

**In re rule for recusal when a party or lawyer
has made a large campaign contribution****PETITION**

We, the undersigned retired members of the Wisconsin judiciary, hereby petition the Wisconsin Supreme Court to take the following actions pursuant to the court's supervisory authority over the Wisconsin unified court system as set forth in Article VII of the Wisconsin Constitution:

1. To establish an objective standard requiring recusal or disqualification of a judge when he or she has received the benefit of campaign contributions or assistance from a party or lawyer;
2. To support an amendment to the Wisconsin Constitution granting the Supreme Court authority to appoint a member or members of the Wisconsin Court of Appeals to temporarily serve as a Supreme Court justice when necessary to reach a quorum.
3. To invite the participation of the bench, bar and public in considering the action requested in this petition.

Preamble

“It is axiomatic that a fair trial in a *fair tribunal* is a basic requirement of due process” (emphasis added.) So says the United States Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009), a case in which that Court concluded that a “fair tribunal” had not been provided when a state supreme court Justice refused to recuse himself from a case where one of the

parties had contributed huge amounts in support of the Justice's election. The Court went on to emphasize that states have the authority to adopt recusal standards that are more rigorous than due process requires, and many have. The U.S. Conference of Chief Justices stated that these standards are "the principle safeguard against judicial campaign abuses."

As money in elections becomes more predominant, citizens rightfully ask whether justice is for sale. The appearance of partiality that large campaign donations cause strikes at the heart of the judicial function, which depends on the public's respect for its judgments. In this age of Super PACs and other independent campaign organizations, perhaps the influx of money to purchase access to legislators has numbed us to ethics. But we are not the legislature, we are the judiciary.

Some might ask why the issues of recusal due to campaign contributions should come up again when the Wisconsin Supreme Court addressed similar matters in 2010. Apart from the statewide and national negative reactions to the rules adopted in 2010, the short answer to this question is "things have changed." In no particular order, here are some of the changes.

First, the Court justified its non-recusal rule in the Comment to SCR 60.04(7) by pointing to the legislative campaign contribution limits on Supreme Court candidates. In 2015 Wisconsin Act 117, the legislature increased by 20 times the limits in place in 2010.

Second, the Court justified its non-recusal rule for "independent communications" in the Comment to SCR 60.04(8) by noting that independent expenditures and issue advocacy communications are not within the control of a judicial candidate, "because these expenditures or communications must be completely independent of the judge's campaign, as required by law, to retain their First Amendment protection." In 2015, the Court issued *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d

165, *mot. for recon. den.* 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49, in which it decided that an individual or an organization engaged in issue advocacy may coordinate with a campaign in any fashion it wishes with no limit on what it may spend and without any obligation to disclose the source of their funds.

Third, the Court in the Comment to the non-recusal rule of SCR 60.04(7) pointed to the state constitutional ban on replacing a Supreme Court Justice who withdraws from a case as a reason to adopt a rule so that recusal is virtually never required. Recently a constitutional amendment to change the manner of designating the Chief Justice was procured. One assumes that a constitutional amendment to allow a Court of Appeals Judge or a retired Supreme Court Justice to be selected to fill in on a case to assure a quorum should multiple justices be required to recuse themselves would likely be easily procured. Your petitioners intend to seek just such a change and seek the Court's support.

Fourth, the majority of the Court issued a decision on July 7, 2010 in support of the non-recusal rule for campaign contributions it had enacted in January. Perhaps by inadvertence, the Court wholly failed to mention a centerpiece of recusal jurisprudence: the appearance of bias. Indeed, the entire SCR section on recusal begins with the admonition that a judge shall recuse (emphasis added):

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.

The U.S. Supreme Court just this last term in a recusal case emphasized the importance of this concept. In *Williams v. Pennsylvania*, 579 U.S.____ (2016) the Court reversed the denial of Williams' postconviction relief because one of the participating state justices had been the district attorney who had personally approved an application to seek the death penalty in the case. Williams had asked

the justice to recuse, but he refused. Citing *Caperton v. Massey*, the Court applied the following standard to determine whether due process had been violated: “whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Williams*, 579 U.S. at _____. The Court found that due process had not been served. But the Court did not stop there. The Court found the due process violation to be structural and not amenable to harmless error review. The Court concluded:

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity of not just one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

Williams v. Pennsylvania, 579 U.S. ____ (2016).

