

# Ordering the Court - Whose Judges Are They, Anyway: Youse, Yinz, or Y'all?

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Professor Michael Dimino  
Topic 1:  
What Judicial Candidates Can and Can't Say

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**ABA Model Code of Judicial Conduct, Rule 4.1(A)(13)**  
***accord* PA Code of Judicial Conduct, Rule 4.1(A)(12)**

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(A)[A] judge or a judicial candidate shall not: . . .

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

# **ABA Model Code's Definition of "Impartial"**

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“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

# Former ABA Model Code of Judicial Conduct, Canon 7(B)

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“[A judicial candidate shall not] announce his or her views on disputed legal or political issues.”

# Republican Party v. White, 536 U.S. 765 (2002)

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MINNESOTA BOARD ON JUDICIAL STANDARDS



# Republican Party v. White, 536 U.S. 765 (2002)

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# PA Rule of Judicial Conduct 2.11(A)(5)

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(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.



Freilich v. SEPTA, 648 Pa. 1, 2, 191 A.3d 739, 739-40 (2018) (Wecht, J., denying recusal motion).

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“[C]riticizing a prior decision is a far cry from committing to its reversal. . . . That an honorable jurist speaks critically of prior precedent should not by itself prompt anyone to assume that he will disdain it.”



League of Women Voters v. Commonwealth, 645 Pa. 341, 347-48, 179 A.3d 1080, 1084 (2018) (Wecht, J., denying recusal motion).

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“Applicants . . . excerpt a handful of comments made during my campaign for this office, including that ‘gerrymandering is an absolute abomination,’ ‘a travesty,’ ‘insane,’ and ‘deeply wrong.’ I mentioned the thirteen-to-five split in favor of Republican representatives in Pennsylvania’s House delegation against the background of a Democratic advantage in voter representation. I further opined that ‘[e]xtreme gerrymandering is . . . antithetical to the concept of one person, one vote.’ These comments expressed my thoughts on the topic, something manifestly distinct from a clear commitment to rule in a certain way if presented with a specific challenge based upon a well-developed factual record and the benefit of full and fair advocacy.”

Robert Davis, Jr.  
Topic 2:  
Campaign Finance

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# The Justices Involved in the dispute: McGraw & Benjamin

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# Caperton v A T Massey Coal Co, Inc

556 US 868, 129 S. Ct 2252, 173 L.Ed 2d 1208 (2009)

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WEST VIRGINIA'S COUNTERPART TO "DALLAS" OR "GAME OF THRONES" OR "YELLOWSTONE"

A.T. Massey Coal Co. - A 'colonial power' in West Virginia for most of state history currently run by **Blankenship** a 'coal baron' if ever one existed;

**Caperton** – Another major actor – ran a major competing coal company – marketing coal. Sometimes ally but always a competitor of A.T. Massey/Blankenship. Obtained \$50 Million jury verdict v. A.T. Massey for numerous business shenanigans aimed to destroy Caperton.

Justice **McGraw** – incumbent, darling of trial lawyers (\$2M in support) whose family has been long seen as generally more "liberal" and less pro-business. No friend of Bob Davis, Jr.

Brent **Benjamin** – Big-firm Charleston lawyer, seen as more pro business. As the 2004 campaign began, sensed massive Massey/Blankenship financial support – called Bob Davis early for advice during campaign, not later.

# THE 2004 ELECTION – MAJOR MONEY

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BLANKENSHIP - \$1,000 allowed by election laws as personal contribution to Benjamin +

“AND FOR SAKE OF KIDS” – Sec. 527 organization – spent \$ 2.5 Million ads, etc. favoring Benjamin , +

\$500,000 direct mailing supporting Benjamin = 3 X amount that Benjamin campaign spent on the campaign.

McGRAW – Spent much less, ran campaign in which he made some very unwise statements, was outspent, and still lost narrowly to Benjamin. Blankenship money given to the Benjamin Campaign surpassed all McGraw donations.

