

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646.292.8310 Fax 212.463.7308
www.brennancenter.org

October 12, 2010

Representative Gary Hebl, Chair
Senator Glenn Grothman, Vice-Chair
Special Committee on Judicial Discipline and Recusal
One East Main Street, Suite 401
Madison, Wisconsin 53703-3382

Re: *Special Committee on Judicial Discipline and Recusal
Recommendations Regarding Judicial Recusal*

Dear Chairman Hebl & Vice-Chairman Grothman,

The Brennan Center for Justice at NYU School of Law¹ commends the Special Committee on Judicial Discipline and Recusal for its leadership regarding judicial disqualification practice in Wisconsin. As an increasing number of state legislatures and judiciaries consider revising the statutes and rules governing judicial recusal, Wisconsin has an important opportunity to provide national leadership even as it ensures equal and impartial justice to the residents of the Badger State. In connection with the Committee's examination of the important issues before it, we respectfully submit the following comments on judicial recusal.

The Brennan Center has for many years advocated substantive and procedural recusal rules that protect due process and reassure citizens that their courts are fair and free of actual or apparent partiality. In 2008, we issued a report, *Fair Courts: Setting Recusal Standards*, which details the increasing threats to the impartiality of state courts and the ways in which robust recusal standards help safeguard due process and public trust in the

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Our research, public education, and advocacy in this area focus on improving selection systems, increasing diversity on the bench, promoting appropriate measures of accountability, and keeping courts in balance with other governmental branches.

judiciary.² We have filed *amicus curiae* briefs in cases involving recusal standards — including in the landmark case *Caperton v. A.T. Massey Coal Co.*³ We testified on the subject of recusal reform before the Supreme Court of Wisconsin in 2009,⁴ and have submitted comments on proposed recusal rules in numerous other states.⁵ In offering the following comments on the Committee’s work, we draw on our national research on recusal practice, and advocate four specific measures that would help safeguard the impartiality of Wisconsin’s judiciary.

Reforming recusal practice in Wisconsin is vital to combat a growing threat to public confidence in the judiciary — and to defeat the perception that campaign contributions and partisanship can influence judicial decision making. This need was strengthened this past winter when, by a razor-thin, one-vote margin, the Supreme Court of Wisconsin voted to accept, verbatim, proposed recusal rules written by Wisconsin Manufacturers & Commerce and the Wisconsin Realtors Association, two groups that have been among the biggest spenders in Wisconsin’s judicial elections.⁶ The rules written by these special interests groups, and adopted by four justices, fly in the face of binding precedent from the U.S. Supreme Court. More importantly, the rules are likely to undermine public confidence in impartial courts by providing that no legal campaign contributions, and no independent campaign spending by a party to a lawsuit — no matter how many of millions of dollars are involved — can be sufficient, standing alone, to require a judge’s disqualification.

State and national surveys demonstrate that the public is extremely wary of the role money plays in judicial elections and believes that campaign contributions may contribute to more favorable legal outcomes for donors.⁷ According to a state-wide poll conducted in 2008, for example, 90% of Wisconsin voters believe that campaign contributions influence judges’ decisions.⁸ This view is shared across the country: a recent national survey conducted by Harris Interactive showed widespread, bipartisan concern about the escalating influence of money in judicial elections and its potential to

² See James Sample *et al.*, *Fair Courts: Setting Recusal Standards* (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (“*Setting Recusal Standards*”).

³ 129 S. Ct. 2252 (2009).

⁴ Our comments are available at <http://tinyurl.com/2cblvvt>.

⁵ See, e.g., comments we have submitted in Washington, at <http://tinyurl.com/2436hzn>; Iowa, at <http://tinyurl.com/2ueo7uu>; and Michigan, at <http://tinyurl.com/274xxk8>.

⁶ See Alex DeGrand, *Wisconsin Supreme Court Adopts Amended Recusal Rules*, State Bar of Wisconsin, Jan. 22, 2010, available at <http://tinyurl.com/2ebxkce>.

