STATE OF WISCONSIN

SUPREME COURT

The Wisconsin Association for Justice's Response to Rule Petition 26-01

EXECUTIVE SUMMARY

Because of its significant concerns regarding Rule Petition 26-01, and its belief that an updated recusal rule would benefit Wisconsin Courts, the Wisconsin Association for Justice (WAJ), urges the court to appoint a Special Advisory Committee to evaluate and propose potential revisions to Wisconsin's judicial recusal standards as they are currently outlined in Wis. SCR:60.04(4),(5), and (7). WAJ urges the court to appoint a representative of the petitioners to serve on the commission along with other relevant experts and stakeholders.

WAJ further urges the court to appoint members to the committee who customarily represent injured plaintiffs in civil litigation. WAJ stands ready to assist the court in identifying individuals willing to take on this important task.

After thorough analysis, it is WAJ's strong opinion that Petition 26-01 suffers from too many shortcomings to be enacted as proposed. Our concerns are that the petition:

1. Departs from Existing Law and the ABA Model Rule without the Guidance or Commentary to Make it Work;
2. Unduly Burdens and Chills The Free Speech of Litigants, Lawyers, and Individuals;
3. Creates an Unenforceable Standard for Judges;
4. Requires "Personal" Financial Knowledge Beyond What is Reasonable or Common;
5. Attributes to Donors All Actions of an Independent Expenditure Organization Despite Donors' Lack of Organizational Control and Fungibility of Donations;
6. Is Incompatible with the Post-*Citizens United* Disclosure Regime; and
7. Experts: Disclosure Laws Necessary to Make Recusal Regime Work.

Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009), offered objective factors that a court is supposed to consider when at the outer bounds of judicial bias allegations. Despite the holding in *Caperton*, there is a reason states have not rushed to cement these items in rigid form. The *Caperton* court was able to evaluate the case because it had all the necessary information upon which to act. The proposed rule, however, attempts to impose a similar analysis without the necessary disclosures underpinning the evaluation. As a result, the rule

creates more problems than it solves and generates more questions than answers on the issue of recusal.

WAJ urges the court to appoint an Advisory Committee to develop, with appropriate commentary, a robust and modern recusal rule that will resoundingly demonstrate the independence and integrity of Wisconsin's courts.

SUMMARY OF CONCERNS

1. The Petition's Treatment of Campaign Contributions is a Stark Departure From Existing Law, the ABA Model Rule and Other States' Rules

The petitioners assert that their proposed rule is based on ABA Model Rule 2.11 with modifications adopted in Georgia as related to the impact of campaign contributions and expenditures. Examination of those two rules, Georgia's and ABA Model Rule 2.11, demonstrates this is not so.

Regarding campaign contributions and expenditures, the language proposed in Petition 26-01 is significantly more expansive than both ABA Model Rule and Georgia's rule. While imperfect, the ABA Model Rule 2.11(4) has always set out to provide an objective framework regarding campaign contributions that require recusal. It did so by providing specific criteria as to amount and timing. Where the Petition would scrutinize *all* lawful contributions, the Model Rule has, since 1999, bracketed specific dollar figures and linked them to defined periods of time. It reads:

> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has *within the previous [insert number] year[s]* made aggregate* contributions* to the judge's *campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity]* [is reasonable and appropriate for an individual or an entity].

Id. (emphasis added).

The language in Petition 26-01 renders itself unworkable by the potential rigidity with which it could require per se recusal for all lawful campaign contributions. The language in Petition 26-01 renders itself unworkable by the potential rigidity with which it could require per se recusal for all lawful campaign contributions. It suggests, for example, that the timing of a contribution could be a factor, but says nothing about distinguishing what inferences should be drawn from those that are years old from those that are made last week. While the Model Rule and the existing statute may benefit from revision and updating, the adopted rule should match this clarity for ease of application and administration. As discussed below, the

presumption instituted in Georgia recreates much of that objective guidance that helps judges, lawyers, and litigants alike.

Regarding personal finances, the proposed rule creates an unworkable expectation that judges maintain intimate knowledge of the financial entanglements for third degree kin and their spouses in ways that exceed existing law, the ABA model rules, and the nature of most human relationships. In doing so, the proposed rule creates largely unique new law without providing the clarity or guidance that would result from a more deliberate and considered rulemaking process.

