BRENNAN CENTER FOR JUSTICE

INSIGHT

Court Rules to Regulate Judicial Elections

By Patrick Berry and Janna Adelstein JUNE 25, 2024

State courts, and particularly state supreme courts, are on the front lines of high-stakes controversies with national implications — from abortion rights to gerrymandered maps to climate policies.[1] Typically, state high courts have the final say on questions of state law.[2] In the coming years, these courts are likely to take on even greater importance as the federal judiciary shuts its doors to litigation involving fundamental rights.

Thirty-eight states elect their high court judges.[3] These elections — once relatively low cost and quiet — have become more expensive and partisan, increasingly looking like races for political office. In 2021–22, candidates, interest groups, and political parties spent more than $100 million on state supreme court elections, nearly twice as much as in any prior midterm cycle.[4] Wisconsin's 2023 high court election, which brought a liberal majority to the bench for the first time in 15 years, saw more than $50 million in spending.[5]

As spending in judicial elections has ballooned, it has also grown secretive. In the 14 years since the U.S. Supreme Court handed down *Citizens United v. Federal Election Commission* (2010), special interests have channeled more of their spending through super PACs and 501(c)(4) nonprofits, which can raise and spend unlimited amounts of money without disclosing their donors, rather than contributing to the candidates themselves.[6] Recent U.S. Supreme Court rulings, such as *Dobbs v. Jackson Women's Health Organization* (2022), have led to a surge of high-profile state court litigation, accelerating these trends.[7]

Today, outside groups are largely unregulated by state campaign finance laws and pose specific challenges with respect to judicial elections:

- **Lack of transparency.** Much of the spending comes from outside groups that are cagey about the true sources of their funding. For example, in the 2015–16 supreme court election cycle, only 18 percent of expenditures could be traced to easily identifiable donors.[8] This leaves voters in the dark and creates the potential for unseen conflicts of interest when judges hear cases involving major campaign supporters.

- **Coordination with candidates.** Weak state regulations enable groups to sidestep contribution limits by coordinating their spending with their favored candidates behind the scenes. Judicial candidates regularly collaborate with outside groups on supportive ads.[9] Candidates have also been accused of relying on groups to serve basic campaign functions, such as raising money, mobilizing voters, and hosting candidate forums.[10] Coordinated spending allows candidates to benefit from

groups' support while evading campaign finance and ethics rules.

- **Failures to recuse.** Elected judges regularly hear cases involving major campaign supporters, and such conflicts of interest can skew judicial decision-making.[11] While almost every state requires judges to step aside from cases when their "impartiality might reasonably be questioned," few offer guidance about when campaign contributions by litigants or their lawyers require recusal, and even fewer address independent expenditures.[12] Further, in most states with elected courts, judges facing motions for recusal are allowed to decide for themselves whether recusal is warranted, without any independent review.[13]

State legislatures have generally failed to codify stronger disclosure standards or close coordination loopholes. Nor have they strengthened judicial recusal rules or ethics standards.[14] With high-cost state supreme court elections likely here to stay, another mechanism can mitigate the growing influence of outside spending in judicial elections: reforms to judicial ethics rules, which govern the behavior of judicial candidates (including sitting judges running for reelection), and to procedural court rules, which govern court proceedings.

Most state high courts have the power to amend state judicial ethics rules, procedural court rules, or both. To that end, we offer model rules in the appendix that would

- establish clear standards for when election spending — including direct contributions, independent expenditures, spending that was coordinated with a candidate or their campaign, and contributions to outside groups or political parties that spent in connection with a judge's election — requires recusal;
- provide for independent consideration of recusal requests;
- prohibit judicial candidates and their campaigns from coordinating with outside groups; and
- require litigants and lawyers to disclose any election spending that they, their counsel, or associated donors made in support of or against the judge assigned to their case or a candidate who opposed the judge.

The model rules in this report are informed by the Brennan Center's research on spending in judicial elections, recusal standards, and judicial ethics.[15] They are also informed by extant rules and can be modified to account for jurisdiction-specific needs.[16] Because the Model Code of Judicial Conduct promulgated by the American Bar Association (ABA) is the primary template for states' judicial ethics rules, we propose revisions to the ABA's model code as the basis for our model ethics rules.[17]

The Legal Framework for Regulating Judicial Elections

The U.S. Constitution, along with state constitutions, protects the rights of individuals and interest groups that participate in judicial elections. Statutes (primarily state law) govern limits, if any, on direct contributions to judicial candidates and determine whether and how candidates and groups must disclose their electoral activities.