Fifth, in 2014 the Center for American Progress conducted an empirical study of the recusal rules of all states that elect their judges. Wisconsin graded 35 (on a 1-100 scale). Only three states had lower grades for their systems to address the real and perceived conflicts created by campaign contributions to the judge by parties and/or attorneys. Analysis by other groups has likewise pointed out the shortcomings of the non-recusal rule adopted by our Supreme Court in 2010. It is precisely because well-informed citizens would and do reasonably question a judge’s ability to be impartial when that judge has received sizeable assistance in his or her campaign from a party to a case or the party’s attorney that we present this Petition.

The undersigned 54 Petitioners are all judges who have served cumulatively as sitting judges for over 1100 years. We know that Wisconsin judges with rare exception strive every day to fulfill their oath to be neutral and

impartial. We also know that Wisconsin citizens reasonably question the success of that endeavor in the face of sizeable campaign assistance.

The fundamental purpose of this proposed rule is to insure the public's confidence in the ultimate fairness and integrity of the entire Wisconsin judicial system.

We, the undersigned retired judges of the State of Wisconsin, ask the court to amend the Code of Judicial Conduct as follows:

Section 1. SCR 60.01 (1m) is created to read:

(1m) "Campaign contributions" means (a) direct contributions to the judge or the judge's campaign committee; (b) independent expenditures made by the contributor either supporting the judge or opposing the judge's opponent, or otherwise attempting to influence the outcome of a judicial election; or (c) contributions by or to a third party made with the intention or reasonable expectation that the third party would use the contribution to make independent expenditures either supporting the judge or opposing the judge's opponent, or otherwise attempting to influence the outcome of a judicial election. The definition includes monetary or in kind contributions.

Section 2. Create SCR 60.04(4)(g)1-4 to read:

(g) 1. The judge's campaign committee has received campaign contributions from a party to a proceeding or that party's lawyer which in the aggregate total at least the following amounts for election to the following judicial offices:

- a. Supreme Court Justice--\$10,000
- b. Court of Appeals Judge--\$2,500
- c. Circuit Court Judge--\$1,000
- d. Municipal Court Judge--\$500

This section does not apply if the contributions are returned prior to the general election.

2. Campaign contributions are made separate from the judge's campaign but with the apparent purpose to favorably influence the judge's election by a party to a proceeding or that party's lawyer which in the aggregate total at least the amounts listed for the judicial offices listed in subpara. (g)1.

3. For purposes of determining whether the monetary limits of paragraph 1. have been exceeded, the rule applies to campaign contributions made both during the judge's current term and during the immediately preceding term, however, the contribution limits apply separately to each of these time periods. If the judge is serving his or her first term, the "immediately preceding term" is considered the period beginning on the date on which the judge became a candidate under Wis. Stat. s. 11.0101 (1) (a) and ending on the day before the current term of office began.

4. Subparagraphs 1 and 2 apply whether such contributions, disbursements or expenditures were made or done with or without the knowledge or approval of the judge.

5. As used in paragraph g, the term "lawyer" means each individual attorney of record. The term "party" includes named individuals and any such individual's spouse and relatives within the 2nd degree of kinship. When the named party is a corporation or organization, "party" shall include not only the corporation or organization itself, but any individual officer, executive director, member of the board of directors, managing partner, or owner of more than 10% of the corporation or organization.

COMMENT

Wisconsin has had an elective judiciary for over 150 years. Money in judicial elections has in recent years played a far more prominent role. Indeed, the legislature in 2015 Wisconsin Act 117 increased the limits on direct contributions to judicial candidates and their campaign committees to \$6000 for circuit court candidates in large counties and to \$20,000 for Supreme Court candidates.

In addition, in 2015 the Wisconsin Supreme Court issued *State ex rel. Unnamed Pet. v. Peterson*, 363 Wis. 2d 1, in which the Court decided that an individual or organization engaged in issue advocacy may coordinate with a campaign in any fashion it wishes with no limits on what it may spend and without any obligation to report the source of its funds.