Georgia, for example, when updating the personal finance-related obligations for judges, opted to maintain the level of awareness found in the ABA Model Rule and current SCR 20:04(5). With some stylistic differences, it maintains the commonsense expectation that judges need only keep aware of the financial entanglements of those in their households. It reads:

> (B) Judges shall keep informed about their personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal financial interests of their spouse, domestic partner, intimate partner, and minor children residing in their households, because such interests may bear on the need for judicial disqualification.

Ga. Code of Judicial Conduct 2.11(A)(6)(B) (substantively matching the existing ABA Model Rule 2.11 (6)(B) and current Wisconsin law).

The differences between the rule proposed in the Petition and the current SCR 60.04 and ABA Model Rule 2.11 are even more stark as to campaign finance. The current Supreme Court Rule does not require recusal based solely on lawful campaign contributions or sponsorship of independent expenditures or issue advocacy communication. The Petition advocates for a rule that requires recusal where campaign contributions of any amount or sponsorship of an independent expenditure or issue advocacy communication (collectively "independent communication") "raise[s] a reasonable question concerning the judge's ability to be impartial."

The Rule requires an analysis by the judge of a significant number of factors before deciding on recusal. Petition 26-01 at 2-3, 5-6.

The Petition proposes a rule that is substantially different than SCR 60.04 and ABA Model Rule 2.11 in breadth and impact. The proposed rule creates a system whereby *any* political contribution or sponsorship of an "independent communication" triggers an in-depth analysis not only of publicly available information, but also the contributor or sponsor's private relationships, unrelated political activities, and an assessment of the impact of the contribution or "independent communication" on the campaign.

The proposed rule will create a system that encourages recusal motions based on any contribution or expenditure *regardless of amount* and a multi-factored inquiry of every contributor or sponsor. It imposes an unworkable burden on the court and threatens to substantially chill protected political speech. No other state has enacted anything comparable to the rule proposed in the Petition, for good reason: unsubstantiated allegations of impropriety damage confidence in the judicial system more than they help.

Judges likewise cannot require disclosure from non-parties, cannot verify such information, and cannot base recusal decisions on speculation.

Accordingly, the rule would condition judicial participation on disclosure of protected political activity while providing no lawful or workable mechanism to obtain or verify that information.

A recusal rule that depends on compelling disclosure of protected and unknowable political activity cannot be enforced without infringing on constitutional rights or relying on speculation. Moreover, requiring the lawyer or sponsor to disclose "prior political activities" and their "prior relationship with the judge" in proposed SCR 60.04(4)(i)(1-8) has never been found to be grounds for recusal.

Comparative State Practice

A survey of state recusal rules shows that no jurisdiction has adopted anything akin to the proposed rule requiring recusal based on independent expenditures.

No state has incorporated receipt of independent expenditure as a basis for a recusal inquiry to the degree proposed by this Petition. Even states with very detailed recusal rules do not include independent expenditures as a reason to recuse as rigidly as proposed by this Petition.[1] Most states, including the Georgia language cited by the Petitioners, acknowledge that independent expenditures can be *a factor* in a bias analysis, they are not an independent basis for it.[2] Nothing about the regime in Georgia suggests that judges must engage in a searching inquiry regarding campaign spending on their behalf that is not subject to legal disclosure.

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[1] *See, e.g.*, Washington: Code of Judicial Conduct Rule 2.11; Tennessee: Tenn. Sup. Ct. R. 10, RJC 2.11; and Colorado: Colo. Code Jud. Conduct Rule 2.11.

[2] Ga. Code of Judicial Conduct 2.11(A)(4)(g).

2. The Petition Unduly Burdens and Chills the Free Speech of Litigants, Lawyers, and Individuals

Proposed SCR 60.04(4)(h)-(i) will burden and chill the First Amendment protected political speech of judges, litigants, lawyers and their firms, and even "individual[s] or entit[ies]" that have no business before the Court. While not explicitly limiting speech, the proposed rules impose a burden as consequence of speaking. See *Davis v. FEC*, 554 U.S. 724, 738-39 (2008); see also *Duwe v. Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007) ("While it is true that the recusal requirement is not a direct regulation of speech, the chilling effect on judicial candidates is likely to be the same."). Accordingly, the proposed rules must be narrowly tailored to serve a compelling state interest. *Republican Party v. White*, 536 U.S. 765, 774-75 (2002). To be narrowly tailored, the proposed rules cannot "unnecessarily circumscribe protected expression." *Brown v. Hartlage*, 456 U.S. 45, 54 (1982).