In addition to state laws, state judicial ethics rules (also known as codes of judicial conduct) set forth standards that govern the campaign activities of judicial candidates, such as whether they can be identified with a political party or attend events sponsored by one.[18] These rules (and any court decisions or advisory opinions that interpret them) apply to all judicial candidates, including sitting judges running for reelection, and are typically enforced by independent bodies that can impose disciplinary sanctions for failure to comply.[19]

As mentioned above, judicial ethics rules in most jurisdictions are based on, or consistent with, the ABA's model code. The model code, along with its related commentary, does not have the force of law, but state and federal courts have cited it as a persuasive authority on ethics questions. State procedural court rules, meanwhile, govern the conduct of court proceedings themselves, including required disclosures by the parties and attorneys in a case. In many jurisdictions, judicial ethics rules and procedural court rules can be amended without legislative action, yet elected court systems have largely failed to use either set of rules to address concerns raised by outside spending.

The ABA itself has been slow to amend its model code to account for outside spending.[20] In *Caperton v. A.T. Massey Coal Co.* (2009), the U.S. Supreme Court ruled that outsize judicial election spending can require recusal as a matter of due process if it presents a serious risk of actual bias.[21] The ABA's policymaking body, the House of Delegates, subsequently directed two standing committees to evaluate the ABA's model recusal provisions.[22] The committees circulated several drafts and proposed revisions to the House of Delegates in 2013 but ultimately withdrew them because they did not have the support of the ABA's Judicial Division or the Conference of Chief Justices.[23]

The U.S. Supreme Court has made clear that state supreme courts can use their authority over judicial ethics rules and procedural court rules to respond to high-cost

judicial campaigns, including outside spending. For example, in *Caperton*, the Court recognized that judicial ethics rules "serve to maintain the integrity of the judiciary and the rule of law" and thus states (and their high courts) may adopt rules "more rigorous than due process requires."[24] And in *Williams-Yulee v. Florida Bar* (2015), the Court made clear that states (and their high courts) can regulate judicial candidates more extensively than would be permitted for other political candidates under the First Amendment because of the vital state interest in safeguarding "public confidence in the fairness and integrity of the nation's elected judges."[25]

Model Rules to Address Election Spending

This report proposes model ethics rules that would prohibit judicial candidates and their campaign committees from collaborating with supportive outside groups and establish clear standards for when judicial election spending requires recusal. It also proposes model procedural court rules that would provide for independent consideration of recusal motions and require litigants and lawyers to disclose any spending, including independent expenditures and contributions to groups or political parties engaged in outside spending, for or against the judge hearing a case or the judge's opponent.

While these model rules do not address all the harms posed by modern judicial election spending, they mitigate several of the worst ones and represent an opportunity for elected courts to assure the public of their independence, impartiality, and ethical conduct. In most jurisdictions, such changes can be adopted by elected state supreme courts without legislative action.

>> Bolster recusal rules to account for all forms of spending and provide for independent review.

Outside spending can obscure conflicts of interest when judges preside over cases involving their major campaign supporters, leaving voters in the dark about who is trying to influence their state's courts. Yet many states' recusal rules fail to address when outside spending necessitates recusal, and those that do — like the ABA's model rules — generally focus on direct campaign contributions alone.[26] Additionally, elected judges in many states are allowed to decide challenges to their own impartiality, threatening the perception of fairness in those courts even further.

Given that election spending can undermine judicial decision-making and public confidence in the judiciary, elected supreme courts should adopt clear guidance as to when all forms of election spending require recusal. The first rule should require automatic recusal when litigants or lawyers appearing in a case within a set number of years after a judicial election contributed or spent more than a modest dollar amount in a race involving the judge they are appearing before. The second rule should require a judge's recusal when litigants or their counsel have, within a specified number of years, made contributions in excess of a preset threshold to an outside group or a political party that made aggregate contributions or expenditures to support or oppose the judge's campaign or that of the judge's opponent in an amount that might reasonably call the judge's impartiality into question.

