wisconsin DEMOCRACY campaign

210 N. Bassett St., Suite 215 / Madison, WI 53703 / 608 255-4260 / www.wisdc.org

Testimony of the Wisconsin Democracy Campaign to the Legislative Council Special Committee on Judicial Discipline and Recusal

September 16, 2010

Thank you for once again extending an invitation to the Wisconsin Democracy Campaign to appear before your committee. We appreciate this opportunity to offer a citizen perspective on issues related to judicial recusal.

The amendment to the Code of Judicial Conduct the state Supreme Court gave final approval to in July allowing judges to decide cases involving their biggest campaign supporters is wrong on multiple levels.

It is wrong because of who wrote it. Wisconsin's new recusal standards were proposed by two of the state's most powerful lobbying groups – Wisconsin Manufacturers and Commerce and the Wisconsin Realtors Association. By embracing what these groups recommended, the four-member majority on the high court regrettably sent a clear message to the people of Wisconsin that they are not only taking cues from powerful interests but have granted such interests the privilege of rewriting the state's judicial ethics code.

The amendment is wrong because it is contrary to the latest jurisprudence in this area, namely the U.S. Supreme Court's 2009 decision in *Caperton v. Massey*. In that case, the court ruled that large campaign contributions or election spending on behalf of a candidate for judicial office can create an appearance of conflict of interest so extreme and a probability of bias so great that recusal of a judge who received such campaign support is required. In that case, the court determined the judge's failure to do so constituted an intolerable threat to the plaintiff's constitutional right to due process under the 14th Amendment. Wisconsin's new rule is in conflict with this ruling because no campaign donation – no matter how large – creates a requirement to recuse. No election spending – no matter how great – obliges a judge to step aside.

The dispute that culminated in *Caperton v. Massey* is well known. It inspired John Grisham's novel "The Appeal." In 1998, Harman Mining Company president Hugh Caperton sued Massey Coal Company, alleging that Massey fraudulently canceled a coal supply contract with Harman Mining, causing it to go out of business. In August 2002, a Boone County, West Virginia jury found in Caperton's favor and awarded $50 million in damages. While the case was pending before the West Virginia Supreme Court, Massey's CEO Don Blankenship poured more than $3 million into a 527 group called "And For the Sake of the Kids" that aired advertising attacking incumbent Supreme Court Justice Warren McGraw and supporting Charleston lawyer Brent Benjamin in his successful bid to unseat McGraw. In 2007, when

Caperton v. Massey came before the West Virginia Supreme Court, Caperton petitioned for Justice Benjamin to recuse himself because of Blankenship's contributions during the campaign. Benjamin refused and became part of the 3-2 majority that overturned the $50 million verdict.

Wisconsin already has had a case with a story line that eerily resembles *Caperton*. In 2008, Wisconsin businesses won a huge victory when the state Supreme Court ruled that they are entitled to sales tax refunds and interest totaling upwards of $300 million and a permanent tax reduction worth over $28 million annually thereafter. The case – *Wisconsin Department of Revenue v. Menasha Corporation* – was a dispute over the taxation of computer software. The revenue department determined the software in question was taxable, and a lower court agreed. Wisconsin Manufacturers and Commerce intervened in the case on behalf of Menasha Corporation and other state businesses. WMC went on to spend over $2 million to support Annette Ziegler's election in 2007. When the case reached the Supreme Court, Ziegler participated in the case, provided the deciding vote in a 4-3 decision favoring Menasha Corporation and WMC and overturning the lower court, and wrote the majority opinion.

What is important for this committee to consider is not whether the case was rightly or wrongly decided. What you need to contemplate is whether Justice Ziegler's participation in the case created an appearance of conflict of interest so extreme and a probability of bias so great that her recusal should have been required. The amendment to the state Code of Judicial Conduct approved in July clearly does not require it.

In *Caperton*, the U.S. Supreme Court ruled that the millions of dollars spent by a party involved in the case in support of a judge who ruled on that case amounted to a violation of the constitutional right to a fair trial that is spelled out in the Due Process Clause of the 14th Amendment. In that West Virginia case, $3 million was spent electing a judge who later voted to overturn a $50 million penalty assessed to the campaign supporter. In *DOR v. Menasha Corp.*, more than $2 million was spent electing a judge who then effectively wrote new tax policy and handed a tax break worth hundreds of millions of dollars to members of the group that did all that campaign spending.

That the facts and circumstances in the West Virginia case and this Wisconsin case are so similar dramatically underscores the shortcomings of the new recusal standard approved by our state Supreme Court. Wisconsin needs recusal rules that meet the standard established by the U.S. Supreme Court in *Caperton v. Massey*. Our state does not have that at the present time. The Legislature should step in and amend state law so that we do.

Finally, there is one more reason why the state Supreme Court's amendment to the judicial ethics code is wrong. It further undermines public confidence in the fairness and impartiality of judges and the integrity of Wisconsin's judiciary. Even before the adoption of the rule allowing judges to decide cases involving their biggest campaign supporters, public opinion survey research was showing the citizenry's trust and confidence had been seriously shaken.

A national Republican polling firm, American Viewpoint, surveyed public opinion in Wisconsin in January 2008 and found only 5% of state residents believe that campaign contributions to judges do not influence decisions, while 78% are convinced they do influence rulings. A national independent polling firm, Belden Russonello and Stewart, polled Wisconsin residents in May 2008 and found nearly half (47%) believe judges' decisions are based on politics and special interest pressure.

A 2007 Zogby poll of national business leaders done for the Committee for Economic Development found that 90% of business executives are concerned that campaign contributions and political pressure

will make judges accountable to politicians and special interest groups instead of the law and the Constitution. More than 90% of all Americans believe judges should not hear cases involving individuals or groups that contributed to their campaign, according to a Gallup Poll done earlier this year for *USA Today*. And a Harris Interactive poll done this summer found that 81% of Americans believe judges should not decide motions asking them to step aside, but rather other neutral jurists should make that call.

Harris Interactive also found that 71% of Democrats and 70% of Republicans believe campaign expenditures have a significant impact on courtroom decisions. Moreover, 82% of Republicans and 79% of Democrats say a judge should not hear cases involving a campaign supporter who spent $10,000 on his or her election. Support for disclosure runs even stronger, as 88% of Republicans and 86% of Democrats say that all campaign expenditures to elect judges should be made public so voters can know who is seeking to elect each candidate.

The polling data show broad bipartisan unease with the role of money in judicial elections and its impact on how legal cases are decided, and broad bipartisan support for automatic disqualification of judges in cases involving their biggest campaign supporters.

Wisconsin has lagged badly in coming to terms with these concerns. Our state needs to do four things:

1) Establish an objective standard for when judges are disqualified from hearing and ruling on cases, specifically spelling out the level of campaign support – either in the form of contributions to their campaigns or election spending on their behalf – that triggers obligatory recusal. Disqualification should no longer be discretionary.

2) Create a procedure for independent review of petitions for recusal made by counsel for plaintiffs or defendants.

3) Require that the reasons for a judge's disqualification be made public.

4) Create serious consequences for failure to recuse in cases involving campaign supporters and other similar conflicts of interest.