As can be seen from the criteria a judge is tasked with considering in a recusal evaluation in the proposed rule, they directly implicate a lawyer's First Amendment rights:

- The amount of the contribution or support;
- The timing of the contribution or support;
- The relationship of the contributor or supporter to the parties;
- The impact of the contribution or support relative to all contributions and support received;
- The degree of the contributor's or supporter's involvement in the judge's campaign;
- The nature of the contributor's prior political activities or support and prior relationship with the judge;
- The nature of the pending proceeding or impending matter and its importance to the parties;
- Whether the contribution or support was likely intended to trigger the recusal;
- Any other factor relevant to the issue of campaign contributions or support that causes the judge's impartiality to be questioned.

The proposed rules' "any support" language is not narrowly tailored and fails the *Caperton* analysis, which explicitly states that recusal is limited to "extraordinary situation[s]" and "confined to rare instances." *Caperton,* 556 U.S. at 887-890. The proposed rules arguably treat routine lawful contributions as the basis for recusal. Other states that have addressed this issue, such as Georgia and Arizona, have language that treats contributions up to the legal limit with a presumption of non-recusal.

The broad language of "any support" raises a panoply of vexing questions and speech chilling scenarios, for example: Does hosting an event for a judicial candidate weigh in favor of recusal more than a maximum contribution? Does a firm with more lawyers that give a higher aggregate amount weigh more for recusal than the solo practitioner who gives the single maximum amount?

In addition to the breadth of "any support," the proposed rules' overly inclusive language of "by any individual or entity..." casts an exceedingly wide net and risks chilling the speech of those not before the Court. Again, other states that have adopted recusal rules post-*Caperton* have narrowly tailored the contributor language to parties, lawyers, and/or law firms. Here, the proposed language is nowhere near narrowly tailored; rather, it broadly encompasses "any individual or entity." This has the potential to chill speech of individuals or entities that are not lawyers or parties before the Court but could arguably be perceived as having interests that dovetail with an issue before the Court. The Wisconsin Supreme Court, has no mechanism to replace a recused justice, has faced a spate of recusal requests based on contributions made by non-party entities that one side perceives as having similar interests. *See,* e.g., *Clarke v. Wis. Elections Comm'n*, 2023 WI 66, ¶37, 409 Wis. 2d 249, 995 N.W.2d 735 ("Neither the petitioners in this case nor their attorneys are alleged to have contributed to my campaign."). The proposed rule change will turbocharge this behavior.

Consider also the proposed rules requirement that a judge consider a lawyer's or litigant's "prior political activities." This penalizes a person's exercise of an essential right – the right to engage in political activities.

Petitioners' proposed rules impose a substantial burden on political speech, but it is not narrowly tailored as required.

3. The Petition Creates an Unenforceable Standard for Judges

The proposed rule revisions, as drafted, are unworkable for judges. Under the current rules, judges are required to recuse based on broad, common-sense criteria. They do NOT require recusal based solely on a lawyer or a party's participation in, or contribution to, a judicial campaign. SCR 60.04(7).

This Rules Petition flips the recusal standard on its head. The proposed rules *mandate* recusal in a number of circumstances based on factors that are simply unknowable, especially at the outset of a case. What's worse, they require recusal relative to the lawyers' or parties' support of, or contribution to, a judge's campaign, creating a chilling effect on the democratic process and requiring judges to undertake a burdensome analysis which is impractical in the context of a system that functions by judicial election.

By way of example, proposed SCR 60.04(4)(e) mandates recusal when the judge, their spouse or domestic partner, or a person with third degree of kindship to either of them could be substantially affected by the proceeding. While this is the same as the existing law, the proposed rule goes further to require judges to "keep informed of the personal economic interests" of not just themselves or their immediate family but also of their third degree of kinship on either side.

How is that possible? How can judges know all the economic interests of their cousins, aunts, uncles, and in-laws? Under these rules, judges would need to do a survey of the interests of their extended family line. Equally problematic, the proposed rules encourage parties to dig up information on extended family members in order to mandate recusal of the judge. *See Wright v. Wisconsin Elections Comm'n*, 2023 WI 67, ¶10, 409 Wis. 2d 311, 995 N.W.2d 699 (citing *County of Dane v. Pub. Serv. Comm'n*, 2022 WI 61, ¶91, 403 Wis. 2d 306, 976 N.W.2d 790 (Hagedorn, J., concurring) ("We have seen bias and recusal allegations increase greatly in recent years, turning the obligation of adjudicator impartiality into a litigation weapon."). The rule imposes overly burdensome requirements on judges which have the potential to be weaponized in unfair ways.