Both rules should account for spending by donors associated with litigants (such as spouses or domestic partners or the executives of a corporate party's affiliate or subsidiary) or their counsel (such as the partners of a party's attorney's law firm). Supreme courts might look to state campaign contribution limits (if reasonable) for guidance in setting the dollar amounts. Supreme courts might also wish to set different dollar thresholds for supreme court and lower court elections and to consider recent spending trends in assessing what level of election spending warrants automatic recusal or risks creating a perception of bias. Supreme courts should also establish a period during which recusal would apply. A reasonable period might be a two- or four-year election cycle or the length of a single judicial term.

Elected supreme courts should also take steps to limit the possibility that recusal rules will be abused to allow judge-shopping or other forms of gamesmanship. For example, any party whose adversary made contributions or expenditures to support or oppose the judge they are appearing before or the judge's opponent should be permitted to waive the disqualification.

The rules' commentary should offer guidance as to when election spending that fails to meet the criteria for automatic recusal — because, for example, it occurred outside the preset period — might nonetheless reasonably call a judge's impartiality into question. Factors should include the amount of the contribution or spending and whether litigation was pending or reasonably expected. ***See revisions to the ABA's Model Rule 2.11 and new comment 7 on pages 6–8***.

To bolster the efficacy of this rule, elected high courts should adopt a system of independent review of recusal motions, so that judges are not assessing their own potential biases. One option is to adopt a procedural court rule like Texas's:

> Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not

sit with the remainder of the court to consider the motion as to him or her.[27]

As an alternative, elected high courts could create an independent commission to decide recusal motions. No state has yet adopted this approach, but independent bodies routinely regulate other aspects of judicial conduct. For example, every state and Washington, DC, has an independent body tasked with investigating complaints of judicial misconduct.[28] Some states also have commissions that monitor judicial elections for ethics violations.[29]

Beyond providing for independent consideration of recusal motions, elected supreme courts should adopt other procedural safeguards previously recommended by the Brennan Center, such as a requirement that recusal decisions be in writing and include their reasons.[30] Taken together, these substantive recusal standards and procedural court rules will mitigate the perception that justice is for sale in states with elected courts and promote public confidence in the judiciary.

>> Limit judicial candidates' coordination with outside groups.

While judicial ethics rules generally prohibit judicial candidates from "engag[ing] in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary," neither the ABA's model code nor elected state court systems' analogues address how candidates and their campaign committees may interact with supportive outside groups or their donors.[31] For example, while the model code prohibits judicial candidates from soliciting funds for political organizations, it says nothing about candidates doing the same for special interest groups.[32]

To ensure that judicial candidates and their campaign committees operate independently from groups that can raise and spend unlimited amounts of money to support their campaigns, elected supreme courts should adopt a judicial ethics rule that explicitly prohibits candidates and campaign committees from coordinating with groups on advertising, messaging, strategy, polling, policy, fundraising, mobilizing voters, or other campaign activities.

In addition, this rule should bar judicial candidates from soliciting money for or directing money to supportive groups; from attending, speaking at, or purchasing tickets for fundraisers and other events hosted by supportive groups; and from using the same vendors or consultants for campaign services as those used by supportive groups. Because it is not possible to draft a black-letter rule that captures all the ways that candidates and groups can collaborate, the commentary to this rule should set forth examples of conduct that creates a rebuttable presumption of coordination, such as a candidate sharing office space with a supportive group, or an outside group running an ad that features B-roll identical to footage that is available on the candidate's website.[33] ***See revisions to the ABA's Model Rule 4.2 and new comments 8–11 on pages 9–11.***

>> Require disclosure of all forms of spending.

Finally, because outside spending in judicial elections can hide potential conflicts of interest, elected high courts should require litigants to disclose all judicial election spending, including outside spending, that they, their counsel, or associated donors have made in support of or against the judge assigned to their case or a candidate who opposed the judge, or to state that they have made no such contributions or expenditures. This removes the burden on judges to proactively identify potential conflicts of interest. ***See the model disclosure rule on page 13***.

Such a disclosure requirement is similar to what is already required by federal courts of corporate parties, which must file disclosure statements to aid judges in identifying potential conflicts of interest.[34] Moreover, by requiring parties to disclose all forms of judicial election spending, this rule would ensure that elected judges and litigants have all the information they need to determine whether there are grounds for recusal.

Conclusion

At a time when state courts and constitutions are taking on increased importance, outside spending in judicial elections is unlikely to subside. But elected court systems need not wait any longer to assure the public of their independence, impartiality, and ethical conduct. They should act now by adopting the model rules recommended in this report and the appendix.