⁷ See, e.g., Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections* (Brennan Center 2010), available at <http://tinyurl.com/258swo6> (collecting survey data on national and state level data demonstrating that Americans believe, by significant margins, that campaign spending has an impact on judicial decision-making).

⁸ *Id.* at 5 (citing Justice at Stake, American Viewpoint: Wisconsin Statewide Survey (Jan. 2008), available at <http://tinyurl.com/36ublu4>).

erode impartiality.⁹ Robust recusal rules are a potent tool to combat perceptions of money's influence in the courtroom.

In order to strengthen recusal practice in Wisconsin, we urge the Committee to adopt four particular policy changes. In particular, we urge the Committee to propose amendments or additions to the Wisconsin Statutes, for adoption by the Legislature, that would:

1. Establish an objective standard for determining when a judge's impartiality can reasonably be questioned.

Wisconsin should align its rules on judicial disqualification with those that apply to judges in the federal system and virtually every other state, by establishing an objective standard under which a judge must recuse in any case in which his or her impartiality might reasonably be questioned. As Justice Crooks has informed the Committee, the simplest way of accomplishing this would be to add a provision analogous to that in 28 U.S.C. § 455(a) to the Wisconsin Statutes as § 757.19(2)(h), calling for disqualification of a judge "when his or her impartiality might reasonably be questioned."

The prevailing interpretation of Wisconsin's existing law on judicial disqualification, Wis. Stat. § 757.19, holds that the assessment of whether "it appears" a judge cannot "act in an impartial manner" is an entirely subjective determination, to be made by the very judge who is subject to a recusal request.¹⁰ Allowing the subject judge to make a subjective evaluation of what a reasonable observer would conclude contradicts the prevailing practice across the nation. It creates an unfortunate conflict with the Wisconsin Code of Judicial Conduct, which uses an objective standard to assess whether a judge should have recused because his or her impartiality could be reasonably questioned. And it conflicts with the jurisprudence of the U.S. Supreme Court, which has clearly announced that due process requires assessing questions of recusal having to do with perceptions of impartiality according to "objective standards."¹¹

2. Eliminate reliance on the subject judge to evaluate whether his or her impartiality can reasonably be questioned by providing for prompt review when a judge denies a recusal request.

One of the most criticized features of recusal practice in most states is the fact that the judge subject to a recusal request has the last word on whether or not recusal should be required. Wisconsin should adopt a rule under which the final decision on recusal is not made by the targeted judge him or herself. One solution would be removing the targeted judge from the recusal decision entirely, by referring it to another judge or a

⁹ Press Release, Justice at Stake, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions (Sept. 8, 2010), *available at* <http://tinyurl.com/2c422fs>.

¹⁰ See *State v. American TV and Appliance of Madison, Inc.*, 151 Wis. 2d 175, 182-0893 (1989).

¹¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009); *see also id.* at 2253 (holding that due process requires recusal when "there is a serious risk of actual bias based on *objective* and reasonable perceptions") (emphasis added).

panel of judges for resolution. A second solution, which has been adopted in several states, would be to allow the targeted judge to issue an initial ruling on recusal, but to provide for prompt review if the judge denies the motion. Under such a rule, a judge subject to a recusal motion could either step aside or, if he or she declined to do so, the litigant seeking recusal could appeal the denial to another judge or group of judges.

A procedure recently adopted by the Michigan Supreme Court provides a useful model.¹² Under that rule, in courts other than the Supreme Court, if a challenged judge denies a recusal motion, the motion is referred to the chief judge, who decides it *de novo*. In the Supreme Court, if a challenged justice denies a motion for disqualification, the litigant may appeal to the full court, and “[t]he entire Court shall then decide the motion for disqualification *de novo*.”¹³ Such a common sense rule ensures a truly objective assessment of whether a targeted justice’s impartiality might reasonably be questioned, and increases public confidence that decisions on a judge’s impartiality are made by a wholly disinterested decision maker. Rules analogous to Michigan’s govern recusal decisions in the high courts of numerous other states.¹⁴

Wisconsin should adopt a similar rule. In the Supreme Court, if a justice asked to recuse denies the request, the disqualification decision should be made by the remaining members of the Court. In the event of an evenly divided, deadlocked vote, the subject judge should be disqualified in order to err on the side of protecting the perception and reality of impartial justice.