As it relates to campaign contributions, proposed SCR 60.04(4)(h) requires judges to examine "any support of the judge's candidacy for judicial office or a contribution to the judge's campaign committee by any individual or entity." The judge must consider nine different factors such as the amount of the contribution, timing, impact, the degree of involvement in the campaign, the nature of the proceeding, etc. The problem with the proposed rule is it requires judges to overly scrutinize activity in their judicial campaign, contrary to our democratic system which encourages engagement in that process. As the comment to our current rule, SCR 60.04(7) explains:

> Wisconsin vigorously debated an elective judiciary during the formation and adoption of the Wisconsin Constitution in 1848. An elective judiciary was selected and has been part of the Wisconsin democratic tradition for more than 160 years.
>
> Campaign contributions to judicial candidates are a fundamental component of judicial elections.

Id.

Moreover, the rule fails to provide guidance as to how the various factors should be weighed. If an attorney previously made a large donation to a judicial campaign, does that automatically warrant judicial recusal? How will a court decide? How long would a lawyer's donation trigger recusal? If an attorney actively participates in a judicial campaign have they now effectively barred themselves from bringing cases before the judge they support?

The practical impact of Petition 26-01 is significant. Rather than provide clear guidance on judicial recusal, the proposed rules create obscure, untenable, standards for judges, lawyers and the public. For these reasons, we urge careful, in-depth, committee review of any changes to SCR 60.04 before proceeding.

4. The Petition Requires "Personal" Financial Knowledge Beyond What is Reasonable or Common

Petition 26-01 proposes expanding the type of financial information that a judge is required to be aware of and consider in the context of recusal beyond that which is reasonable or practical. It obligates judges to:

> [M]ake a reasonable effort to keep informed of the personal economic interests of the judge's spouse, domestic partner, *and any person within the third degree of kinship to either of them, or the spouse of such a person*, having due regard for the confidentiality of their business.

See Petition 26-01, 2 (emphasis added).

Adding relatives within the third degree of kinship is a significant expansion of the current rule, SCR:60.04(5), which is patterned on the ABA model rule 2.11(5). A third degree of kinship encompasses parents, grandparents, aunts/uncles and nieces/nephews. Extending the breadth to a spouse of individuals within a third degree of kinship broadens the obligation beyond the realm of reason and practicality.

Although it is reasonable to expect that judges be aware of their own economic interests, those of a spouse and perhaps those of a child, the petition unreasonably seeks to expand this obligation to the economic interests of people within a third-degree of kinship, and their spouses. It is not reasonable for a judge to be required to consider the economic interests of their niece's spouse.

The personal financial interests of a judge's family members, if known, can present a basis for mandatory recusal. The existing Supreme Court Rule sets forth parameters that are much more practical and enforceable than that advocated for in the Petition. It is practical in that it does not require judges to be knowledgeable of familial financial interests across multiple generations and amongst distant relatives with whom they maintain no contact. The existing rule strikes the right balance, by allowing parties to present information about financial conflicts, but does not require judges to possess knowledge that they may not legally or practically have any access to.

5. The Petition Attributes to Donors All Actions of an Independent Expenditure Organization Despite Donors' Lack of Organizational Control and Fungibility of Donations

Petition 26-01, particularly proposed SCR 60:04(4)(i)(1-8), contains never-before-seen provisions requiring recusal if a judge knows or should know that an independent expenditure (presumably used for political advocacy, which may or may not be expressly election related) raises a question concerning the judge's ability to be impartial. The proposed rule then lists eight factors that should be considered to determine impartiality. Read in its entirety, the proposed rule fails to account for the realities of modern political spending and creates an insurmountable attribution problem that renders it unworkable. The factors in the proposed rule are:

- The amount of the sponsorship;
- The timing of the sponsorship;
- The relationship of the sponsor to the parties;
- The impact of the sponsorship relative to all other sponsorship received;
- The degree of the sponsor's involvement in the judge's campaign;
- The nature of the sponsor's prior political activities, contributions and support and prior relationship with the judge;
- The nature of and the issues in the pending proceeding or impending matter and their importance to the parties;
- Any other factor relevant to the issue of independent communication sponsorship that causes the judge's impartiality to be questioned.

