

October 22, 2009

Clerk of Supreme Court
Attn: Carrie Janto, Deputy Clerk
Supreme Court of Wisconsin
P.O. Box 1688
Madison, WI 53701-1688

RECEIVED
OCT 23 2009
CLERK OF SUPREME COURT
OF WISCONSIN

RE: Proposed Supreme Court Rule Changes on Judicial Recusal

Dear Ms. Janto:

I am writing on behalf of American Justice Partnership (“AJP”), a non-profit, Section 501(c)(4) corporation dedicated to legal reform of the civil justice system at the state level. AJP and many of the other organizations with which it cooperates are engaged in elections in a variety of ways, including through contributions and independent spending. AJP writes to express its view on the three rule petitions that have been submitted to this court regarding judicial recusal based on campaign contributions and spending limits.

In sum, AJP opposes Rule Petition 08-16 filed by the League of Woman Voters of Wisconsin Education Fund (the “League”), and supports the Rule Petitions filed by the Wisconsin Realtors Association, Inc. (the “Realtors”), Rule Petition 08-25, and Wisconsin Manufacturers & Commerce (“WMC”).

AJP Opposes the League’s rule Petition 08-16

AJP urges the Court to reject the changes to the Wisconsin Code of Judicial Conduct proposed by Rule Petition 08-16 submitted by the League. The League's Petition requires a judge to recuse from presiding over a case under the following circumstances:

- If the judge's campaign committee had accepted within the previous two years from a party involved in the case, an attorney or the law firm for the party, or the officers or directors of a party total contributions of \$1,000 or more.
- If an individual or organization involved in the case spent within the last two years any amount of money or sponsored an independent expenditure or issue advocacy communication in support of the judge's campaign.
- If an individual or organization involved in the case financially supported or sponsored an independent expenditure or issue advocacy communication that mentioned the judge or another candidate for that position where the communication was disseminated within 60 days of the election.

This Court should not adopt these changes to the state's Code of Judicial Conduct for several reasons. First, the proposed rules circumvent the state's legislatively established campaign contribution limits, effectively establishing a lower contribution limit than the current statutory standard applicable to candidates for the state Supreme Court, appellate courts, and circuit courts. For example, the Wisconsin Legislature established a contribution limit of \$10,000 for individual contributions to supreme court candidates. Under the rules proposed by the League, a justice would be required to recuse from presiding over a case involving a party, or lawyer or law firm for the party, who previously contributed *one-tenth* -- \$1,000 -- of the maximum legal contribution to the justice's campaign committee. This threat of recusal would effectively deter contributions

over \$999, establishing a de facto campaign contribution limit for all judicial candidates in an amount that is dramatically lower than the amount set forth in the state statutes.

Second, a mandatory rule of the type proposed by the League would “weaponize” the recusal motion process. Any party or lawyer could, in the wake of such a rule, make tactical political contributions – not to support a candidate, but to injure the candidate. In other words, a party or lawyer could force a judge to recuse himself or herself by simply contributing \$1000 to a judicial candidate’s campaign, which would trigger the recusal rule in the event of that candidate wins the election. A party could thus tactically prevent select judges from presiding over cases in which the party is involved.

Third, the League’s proposed rules would stifle the rights of individuals and groups to engage in political speech. The U.S. Supreme Court has made clear that spending money to support a candidate – either directly or indirectly – is protected by the First Amendment. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). The government may not restrict the rights of individuals or organizations to financially or otherwise support a judicial candidate unless the restriction meets certain strict standards required by the Constitution. Bu the League has identified ***no evidence whatsoever*** of any risk associated with ***legal*** campaign contributions or independent spending communications.

Fourth, the League’s proposed rules ignore entirely the particular protection afforded to independent spending in an election. Independent expenditures and issue advocacy communications are protected forms of political expression under the First Amendment, and cannot be subject to any restrictions except under a very narrow set of exceptions under federal law. This is in part because independent expenditures and issue advocacy communications are not prepared or disseminated in cooperation or consultation with

any candidate, agent, or authorized committee of a candidate who is to be supported or opposed by the communication. There is no basis in law or policy to **limit, deter,** and **punish** involvement in the political process by individuals and groups engaged in independent spending. Yet, this is exactly what the League's petition does.

AJP Supports the Realtors' Rule Petition 08-25

AJP supports Rule Petition 08-25 submitted by the Realtors asking the Court to amend the Code of Judicial Conduct to explicitly provide that the receipt of a lawful campaign contribution by a judicial campaign committee or endorsement of a candidate does not, by itself, warrant judicial recusal. This rule is necessary to protect the rights of interested individuals and groups like AJP that are involved in debate surrounding political campaigns. Parties must be able to speak up – through financial support – in support of or opposition to a candidate without fear that the candidate they believe would be the best judge will be forced to recuse merely because of a previous legal contribution to that judge's campaign.

AJP Supports WMC's Rule Petition

AJP notes that just as important as campaign political speech is the lawful political speech and activities of those who work independently of a judicial campaign committee. Thus, AJP urges the Court to adopt the rule petition filed by WMC providing that judicial recusal is not warranted solely on the basis of lawful independent expenditures or issue advocacy efforts.

Organizations such as AJP depend on the freedom to engage in the electoral process through independent spending. AJP represents the interests of individuals and businesses throughout Wisconsin and the rest of the nation. It is largely through AJP that their voices on legal reform in the civil justice system are heard in elections. Our independent spending in elections represent a collective voice speaking out on policies and issues important to them. To limit spending is to stifle the debate that should take place during an election. Fundamental to our First Amendment and democracy is robust speech. WMC's petition protects this fundamental value in Wisconsin.

Conclusion

In closing, AJP appreciates the opportunity to present its views on these three rule petitions pending before this Court. AJP would be happy to answer any questions the Court may have, or provide additional information to the Court.

Sincerely,

A handwritten signature in black ink that reads "Dan Pero". The signature is written in a cursive, slightly slanted style.

Dan Pero
President