Benjamin’s approach during campaign – was greatly concerned of perception of being “bought and paid for” by Blankenship – could not find a way to deal with that, as he agreed with most of the good things Blankenship and Blankenship “entities” were saying about his qualifications.

# 4 BENJAMIN RESPONSES TO BIAS CLAIMS

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#1 RECUSAL MOTION V BENJAMIN & OTHERS – Benjamin insists he is objective, not biased by election activities of Blankenship/Massey rejecting Motion in W.Va. Supreme Ct. of Appeals

#2 DISREGARDS ADVICE OF JUSTICE STARCHER - Starcher disqualified – urged Benjamin in a publicly- released writing to recuse from A.T. Massey appeal of 2002 jury verdict.

#3 RENEWED MOTION BY CAPERTON – Justice Benjamin again declines to withdraw – says no proof of “direct, personal, pecuniary interest” ever shown in the Caperton motions; re-asserts his lack of bias, good faith, objectivity. [Massey Poll – 67% polled doubted he would be fair ]

APRIL 2008 – Second Victory by Massey ; 3-2 vote w/ Benjamin in majority. Caperton appeals.

#4 AFTER US SUPREME COURT GRANT OF CERT - Benjamin wrote concurring opinion further defending, in detail, why there was no hard evidentiary support for the disqualification motion.

# US SUPREME COURT FINDINGS/POINTS – DO THEY “KNOW IT WHEN THEY SEE IT?”

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NO ACTUAL BIAS OF BENJAMIN EVER SHOWN – US Supreme court said never found him biased;

OLD “APPEARANCE OF PROPRIETY’ APPROACH, PER ABA JUDICIAL CANON +

TOOMEY V OHIO 273 US 510 (1927) TEST - facts demonstrate a *possible temptation* to the average judge ... that will lead him not to **hold the balance nice, clear and true.** +

CONCEPT THAT NO PERSON SHOULD BE ALLOWED TO CHOOSE THE JUDGE IN THEIR CASE =

Finding generally that integrity of judicial process and judges is critical to society so that when actions of a party expected to appear before the judge seem to present a **significant and disproportionate influence in placing a judge onto the court that will decide that person’s case – raises a situation in which the due process/fair trial rights of the opposing party are violated and removal of the judge is mandated.**



# WHAT IS THE CAPERTON V A.T. MASSEY RULE AND HOW WELL DOES IT WORK ?

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4 JUSTICES DISSENTED AND GAVE 40 DIFFERENT EXAMPLES OF SITUATIONS IN WHICH THE TEST ADOPTED BY THE COURT IN THE CASE WOULD BE DIFFICULT TO APPLY, WOULD RESULT IN INCONSISTENT RESULTS OR WAS SIMPLY UNWORKABLE.

The MAJORITY opinion admitted that their announced approach for deciding a lack of Due Process in a judicial election “may sometimes bar trial by judges with no bias and who would do their very best to weigh the scales of justice equally between contending parties.”

Justice Benjamin asserts to this day that he was just such a judge.

# Stretton vs PA Disciplinary Board & Davis

## 994 F.2d 137 3<sup>rd</sup> Cir. (1991)

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Stretton claimed PA Rules applicable to Judicial Candidates that prohibited him to “announce views on contested legal issues” and to personally solicit funds were violative of his First Amendment Rights as a candidate for Common Pleas bench.

Disciplinary Board/ ADC Davis took position that the Rule prohibited only statements that were promises to decide contested cases in a certain way but that “announcing views” on issues was protected speech thus was constitutional as applied + ban on personal solicitation of funds was proper.

Judge Newcomer, E.D.Pa. , struck down the prohibition of solicitation as an overbroad limitation of speech but upheld the prohibition on personal solicitation of funds as narrowly drawn and serving compelling state interest to avoid the “appearance of impropriety”. Assessed costs.