As seen from those criteria, the proposed rule implicitly requires lawyers and litigants to disclose contributions to independent expenditure groups in order for a judge to evaluate recusal. However:

- There is no mechanism to compel such disclosure within a judicial conduct rule;
- Lawyers may refuse to disclose such information as protected political activity;
- Lawyers often do not know whether their contributions to an independent group were used for any judicial-related expenditure;
- Lawyers cannot determine whether other members of their firm made such contributions, nor should they be held responsible for their partners' donation decisions;
- Any attempt to require firm-wide disclosure would intrude on protected associational rights.

Political contributions to parties, PACs, and other entities are pooled, commingled, and redistributed. There is often no reliable mechanism to attribute a specific individual's contribution to a particular independent expenditure supporting a judicial candidate.

A lawyer contributing to a political party or organization cannot always know whether those funds were later used for an independent expenditure related to a judge. Likewise, a judge cannot determine whether any such indirect support occurred or attribute it to a particular party or attorney. The rule, therefore, requires judicial decisions based on unknown, and unknowable, facts, which is incompatible with due process and sound judicial administration.

This stands in contrast to *Caperton* and *Williams v. Pennsylvania,* 579 U.S. 1 (2016), which rely on objective and known facts, not speculative or indirect influence.

Money is fungible, and once pooled, no principled method exists to trace a particular contribution to a particular expenditure. A rule that conditions mandatory recusal on such indirect political spending requires courts to assign legal significance to relationships that cannot be identified, verified, or reliably attributed.

If indirect contributions trigger recusal analysis, ordinary political participation becomes grounds for disqualification, placing lawyers and litigants at risk based on conduct they can neither control nor identify.

6. The Post-*Citizens United* Disclosure Regime Is Not Compatible with This Proposed Rule

The proposed rule creates serious constitutional defects as it effectively requires disclosure and investigation of protected political activity. The proposed rule, however, requires judges, lawyers and parties to embark on this effort to identify political spending without adequate legal tools to do so.

Judicial recusal rules are a poor substitute for the desperately needed legislative revisiting of our now severely outmoded campaign finance and independent expenditure disclosure regime. This is true at both the state and federal level. Though beyond the ambit of this petition, political spending has exploded over the past two decades. The expansion in campaign spending, both directly and indirectly, is a significant consequence of Supreme Court precedent sent in the wake of the Bipartisan Campaign Finance Reform Act of 2002. Judges, litigants, and their lawyers should not be forced to walk a tightrope created by the failure of legislators to appropriately modernize campaign finance laws with adequate disclosure requirements.

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court held that independent expenditures constitute protected political speech that cannot be restricted based on the identity of the speaker.

7. Experts: Disclosure Laws Necessary to Make Recusal Regime Work

Because there does not currently exist a meaningful, working disclosure regime around independent campaign expenditures, regardless of type, this rule falls far short of being an objective standard and is instead a morass that generates more questions than answers.

Even the Brennan Center, which has backed significant recusal proposals in Wisconsin and in other states, does not identify any enacted rule requiring judges to investigate, quantify, or disclose such expenditures. A review of its advocacy reveals that a necessary precondition for a recusal regime to work is that applicable state campaign finance laws require specific information be disclosed.[3]

Instead, three core problems remain:

(1) Knowledge – such expenditures are often unknown;

(2) Enforceability – no mechanism exists to verify them;

(3) Constitutionality – rule demands action against activity protected by the Constitution under *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Conclusion

An outside Advisory Committee would be able to greatly assist the Court in determining how best to update Wisconsin's judicial recusal standards Such an advisory committee made up of members of a variety of legal constituencies could be tasked to further study various existing statutory schemes and to propose recusal standards, guidance, and commentary that would better serve the interests of justice in all Wisconsin courts.

The members of the Wisconsin Association for Justice understand the complexity of the issues presented in Petition 26-01. We look forward to the opportunity to appear and participate in the hearing currently scheduled for June 4, 2026.

Dated: April 27, 2026

Respectfully submitted,
WISCONSIN ASSOCIATION FOR JUSTICE

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[3] Adam Skaggs, *Disclosure in the State Courts*, Brennan Center for Justice, May 13, 2010. Found online at: https://www.brennancenter.org/our-work/analysis-opinion/disclosure-state-courts (urging the passage of state laws to require disclosure of independent expenditures).