THE TOTAL AMOUNT SPENT IN THE ELECTION, AND THE APPARENT EFFECT OF THE CONTRIBUTION ON THE OUTCOME.

**CAPERTON OPINION (con't)**

- MORE MAJORITY OPINION:
  - THE INQUIRY IS AN OBJECTIVE ONE. THE COURT ASKS NOT WHETHER THE JUDGE IS ACTUALLY, SUBJECTIVELY BIASED, BUT WHETHER THE AVERAGE JUDGE IN HIS POSITION IS “LIKELY” TO BE NEUTRAL, OR WHETHER THERE IS AN UNCONSTITUTIONAL “POTENTIAL FOR BIAS.”

**C.J. ROBERTS, DISSENTING**

- DISSENT LISTS 40 CONCERNS WITH CAPERTON MAJORITY
- SOME OF ROBERTS' MAJOR CONCERNS:
  - HOW MUCH MONEY IS TOO MUCH MONEY?
  - DOES THE AMOUNT AT ISSUE IN THE CASE MATTER?
  - SHOULD WE ASSUME THAT ELECTED JUDGES FEEL A “DEBT OF HOSTILITY” TOWARDS MAJOR OPPONENTS OF THEIR CANDIDACIES?

**ROBERTS DISSENT (con't)**

- DOES A DEBT OF GRATITUDE FOR ENDORSEMENTS . . . GIVE RISE TO A CONSTITUTIONALLY UNACCEPTABLE PROBABILITY OF BIAS?
- DOES CLOSE PERSONAL FRIENDSHIP WITH A PARTY OR LAWYER NOW GIVE RISE TO A PROBABILITY OF BIAS?
- DOES IT MATTER WHETHER THE CAMPAIGN EXPENDITURES COME FROM A PARTY OR THE PARTY'S ATTORNEY?

**ROBERTS DISSENT (con't)**

- WHAT ROLE DOES CAUSATION [OF THE ELECTION VICTORY] PLAY IN THIS ANALYSIS?
- WHAT IF THE ELECTION IS NONPARTISAN?
- ARE THE PARTIES ENTITLED TO DISCOVERY WITH RESPECT TO THE JUDGE'S RECUSAL DECISION?

**POST-CAPERTON PROPOSALS**

- TWO RECOMMENDED CHANGES TO CODE REQUIRING DISQUALIFICATION BASED ON CAMPAIGN SUPPORT:
  - (1) ADOPT MODIFIED VERSION OF ABA MODEL RULE 2.11(A)(4) -- NEW TO NEVADA
    - MANDATES A JUDGE'S DISQUALIFICATION BASED ON AGGREGATE CAMPAIGN SUPPORT THAT EXCEEDS \$50,000 WITHIN THE PREVIOUS 6 YEARS FROM A PARTY, ITS AFFILIATES OR LAWYERS.

**POST-CAPERTON PROPOSALS**

- (2) ADOPT NEW RULE 2.11A
  - GOVERNS A JUDGE'S DISQUALIFICATION BASED ON AGGREGATE CAMPAIGN SUPPORT EXCEEDING 5% OF THE JUDGE'S TOTAL FINANCIAL OR ELECTORAL BACKING WITHIN THE PREVIOUS 6 YEARS FROM A PARTY, ITS AFFILIATES OR LAWYERS.
  - DISQUALIFICATION IN THESE CIRCUMSTANCES IS REQUIRED ONLY WHEN SUCH SUPPORT CREATES A REASONABLE QUESTION AS TO THE JUDGE'S IMPARTIALITY AS DETERMINED UNDER PARAGRAPH (E) OF THE RULE.