Appendix

This appendix includes model judicial ethics rules in subsection A and a model disclosure rule in subsection B.

A. Proposed Revisions to the ABA's Model Code

Proposed additions to the ABA's model code are indicated by text that is in boldface and underlined, while proposed deletions to the model code are indicated by text that is struck through.

Terminology

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

"Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent. **For purposes of Rule 2.11, the term includes all contributions made directly to a candidate's campaign committee and all financial or in-kind expenditures made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's campaign committee, or agents of a candidate or campaign committee to support or oppose a candidate.** See Rules 2.11 and 4.4.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, **4.2**, and 4.4.

"Coordination," in relation to a judicial candidate in a public election, means the act of making a financial or an in-kind expenditure in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a campaign committee, or agents of a candidate or campaign committee on whose behalf, or for whose benefit, the expenditure is made. See Rules 4.2 and 4.4.

"Independent expenditure," in relation to a judicial candidate in a public election, means a financial or an in-kind expenditure made to support or oppose a candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a campaign committee, or agents of a candidate or campaign committee. See Rule 2.11.

"Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.

"Non-candidate committee," in relation to a judicial candidate in a public election, means any entity that accepts contributions or makes contributions or independent expenditures to support or oppose a candidate. For purposes of this Code, the term does not include a political organization or a candidate's campaign committee. See Rules 2.11 and 4.2.

"Personally solicit" means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. See Rule**s** 4.1 **and 4.2**.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. See Rules **2.11,** 4.1**,** and 4.2.

Rule 2.11: Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

Note: These changes to the ABA's model recusal rule are also accomplished by revising the terminology section to expand the definition of "aggregate," adding a new definition of "independent expenditure" with a cross-reference to Rule 2.11, adding a cross-reference to Rule 2.11 in the new definition of "non-candidate committee," and updating the definition of "political organization" to include a cross-reference to Rule 2.11.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, **a party's spouse or domestic partner, an affiliate or subsidiary of a party,** a party's lawyer, ~~**or**~~ the law firm of a party's lawyer**, or an executive officer of any of the foregoing entities** has within the previous [insert number] year[s] made**:**

(a) aggregate* contributions* to **support or oppose** the judge's campaign **or that of a candidate opposing the judge; or**

(b) independent expenditures* to support or oppose the judge's campaign or that of a candidate opposing the judge

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]~~.

(5) The judge knows or learns by means of a timely motion that a party, a party's spouse or domestic partner, an affiliate or subsidiary of a party, a party's lawyer, the law firm of a party's lawyer, or an executive officer of any of the foregoing entities has within the previous [insert number] year[s] made:

(a) contributions greater than $[insert amount] to a non-candidate committee* or political organization* that made aggregate contributions or independent expenditures to support or oppose the judge's campaign or that of a candidate opposing the judge; or

(b) contributions greater than $[insert amount] to a non-candidate committee or political organization that transferred the contributions to another entity that made aggregate contributions or independent expenditures to support or oppose the judge's campaign or that of a candidate opposing the judge

such that the judge's impartiality might reasonably be questioned.

~~(5)~~ **(6)** The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

~~(6)~~ **(7)** The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) Disqualification due to contributions or independent expenditures in a judicial election, including under paragraphs (A)(4) through (A)(5), may be waived by any party, provided that the party, the party's spouse or domestic partner, an affiliate or subsidiary of the party, the party's lawyer, the law firm of the party's lawyer, or an executive officer of any of the foregoing entities has not made such contributions or independent expenditures.

Comment on Rule 2.11

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through ~~(6)~~ **(7)** apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

[7] In determining whether a judge's impartiality might reasonably be questioned due to contributions or independent expenditures in a judicial election, including contributions to a non-candidate committee or political organization as described in paragraph (A)(5), a judge should consider the following factors:

(1) the amount of the contribution or independent expenditure, including whether it exceeded the maximum allowable contribution that may be contributed to the candidate;

(2) whether any contribution to a non-candidate committee or political organization was made with the intention or reasonable expectation that the non-candidate committee or political organization would use the contribution to support or oppose the judge's campaign or that of a candidate opposing the judge;

(3) whether any contribution to a non-candidate committee or political organization was made with the intention or reasonable expectation that the non-candidate committee or political organization would transfer the contribution to another entity to support or oppose the judge's campaign or that of a candidate opposing the judge;