3. Require transparent decision-making and written decisions on recusal requests.

It is critically important — for litigants, for the courts, and for the public at large — that disqualification decisions offer transparent and reasoned decision-making. As explained in the Brennan Center’s recusal report, a failure to explain recusal decisions offends the fundamental principle “that officials must give public reasons for their actions in order for those actions to be legitimate.”¹⁵ Failing to explain the reasoning behind a recusal decision makes it difficult for those reviewing a decision to understand the underlying rationale or facts. It denies other judges and courts precedent for use in other cases. And, in a state in which judges and justices run for election, a failure to explain disqualification decisions deprives the public of valuable information concerning how those judges or justices address challenges to their impartiality.

¹² See Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 (Mich. S. Ct. 2009).

¹³ *Id.*

¹⁴ See, e.g., Alaska Stat. § 22.20.020(c); Ga. Sup. Ct. R. 26; La. Code Civ. Proc. Ann. art. 159; Miss. R. App. P. 48C(a)(iii); Nev. Rev. Stat. Ann. §1.225(4); Or. R. App. P. 8.30(3); Tex. R. App. P. 16.3; Vt. R. App. P. 31(e)(2).

¹⁵ *Setting Recusal Standards* at 32 (footnote omitted).

Although Wisconsin law provides that, when a judge decides to recuse, the judge “shall file in writing the reasons”¹⁶ for the decision, the statutes do not require a written explanation by a judge who has concluded disqualification is *not* warranted. Wisconsin should remedy this situation by adopting a requirement that *all* recusal decisions be rendered in writing.

4. Adopt language acknowledging that judges’ impartiality may reasonably be questioned, and recusal may be appropriate, based on campaign spending by litigants and/or their attorneys.

As was made clear by the U.S. Supreme Court’s decision in *Caperton* and the public outcry following the Supreme Court of Wisconsin’s adoption of recusal rules written by special interest groups that are among the biggest spenders in Wisconsin’s judicial elections, serious threats to the perception of judicial impartiality can arise when judges preside over the cases of campaign contributors (or those who have funded independent campaign expenditures). The Brennan Center therefore urges the adoption of a rule that addresses all forms of campaign spending, including both direct contributions and independent expenditures. The ideal rule would call on judges assessing disqualification to consider the totality of circumstances surrounding a litigant’s campaign spending — including not just the gross amount spent on contributions and expenditures, but also the relative size of a party’s contributions in comparison to the total amount of money contributed to the campaign; the ratio of the party’s spending to the total amount spent in the election; the apparent effect of the party’s spending on the results of the election; and whether the party’s spending occurred while the litigation in question was pending or imminent.¹⁷

A useful model to consider in developing a recusal rule on campaign spending is the one adopted last month by the Supreme Court of Washington.¹⁸ The Washington rule calls for recusal in situations where a judge’s impartiality might reasonably be questioned based on a party’s financial support for the judge — including in the form of direct contributions or independent spending — and requires consideration of the amount of financial support provided by a party relative to the total amount of the financial support for the judge’s election, as well as the timing between the financial support and the pendency of the matter in question. Wisconsin should adopt a similar rule.

* * *

¹⁶ Wisc. Stat. § 757.19(5).

¹⁷ See generally *Caperton*, 129 S. Ct. at 2263-64.

¹⁸ See *In the Matter of the Adoption of the New Code of Judicial Conduct*, No. 25700-A-963, Rule 2.11 (Wash. Sept. 9, 2010), available at <http://www.courts.wa.gov/newsinfo/content/pdf/cjcOrder.pdf>.

The Brennan Center applauds the Committee for its leadership in safeguarding the independence and impartiality of the Wisconsin judiciary, and thanks the Committee for the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Adam Skaggs", with a long horizontal flourish extending to the right.

J. Adam Skaggs
Counsel, Democracy Program
Brennan Center for Justice
161 Avenue of the Americas
New York, New York 10013
(212) 992-8976
adam.skaggs@nyu.edu