Third Circuit – Found D Board’s limitation of enforcement of the Rule only to direct promises of action served a compelling state interest and was narrowly interpreted and applied and thus met the strict scrutiny requirement applicable to analysis of First Amendment challenges.

# Williams- Yulee v Florida Bar

## 135 S.Ct.1656, 191 L.Ed.2d 570 (2015)

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Judicial Candidate Yulee sent posted a personal letter on the internet stating her views and also asking for contributions to her campaign.

Florida Bar charged this as a forbidden “personal solicitation of campaign donations” under Florida Judicial Code and charged and punished Yulee.

US Supreme Court were generally in agreement that forbidding face-to-face solicitation of donations to a judicial campaign was a compelling state interest and such in-person solicitation was prohibited BUT the majority rejected Yulee’s claim that Florida Rule failed to address specifically the written solicitation of campaign funds thus application of the Rule was improper limitation on political speech.

Majority held application of “no personal solicitation” provision to letter solicitation was not “perfectly tailored” restriction but was sufficiently narrow to pass constitutional muster.

Jake Younts  
Topic 3: PA Requirements  
Article V Requirements for the Judiciary

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# Qualifications – Section 12

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- Judges must be citizens of the commonwealth.
- Judges must be members of the bar of the Supreme Court.
- Judges in statewide courts must be residents of the commonwealth for a year prior to their term and throughout their term.
- Other Judges must reside within their district for a year prior to their term and throughout it.

# Elections & Vacancies – Sections 13 & 15

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- Judges are elected for 10-year terms.
- Vacancies are filled by appointment by the governor.
- Judges can file for retention elections.

# Prohibited Activities – Section 17

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- Must be fully devoted to the judicial role
- Must not break the law or violate the prescribed code of conduct
- Cannot be paid for judicial work except their salary

Pooja Iyer and Greg McIntosh  
Topic 3: PA Requirements  
PA Code of Judicial Ethics

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# Code of Judicial Conduct (effective 2014) - Rule 2.11 Disqualification

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“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to . . . [t]he judge knows or learns that a party, a party’s lawyer, or the law firm of a party’s lawyer has made a direct or indirect contribution(s) to the judge’s campaign in an amount that would raise a reasonable concern about the fairness or impartiality of the judge’s consideration of a case . . . .” *See also* Comment 6 concerning Political Action Committees.

*Compare* with “Rule 2.7. Responsibility to Decide. A judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law.”

Rule 2.7, Comment 1 provides: “Unwarranted disqualification or recusal may bring public disfavor to the court and to the judge personally.”

# Canon 2 - Unauthorized statements generally

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## Rule 2.10. Judicial Statements on Pending and Impending Cases.

“(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Rule 2.10, Comment 1: “This Rule’s restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary. A judge should be mindful that comments of a judge regarding matters that are pending or impending in any court can sometimes affect the outcome or impair the fairness of proceedings in a matter.”

# Canon 4 - Unauthorized statements as applied to campaigns

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Rule 4.1, Comment 1 - “Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case.” Tracks language from *Caperton, Republican Party of Minnesota*, and *Florida Bar*.

4.1(A)(12) a judge or judicial candidate shall not “in connection with cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

4.2(C)(4) a judge or judicial candidate shall not “make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”

In other words, applies Rule 2.10 to judicial candidates.

“Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited.”

# Canon 4 - Campaigns contributions

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Like *Florida Bar*, Rule 4.1(A)(7) provides that “a judge or judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4.”

Rule 4.4 provides that “[a] judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, including seeking, accepting, and using endorsements from any person or organization, subject to the provisions of this Code.”

Gina Miller  
Part 3: Constitutional Amendments  
Keep Current Structure

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# WHERE DO WE GO FROM HERE?

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A Constitutional Convention, of course!!



It's not broken, so we don't need to fix it!