(4) the size of the contribution or independent expenditure in comparison to the total amount of money contributed to or expended in the judge's election, and, if the contribution was made to a non-candidate committee or political organization, the size of the contribution relative to the total amount expended by the non-candidate committee or political organization to support or oppose the judge's campaign or that of a candidate opposing the judge;

(5) if a contribution was made to a non-candidate committee or political organization, the ratio of the non-candidate committee's or political organization's spending to the total amount raised or spent in the judge's election;

(6) the apparent effect of the contribution, independent expenditure, or non-candidate committee's or political organization's spending on the results of the judge's election;

(7) the timing of the contribution or independent expenditure in relation to the case for which disqualification is sought; and

(8) any other factor relevant to a judge's election that causes the judge's impartiality to be questioned.

Rule 4.2: Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judicial candidate* in a partisan, nonpartisan, or retention public election* shall:

(1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;

(2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.

(B) A candidate for elective judicial office may, unless prohibited by law,* and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general or retention election:

(1) establish a campaign committee pursuant to the provisions of Rule 4.4;

(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

(3) publicly endorse or oppose candidates for the same judicial office for which he or she is running;

(4) attend or purchase tickets for dinners or other events sponsored by a political organization* or a candidate for public office;

(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and

(6) contribute to a political organization or candidate for public office, but not more than $[insert amount] to any one organization or candidate.

(C) A judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election:

(1) identify himself or herself as a candidate of a political organization; and

(2) seek, accept, and use endorsements of a political organization.

(D) A judicial candidate in a partisan, nonpartisan, or retention public election shall not:

(1) coordinate* with a non-candidate committee* supporting the candidate's campaign on advertising, messaging, strategy, policy, polling, allocation of resources, fund-raising, mobilizing voters, or other campaign activities;

(2) personally solicit* contributions* for or direct contributions to a non-candidate committee supporting the candidate's campaign;

Note: These changes to the ABA's model code are also accomplished by revising Model Rule 4.4 and its commentary to make clear that the prohibition on coordination with outside groups that applies to judicial candidates also applies to their campaign committees, by revising the terminology section to add a new definition of "coordination" with a cross-reference to Rules 4.2 and 4.4 and a new definition of "non-candidate committee" with a cross-reference to Rule 4.2, and by updating the definitions of "contribution" and "personally solicit" in the terminology section to include a cross-reference to Rule 4.2.

(3) attend, speak at, or purchase tickets for a fund-raising event or other event sponsored by a non-candidate committee supporting the candidate's campaign; or

(4) use the same consultants or vendors for campaign services as those used by a non-candidate committee supporting the candidate's campaign.

(E) A judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the candidate or the candidate's campaign committee, any activities prohibited under paragraph (D).

Comment on Rule 4.2

[1] Paragraphs (B) and (C) permit judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than [insert amount of time] before the first applicable electoral event, such as a caucus or a primary election.

[2] Despite paragraphs (B) and (C), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11), and (13).

[3] In partisan public elections for judicial office, a candidate may be nominated by, affiliated with, or otherwise publicly identified or associated with a political organization, including a political party. This relationship may be maintained throughout the period of the public campaign, and may include use of political party or similar designations on campaign literature and on the ballot.

[4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization.

[5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations.

[6] For purposes of paragraph (B)(3), candidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election. In endorsing or opposing another candidate for a position on the same court, a judicial candidate must abide by the same rules governing campaign conduct and speech as apply to the candidate's own campaign.

[7] Although judicial candidates in nonpartisan public elections are prohibited from running on a ticket or slate associated with a political organization, they may group themselves into slates or other alliances to conduct their campaigns more effectively. Candidates who have grouped themselves together are considered to be running for the same judicial office if they satisfy the conditions described in Comment [6].

Coordination with Non-candidate Committees

[8] Public confidence in the judiciary is eroded if judicial candidates or their campaign committees are perceived to be engaged in conduct that is meant to circumvent provisions of this Code or other law related to campaign contribution limits, judicial disqualification, or disclosure requirements. Accordingly, paragraph (D) requires judicial candidates, campaign committees, and agents of candidates or campaign committees to operate independently from non-candidate committees supporting the candidate's campaign.

