WISCONSIN ASSOCIATION *for* JUSTICE

October 9, 2009

HAND DELIVERED

David R. Schanker
Clerk of the Supreme Court
P. O. Box 1688
Madison, Wisconsin 53701-1688

RE: Rule Petitions 08-16 and 08-25; Judicial Recusal

Dear Mr. Schanker:

The Wisconsin Association for Justice (WAJ) would like to add its voice to the discussion of Rule Petitions 08-16 and 08-25 dealing with judicial recusals.

Wisconsin's Judicial Conduct code stipulates that "a judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." Wisc. Sup. Ct. R. ch. 60.04(4) (2005).

Examples of when judges should recuse themselves are: previously served as a lawyer in the matter in controversy,[1] has an economic interest in the subject matter of greater than *de minimis* value,[2] is closely related – parent, child, brother, sister, aunt, uncle – to a party or lawyer in the proceeding,[3] was a material witness concerning the matter,[4] or has made improper *ex parte* communications during the course of the proceeding.[5]

Many of the examples are fairly clear and concern some sort of personal or financial involvement.

Another example is not as clear-cut – when the judge is biased against one of the parties. Bias is not always an easy thing to prove or a judge to admit to. A new wrinkle has been added to the question of bias – the role of campaign contributions to a judicial candidate. This is especially true now with the advent of high spending judicial elections. What is

[1] ABA Model Code of Judicial Conduct, Canon 2, R. 2.11(A)(6)(a).
[2] *Id.* Canon 2, Rule 2.11(A)(3).
[3] *Id.* Canon 2, R. 2.11(A)(2).
[4] *Id.* Canon 2, R. 2.11(A)(6)(c).
[5] *Id.* Canon 2, R. 2.9(A).

the role of campaign contributions to judges in judicial elections and do the contributions create a bias?

The U.S. Supreme Court has weighed in on this matter in *Caperton v. A.T. Massey Coal Co., Inc.,* No. 08-22. In that case, Caperton had sued A.T. Massey Coal Co., Inc. and a jury had found A.T. Massey liable for $50 million. The matter was on appeal when Don Blankenship, the chairman, chief executive officer and president of A.T. Massey Coal Co., spent more than $3 million in getting Justice Brent Benjamin elected to the West Virginia Supreme Court, replacing the former Chief Justice on the Court.

While Blankenship donated the legal limit to the Benjamin campaign, $1,000, he also gave almost $2.5 million to a political organization "And for the Sake of the Kids" as well as $500,000 for direct mailings and television and newspaper advertisements to supporting Benjamin. Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own campaign committee. It was also $1 million more than the total amount spent by the campaign committees of both candidates combined.

Justice Benjamin did not recuse himself from the case after Caperton made several requests that he do so. The U.S. Supreme Court found Justice Benjamin's refusal to recuse himself from the case violated the Due Process Clause.

The Supreme Court held, "We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – 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. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." (Page 14 of Slip Opinion.)

> As the Supreme Court noted:
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> Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case.
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> Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Tumey, supra,* at 532. In an election decided by fewer than 50,000 votes (382,036 to 334,301), see ___ W. Va., at ___, ___ S. E. 2d, at ___; App. 677a, Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and

> disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow, supra,* at 47.

(Pages 14 and 15 of Slip Opinion.)

Justice Kennedy, writing for the majority noted, "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." (Page 19 of Slip Opinion)

The two petitions under consideration by this Court, 08-16 by the League of Women Voters and 08-25 by the Wisconsin Realtors Association, ask this Court to take two contrasting views to resolving bias questions raised by campaign contributions.

The 08-16 petition seeks a hard and fast rule that judges presiding in cases that receive $1000 or more from a party in an action or the lawyer or law firm in an action or if that amount of money is spent amount on a media campaign relating to a judicial election for a judge should be required to recuse themselves.

The 08-25 petition takes the view that the receipt of a lawful campaign contribution[6] by a judicial campaign committee or an endorsement of a candidate does not, by itself, warrant judicial recusal. This would include donations from lawyers, parties and entities involved in legal proceedings before the Court.

Petition 08-25 simply wants the receipt of a legal contribution to a judicial campaign committee or an endorsement not to automatically require recusal. WAJ supports this proposed rule.

The Wisconsin Association for Justice finds that the 08-16 petition limit of $1000 is arbitrary. While it is the legal limit for a number of circuit court candidates, it is well below that for Court of Appeal and Supreme Court candidates. It also has the potential to invite mischief, if a party or lawyer wanted to make sure a Supreme Court Justice or Court of Appeals Judge could not sit on a case, they could give over $1000 to them, which would require recusal. WAJ opposes this proposed rule.

In addition, enforceability is a problem with contributions donated to a "media campaign." Right now in Wisconsin candidates and citizens do not know who is

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[6] Candidates running for the Supreme Court may receive campaign contributions up to $10,000 from an individual or $8,625 from a committee. Court of Appeals candidates in District I have a $3000 limit for both individuals and committees, while all other Court of Appeals candidates have a $2500 limit. Circuit Court candidates in Dane, Milwaukee and Dane Counties have a $3,000 limit for both individuals and committees, while all other circuit court candidates have a $1000 contribution limit.

donating to groups that do issue advocacy.[7] The IRS or state campaign finance laws do not require disclosure of contributors to 501(c) (4) groups.

The fact remains that neither petition fully addresses when judges should recuse themselves. The Wisconsin Association for Justice believes that Supreme Court should consider adopting recusal rules that are transparent and understandable to parties, attorneys and the public.

The U.S. Supreme Court announced in *Caperton* that the proper standard for judicial recusal is an objective standard. This Court should undertake to set this objective standard.

The importance of a recusal standard in the Code of Judicial Conduct cannot be overstated. As Justice Kennedy noted, "These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11." (Page 19 of Slip Opinion)

We appreciate the opportunity to present our views to the Court on this very important matter.

Sincerely,

Mark L. Thomsen
President

[7] It is interesting to note that in *Caperton*, Blankenship gave to a § 527 group, which was required by the IRS to provide the name of contributors. Had Mr. Blankenship gave the money to a 501(c)(4), that $2.5 million he contributed may never have been disclosed.