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Chris Zivny  
Part 3: Constitutional Amendments  
Candidates Can Do and Say Anything

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# Introduction

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At one end of the spectrum, there are those that believe that a judicial candidate's speech and actions should not be restricted in any way at all so that those candidates may express their beliefs freely and so voters may know exactly who they are voting for and what their opinions and beliefs are.

# Unrestricted Speech

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It is posited by some that giving at least the same degree of free speech that political candidates enjoy to judicial candidates would most neatly comport with the First Amendment. See *Nat Stern, Judicial Candidates' Right to Lie*, 77 MD. L. Rev. 774 (2018).

The (theoretical) goal of providing completely unrestricted speech is to give voters a better idea of who they are voting for in judicial elections.

# Knowledge is Power

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Sir Francis Bacon is credited with the phrase “knowledge is power.” However, it is of paramount importance to understand and appreciate that “[i]n a *democracy*, knowledge is power.” (Jerit et al. 2006): 266 (emphasis added).

Thomas Jefferson, who greatly admired Sir Francis Bacon, once stated that “[i]f a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.” Thomas Jefferson, letter to Charles Yancey, 1816.

# Meaningfully Informed Voters

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At one extreme, when a judicial candidate's speech is **greatly** restricted, a trade is made. The *appearance* of impartiality is upheld by the sacrifice of a meaningfully informed voter; however, the goal of true impartiality may go by the wayside. It is only after the judicial candidate becomes a judge that the voter finds out if his or her gamble or guess paid off.

The argument is that the *appearance* of impartiality is of no moment if the price of that appearance may ultimately be the impartiality itself.

# Accountability to Voters

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Proponents of greater First Amendment protection for judicial candidates' speech believe this will make those candidates and judges more accountable to the public, however at the possible cost of politicizing the courts. The theory is that much like the political branches, if voters are going to directly elect a judicial candidate, voters should enjoy the advantages of knowing what that judicial candidate truly stands for and what the voter can expect in terms of performance.

[Mtsu.edu/first-amendment/article/1124/judicial-campaign-speech](https://mtsu.edu/first-amendment/article/1124/judicial-campaign-speech).

# Fact vs. Fiction

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Interestingly, it is almost axiomatic that political candidates may (*generally*) lie without legal repercussion. However, separation of powers principles guide the judiciary towards a higher standard for those who seek judicial office.

More than twenty states have laws which contain a “misrepresentation clause” barring deliberately false or misleading statements by judicial candidates. *Republican Party of Minnesota v. White* creates an air of uncertainty as to whether most, some, or all of these restrictions on a judicial candidate’s speech are constitutional.

See *Nat Stern, Judicial Candidates’ Right to Lie*, 77 MD. L. Rev. 774 (2018).

# Absolute Freedom of Speech

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In line with the recent trend toward allowing greater First Amendment protection for judicial candidates' speech, a new amendment to the Pennsylvania Constitution could provide for completely unfettered and unrestricted speech. Such an amendment would not be concerned with judicial impartiality or the appearance of impartiality. Instead, proponents of such an amendment would take a free speech absolutist approach by granting judicial candidates' completely unrestricted speech.

# Free Speech Amendment

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The language of such an amendment would be as follows:

**A judicial candidate's speech shall not be restricted in any way whatsoever, and no restrictions to a judicial candidate's speech may be applied retroactively.**



# Letting It All Hang Out

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By keeping things simple, the greatest amount of protection to judicial candidates' speech is provided. A judicial candidate may therefore speak freely on any subject without restriction, including but not limited to pending cases, the support or opposition of any candidate for any office, political subjects, and more.

In this way, Pennsylvania voters could (*theoretically*) be provided with a fuller view of who the candidate is and what they are voting for.

# Aaron Rosengarten and Samantha Zimmer

## Part 3: Constitutional Amendments

### Candidates are Restricted from Doing or Saying Much

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# PROPOSED AMENDMENT

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Any person running for statewide judicial office shall be prohibited from commenting on current or pending cases and shall be prohibited from expressing their personal views on past decisions or any issues that could come before the court to which the candidate may be elected. Judicial candidates will be elected based solely on their qualifications.