[9] For purposes of paragraph (D), there is a rebuttable presumption that an expenditure by a non-candidate committee is coordinated with a judicial candidate, a campaign committee, or agents of a candidate or campaign committee under any of the following circumstances:

(1) the expenditure is made by or through an agent of the candidate or the candidate's campaign committee in the course of the agent's involvement in the candidate's campaign;

(2) the non-candidate committee republishes, disseminates, or distributes, in whole or in part, any video or broadcast or any written, graphic, or other form of campaign material prepared by the candidate, the candidate's campaign committee, or agents of the candidate or campaign committee;

(3) the non-candidate committee makes an expenditure based on information about the candidate's or campaign committee's needs, plans, or strategy that the candidate, campaign committee, or agents of the candidate or campaign committee provided to the non-candidate committee directly or indirectly;

(4) the non-candidate committee is established, run, or staffed in a leadership role by an individual who worked for the candidate or the candidate's campaign committee in a senior position or advisory capacity;

(5) the non-candidate committee is established, run, staffed in a leadership role, or principally funded by a member of the candidate's family;

(6) the candidate, the candidate's campaign committee, or agents of the candidate or campaign committee provide the non-candidate committee with names of potential donors or other lists to be used by the non-candidate committee for a fund-raising purpose;

(7) the candidate, the candidate's campaign committee, or agents of the candidate or campaign committee share or rent office space with or from the non-candidate committee; or

(8) the non-candidate committee was directly or indirectly formed or established by or at the request or suggestion of, or with the encouragement of, the candidate, the candidate's campaign committee, or agents of the candidate or campaign committee.

[10] A candidate or non-candidate committee may provide evidence to [name of appropriate regulatory authority] to rebut the presumptions described in Comment [9].

[11] Paragraph (D) does not restrict expenditures by non-candidate committees that are made independently of judicial candidates, campaign committees, or agents of a candidate or campaign committee.

Rule 4.4: Campaign Committees

(A) A judicial candidate* subject to public election* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.*

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions* as are reasonable, in any event not to exceed, in the aggregate,* $[insert amount] from any individual or $[insert amount] from any entity or organization;

(2) not to solicit or accept contributions for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; ~~**and**~~

(3) **not to engage in coordination* prohibited by Rule 4.2(D); and**

(4) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding $[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.

Comment on Rule 4.4

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions.

[2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

[4] Paragraph (B)(3) makes applicable to campaign committees the prohibition that applies to judicial candidates in Rule 4.2(D), relating to coordination with non-candidate committees that are supporting the candidate's campaign.

B. Proposed Disclosure Rule to Be Incorporated into Civil Rules of Procedure

(a) Definition. "Election spending" shall include:

(1) direct contributions to the campaign committee of the judge or a candidate opposing the judge;

(2) independent expenditures made in support of or against the judge's election campaign or that of a candidate opposing the judge;

(3) expenditures made in cooperation, consultation, or concert with, or at the request or suggestion of, a judicial candidate, the candidate's campaign committee, or agents of the candidate or campaign committee to support or oppose the judge's election campaign or that of a candidate opposing the judge;

(4) contributions to a third-party entity including but not limited to a political party, political action committee, 501(c)(4) social welfare group, 501(c)(5) labor organization, 501(c)(6) trade association, or limited liability company made with the intention or reasonable expectation that the entity would use the contributions to engage in spending described in paragraphs (a)(1) through (a)(3) of this section to support or oppose the judge's election campaign or that of a candidate opposing the judge; and

(5) contributions to a third-party entity including but not limited to a political party, political action committee, 501(c)(4) social welfare group, 501(c)(5) labor organization, 501(c)(6) trade association, or limited liability company made with the intention or reasonable expectation that the entity would transfer the contributions to another entity to engage in spending described in paragraphs (a)(1) through (a)(3) of this section to support or oppose the judge's election campaign or that of a candidate opposing the judge.

(b) Who Must File; Contents. All parties shall file an affidavit that:

(1) discloses any election spending exceeding $[insert amount] made in the previous [insert number] years by the party, the party's spouse or domestic partner, an affiliate or subsidiary of the party, the party's lawyer, the law firm of the party's lawyer, or an executive officer of any of the foregoing entities in support of or against any judge hearing the case or a candidate opposing any judge hearing the case; or

(2) states that no such election spending has been made.

(c) Time to File; Supplemental Filing. All parties must:

(1) file the affidavit once the judge or judges assigned to the case are known; and

(2) promptly file a supplemental affidavit if any required information changes.

Notes

The definition of "election spending" includes monetary or in-kind contributions and monetary or in-kind expenditures.