These rules do not suggest that receipt of a campaign contribution or the benefit of an expenditure from an independent source automatically impairs the judge's integrity. Instead, they are a response to the widespread reasonable perception of average citizens. There is a commonly held belief that when one side to a lawsuit has devoted substantial amounts to the election of the judge assigned to that lawsuit, the natural tendency to feel gratitude may interfere with that judge's ability to keep the scales of justice totally even. Such a perception undermines respect for our courts.

Citizens, and now corporations, have a constitutional right to contribute to the judicial candidate of their choice. They do not, however, have the right to have that person preside over their lawsuit.

When subsec. (4)(g) refers to a party's "lawyer," it is intended that this shall include each individual attorney of record. However, large aggregate contributions from an individual attorney's law firm may cause an appearance of bias requiring recusal even if the precise limits of the rule are not exceeded by a particular attorney. The following factors may be considered in any situation in which the judge's impartiality may reasonably be questioned due to campaign contributions:

- a. amount of the expenditure;
- b. timing of the expenditure;
- c. relationship of contributor or supporter to the party;
- d. impact of the expenditure;
- e. nature of the contributor's prior political activities or support and prior relationship with the judge;
- f. nature of pending matter or proceeding and its importance to the party or counsel;
- g. any other factor relevant to a judge's campaign that causes the judge's impartiality to be questioned.

Section 3. Create SCR 60.04(4)(g)6 to read:

6. Once the judge or judges assigned to a case are known, each party or the party's lawyer shall file an affidavit disclosing any campaign contribution exceeding \$250 made by the party or the party's lawyer to any assigned judge during the time periods described in subparagraph 3. The lawyer shall engage in reasonable efforts to ascertain if the party or the party's lawyer has made any such campaign contribution.

COMMENT

Ordinarily the facts that may require recusal are known to or readily available to the judge, but in the case of campaign spending, especially spending outside of the judge's own

campaign committee, that is not always true. Of course, this rule is not intended to replace a judge's duty to make disclosure when he or she does know the facts. However, judges should not be expected to devote the enormous time needed to ascertain who connected to every case has made campaign contributions. This task can more accurately and easily be performed by counsel.

Section 4. Create SCR 60.04(4)(h) to read:

(h) 1. Ordinarily the need for a judge to recuse himself or herself shall be disclosed by the judge. A party may bring a motion for recusal or disqualification and shall by affidavit include all grounds for recusal or disqualification that are known at the time the motion is filed. Any such motion shall be filed at the earliest possible time after discovery of the grounds requiring recusal or disqualification in order to avoid delay in the proceeding.

2. The challenged judge shall initially decide the motion and enter his or her decision on the record. If the challenged judge denies the motion, a party may seek review of the decision within 7 days by filing a written motion. If the challenged judge is a municipal judge or a circuit court judge, the review shall be conducted by the chief judge of the district in which the judge's court is located. If the challenged judge is a court of appeals judge, the review shall be conducted by a Supreme Court justice randomly selected by the Director of State Courts. If the challenged judge is a Supreme Court justice, the review shall be conducted by a panel of three court of appeals judges randomly selected by the Director of State Courts.

3. The reviewing authority shall expeditiously decide the motion de novo by written order reciting the reasons for its grant or denial using such procedure as is fair under the circumstances.

COMMENT

Certain of the preceding rules establish an objective standard for when recusal is required. A review procedure is a necessary ingredient to the effectiveness of such a standard.

When the chief judge of a district is the subject of a recusal motion or is otherwise unable to act, the deputy chief judge of the district shall conduct the review.

Section 5. Add to SCR 60.04(6) the following:

In the case of a recusal required by sub. (4)(g), agreement that the judge should not be required to recuse will only be needed from the non-contributing party or parties.

COMMENT

The final sentence of the rule is included to avoid the disqualification of a judge by a party making a contribution or an expenditure with the intent to cause circumstances that would require recusal.

Section 6. Repeal SCR 60.04(7) and (8).

The petitioners request a public hearing on the petition.

Dated: January 11, 2017.

Petitioners' signatures are on the five following pages.