Dolly Shuster  
Part 3: Constitutional Amendments  
Merit Selection – aka Assisted Appointment aka the Missouri Plan

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## 6 METHODS OF JUDICIAL SELECTION

1. **Partisan Elections**: Judges elected by the people, candidates listed on the ballot alongside a label designating political party affiliation. (Pennsylvania)  
**8 states**
2. **Nonpartisan Elections**: Judges elected by the people; candidates listed on the ballot alongside a political party designation.  
**13 states at the state supreme court level & 15 states at least one type of court below the supreme court level.**
3. **Michigan Method**: Combines nonpartisan general elections preceded by a partisan primary candidate selection process. **1 state**

## 6 METHODS OF JUDICIAL SELECTION, con't

4. **Legislative Elections**: Judges selected by the state legislature.

2 states

5. **Gubernatorial Appointment**: Judges appointed by the governor. In some cases, approval from the legislative body required.

5 states

6. **Merit Selection**: Nominating commission reviews the qualifications of judicial candidates and submits a list of names to the governor, who appoints a judge from the list.

21 states & DC

## 3 Forms of Merit Selection

- 1. Governor-Controlled Commission** - The governor is either responsible for appointing a majority of the members of the nominating commission or may decline to appoint a candidate from a list provided by the nominating commission. **10 states**
- 2. Bar-Controlled Commission** - The state Bar Association is responsible for appointing a majority of the members of the nominating commission. **1 state**
- 3. Hybrid** - There is no majority of members chosen by either the governor or the state Bar Association. The membership of these commissions is determined by different rules in each state.  
**21 states & DC at the state supreme court level;**  
**25 states & DC for at least one type of court below the supreme court level.**

# **Amendment to Article V. Sec. 13 (b) of the Pennsylvania Constitution (Merit Hybrid)**

**Subsection (b) of Section 13, Election of justices, judges and justices of the peace; vacancies, shall be amended as follows:**

1. (b) A vacancy in the office of justice, or judge of the Supreme Court, Superior Court, or Commonwealth Court, or any other state-wide appellate court that may be created in the future, shall be filled by appointment by the Governor from a list of three candidates presented by the Nominating Committee.

(1). The Nominating Committee shall be composed of 13 members who are selected as follows:



## **Amendment to Art. V. Sec. 13 (b) of the PA Constitution (Merit Hybrid), con't**

(A). The Governor shall select four members, two members in good standing of the Pennsylvania Bar and two non-lawyer members who are citizens of the Commonwealth of Pennsylvania. No more than two of the four members may be members of the same political party.

(B). The Speaker of the House and the Minority Leader of the House shall each select a member, and the President of the Senate and President Pro Tempore of the Senate shall each select a member.

(C). The Chief Justice shall select four members, two members of the Pennsylvania Bar, and two non-members of the Pennsylvania Bar.

## **Amendment to Art. V. Sec. 13 (b) of the PA Constitution (Merit Hybrid), con't**

(D). The Chief Justice of the Supreme Court shall chair the Nominating Committee, but shall have no vote except to break a tie.

2. Any person proposed by any member of the Nominating Committee to fill a vacancy must be a member in good standing of the Pennsylvania Bar, and meet all of the requirements set forth in §12, above.

## **Amendment to Art. V. Sec. 13 (b) of the PA Constitution (Merit Hybrid), con't**

(D). The Chief Justice of the Supreme Court shall chair the Nominating Committee, but shall have no vote except to break a tie.

2. Any person proposed by any member of the Nominating Committee to fill a vacancy must be a member in good standing of the Pennsylvania Bar, and meet all of the requirements set forth in §12, above.

3. This amendment shall take effect immediately upon signing.

# “Pittsburgh Judge” Michael H. Wojcik

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# Amy Dreibelbis and John Pietrzak

## Program Narrators and Script-writers

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