Each party's lawyer shall engage in reasonable efforts to ascertain if the party, the party's spouse or domestic partner, an affiliate or subsidiary of the party, the party's lawyer, the law firm of the party's lawyer, or an executive officer of any of the foregoing entities has made any such election spending.

Endnotes

1 For recent state constitutional cases across the country, see "State Case Database," *State Court Report*, https://statecourtreport.org/state-case-database.

2 Douglas Keith, Patrick Berry, and Eric Velasco, *The Politics of Judicial Elections, 2017–18*, Brennan Center for Justice, 2019, 2, https://www.brennancenter.org/sites/default/files/2019-12/2019_11_Politics%20of%20Judicial%20Elections_FINAL.pdf.

3 Brennan Center for Justice, "Judicial Selection: An Interactive Map," last updated October 11, 2022, https://judicialselectionmap.brennancenter.org/.

4 This calculation reflects adjustments for inflation. Douglas Keith, *The Politics of Judicial Elections, 2021–22*, Brennan Center for Justice, 2024, https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022.

5 Keith, *The Politics of Judicial Elections, 2021–22*.

6 In *Citizens United*, the U.S. Supreme Court struck down limits on election spending by corporations and unions, as long as it is done independently of candidates. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). Lower courts have interpreted *Citizens United* to likewise prohibit states from limiting contributions to groups that do not coordinate with candidates and political parties. See SpeechNow.org v. Federal Election Commission, 599 F.3d 686 (D.C. Cir. 2010).

7 In *Dobbs*, the U.S. Supreme Court held there is no constitutional right to abortion, overturning *Roe v. Wade*. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

8 Alicia Bannon, Cathleen Lisk, and Peter Hardin, *Who Pays for Judicial Races?*, Brennan Center for Justice, 2017, 2, https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf.

9 For example, in 2018 a liberal group called Greater Wisconsin Committee spent $352,235 on an ad supporting then Wisconsin Supreme Court candidate Rebecca Dallet that used portions of B-roll appearing on the Dallet campaign's YouTube account. Rebecca Dallet for Justice, "Extras," YouTube, February 28, 2018, video, 2:46, https://www.youtube.com/watch?v=EqSfFoB5-cQ; Greater Wisconsin Political Fund, "At It Again," March 28, 2018, video, 0:28, https://www.brennancenter.org/sites/default/files/STSUPCT_WI_GREATERWI_AT_IT_AGAIN.wmv; and Brennan Center for Justice, "Buying Time 2018 – Wisconsin," January 23, 2018, https://www.brennancenter.org/our-work/research-reports/buying-time-2018-wisconsin.

10 Alison Frankel, "Behind $250 Million State Farm Settlement, a Wild Tale of Dark Money in Judicial Elections," Reuters, September 5, 2018, https://www.reuters.com/article/legal-us-otc-darkmoney/behind-250-million-state-farm-settlement-a-wild-tale-of-dark-money-in-judicial-elections-idUSKCN1LL2ZQ; "Elections Board Cites Wilcox's Campaign Manager, Voter Group," *Daily Reporter*, July 25, 2000, https://dailyreporter.com/2000/07/25/elections-board-cites-wilcox8217s-campaign-manager-voter-group/; and "State Authorities Launch Investigations into Mark Walker, E.C. Sykes and the 'Alliance Defending Freedom,'" *Carolina Forward*, February 27, 2023, https://carolinaforward.org/blog/investigation-into-walker-sykes-alliance-defending-freedom/.

11 Alicia Bannon, *Choosing State Judges: A Plan for Reform*, Brennan Center for Justice, 2018, 4, https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform.

12 The "impartiality might reasonably be questioned" standard comes from the ABA's model recusal rule. ABA Model Code of Judicial Conduct, Model Rule 2.11(A). Wisconsin's recusal rule explicitly provides that judges "shall not be required" to recuse themselves solely on the basis of campaign contributions. Wis. R. App. P. CJC S 60.04(7).

13 Matthew Menendez and Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, Brennan Center for Justice, 2016, 4–5, https://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Recusal_Reform.pdf.

14 There is technically a difference between disqualification, which is mandatory, and recusal, which is voluntary; however, that difference is often blurred in practice because disqualification can function like recusal in jurisdictions where judges can decide for themselves whether they must step aside from a case. In this report, we use the terms interchangeably but distinguish between voluntary and mandatory recusal.

