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October 27, 2009

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FILED
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CLERK OF SUPREME COURT
OF WISCONSIN

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

RE: Rule Petitions 09-10 and 09-11; Judicial Recusal

Dear Mr. Schanker:

Given that two additional judicial recusal petitions have been filed with the Wisconsin Supreme Court, Petition 09-10 and 09-11, the Wisconsin Association for Justice (WAJ) would like to provide the Court with some initial thoughts.

Petition 09-10, filed by Wisconsin Manufacturers and Commerce (WMC), would set in place a rule that a judge should not have to recuse themselves in a case simply because a party had sponsored an independent expenditure or engaged in issue advocacy.

WAJ does not support this petition. The petition seems to disregard the Supreme Court's ruling in *Caperton v. A.T. Massey Coal Co., Inc.,* No. 08-22. After all, no one accused Mr. Blankenship of making an illegal campaign contribution. All his donations were legal. It was the size and the disproportionate impact of the contributions within the total campaign that caused the U.S. Supreme Court to decide that Justice Benjamin's refusal to recuse himself from the case violated the Due Process Clause.

The Supreme Court noted, "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.)

Petition 09-10 also does not address how judges and the public would know who is contributing to issue advocacy campaigns. WMC has participated in issue advocacy campaigns during the 2007 and 2008 Supreme Court races. They have never disclosed who made the contributions to them or how much was contributed. If no one knows who is making the campaign contribution there is no way to judge whether the contribution meets the *Caperton* test of size and disproportionate impact on a campaign. This would not meet the objective due process requirement as set forth in *Caperton.*

Petition 09-11, submitted by former Justice William Bablitch, is a much more interesting petition and WAJ likes certain aspects of it but has several questions and concerns. The petition recommends creating new statutory language, not relying on the Code of Judicial Conduct. Does the Court have the concurrent jurisdiction to make this change or must it go to the Legislature?

The petition uses the sum of $10,000 for a contribution to a judge's campaign committee or an independent expenditure by one group. The petition admits that number is arbitrary. WAJ would like to remind the Court that there are various limits for different judicial elections in the state. 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 $3,000 limit for both individuals and committees, while all other Court of Appeals candidates have a $2,500 limit. Circuit Court candidates in Dane and Milwaukee Counties have a $3,000 limit for both individuals and committees, while all other circuit court candidates have a $1,000 contribution limit. There is a $10,000 cumulative yearly limit to all candidates for office in Wisconsin.

It would seem that the provision should consider the limitations for each office as currently set forth in Wis. Stat. § 11.26.

The current proposal uses the term of "in-kind" contribution. An "in-kind" contribution is generally thought to be a contribution to a campaign committee and is required to be reported as such.[1] From the other comments in the petition, WAJ was wondering if the petition is also referring to independent expenditures or issue advocacy campaigns?

Allowing a party to ask a judge to disqualify him or herself seems to put in place a structure for challenging a judge's impartiality. Currently there is no formal recusal protocol in place in Wisconsin. This seems like a sound requirement.

The challenge of a judge based on a failure to disqualify himself or herself because of campaign donations in excess of the listed limit or because of third-party contributions above $10,000 would then necessitate the disclosure of the third-party sources. If the third-party fails to disclose, the judge is automatically disqualified.

WAJ supports the concept of disclosure. Campaigns are public events. The law requires candidates to disclose who is contributing to campaigns. The law also requires that groups doing independent expenditures also disclose who is contributing to campaigns. There is this gaping hole of "issue advocacy" that cloaks itself in legitimacy by raising "issues" and then pretends it is not involved in campaigns. The groups hide behind this façade without disclosing who is contributing and how much is being contributed. There is no way of knowing if a party is contributing millions of dollars to this effort.

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[1] A common type of in-kind contribution is buying food for a fundraiser. The cost of the food is reported as an in-kind contribution.

We are concerned that the petition calls for self-enforcement. Where and who would the third-party report to? Would the Government Accountability Board be involved or could the Court order disclosure? Does the Court have the jurisdiction and authority to compel the third-party to disclose its contributors? There does need to be a better enforcement mechanism that is spelled out. Otherwise, the requirement will be ignored. WAJ is uncertain of the role of the Judicial branch in the enforcement effort.

Also the remedy of automatically requiring the recusal of the judge because a third-party fails to disclose contribution information may be rough justice, but it could also invite mischief. If a group wanted to make sure a justice could never sit in on a specific type of case, then why not promote the judge in that manner and sit back and say nothing. The judge would automatically be disqualified. Not having a full compliment of the court hearing important cases creates it own problems.

WAJ again states that the Supreme Court should consider adopting recusal rules that are transparent and understandable to parties, attorneys and the public.

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

Sincerely,

Mark L. Thomsen
President