15 Bannon, *Choosing State Judges*; Menendez and Samuels, *Judicial Recusal Reform*; and Adam Skaggs and Andrew Silver, *Promoting Fair and Impartial Courts Through Recusal Reform*, Brennan Center for Justice, 2011, https://www.brennancenter.org/sites/default/files/2019-08/Report_Promoting_Fair_Courts_2011.pdf.

16 Sources include existing state and local laws, state judicial ethics rules, state court rules, and previously proposed revisions to Rule 2.11 of the ABA's model code.

17 See Tom Lininger, "Green Ethics for Judges," *George Washington Law Review* 86 (July 30, 2018): 720, https://www.gwlr.org/green-ethics-for-judges/ (noting that "the vast majority of states have adopted approximately ninety percent of the provisions in the ABA's boilerplate").

18 ABA Model Code of Judicial Conduct, Model Rule 4.2(C)(1); and ABA Model Code of Judicial Conduct, Model Rule 4.2(B)(4). Several provisions of the ABA's Model Rules of Professional Conduct are also applicable to the conduct of attorneys who run for judicial office. See, e.g., ABA Model Rules of Professional Conduct, Model Rule 8.2(b) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.").

19 For a discussion of how jurisdictions handle ethical violations by judicial candidates, see Charles Gardner Geyh, James J. Alfini, and James J. Sample, *Judicial Conduct and Ethics*, 6th ed., §10.03 (New York: Matthew Bender, 2020).

20 For a discussion of the ABA's past efforts to update the model code to address judicial election spending, see Charles Geyh et al., "The State of Recusal Reform," *New York University Journal of Legislation and Public Policy* 18 (2015): 520–23, https://nyujlpp.org/wp-content/uploads/2015/11/The-State-of-Recusal-Reform-18nyujlpp515.pdf.

21 556 U.S. 868 (2009).

22 American Bar Association, "Mod. Code Jud. Conduct Rule 2.11 Revision," July 30, 2013, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mcjc_rule_2_11/.

23 See American Bar Association, Resolution 105C, 2014, 4, https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-14-judicial-disqualification.authcheckdam.pdf. See also Geyh et al., "The State of Recusal Reform," 521–22.

24 556 U.S. 868, 887–89 (2009).

25 575 U.S. 433, 445–46 (2015). While *Williams-Yulee* did not overturn the Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which it held that the free-speech rights of judicial candidates can trump a state's judicial ethics rules, *Williams-Yulee* did establish a more forgiving standard for restrictions on judicial candidates' speech. See Richard Briffault, "The Supreme Court, Judicial Elections, and Dark Money," *DePaul Law Review* 67, no. 2 (2018), https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4049&context=law-review

26 The ABA's model recusal rule calls for the automatic disqualification of an elected judge who learns that a party or the party's lawyers have made campaign contributions exceeding a specific threshold within a particular number of years. ABA Model Code of Judicial Conduct, Model Rule 2.11(A)(4).

27 Tex. R. App. P. 16.3.

28 Geyh, Alfini, and Sample, *Judicial Conduct and Ethics*.

29 See, e.g., Louisiana Supreme Court, "Judicial Campaign Oversight Committee," accessed June 13, 2024, https://www.lasc.org/Judicial_Campaign_Oversight; State of Mississippi Judiciary, "The Judicial Election Oversight Committee," accessed June 13, 2024, https://courts.ms.gov/commissions/electionoversight.php; Ohio Bar Association, "Judicial Election Campaign Advertising Monitoring Committee," accessed June 13, 2024, https://www.ohiobar.org/advocacy/independence-of-the-judiciary/judicial-election-campaign-advertising-monitoring-committee/; and Tennessee Bar Association, "Judicial Campaign Code of Conduct Committee," accessed June 13, 2024, https://www.tba.org/?pg=Judicial-Campaign-Code-of-Conduct-Committee.

30 Menendez and Samuels, *Judicial Recusal Reform* (recommending that states adopt rules referring recusal motions to an independent judge in the first instance; requiring judges to issue reasoned, transparent recusal decisions in writing or on the record; providing meaningful review of denials of recusal motions on appeal or reconsideration en banc; establishing a clear, practical mechanism within the judicial system for replacing disqualified state supreme court justices; and allowing a preemptory strike at the trial level).

31 ABA Model Code of Judicial Conduct, Canon 4.

32 See ABA Model Code of Judicial Conduct, Model Rule 4.1(A)(4) (providing that a judicial candidate shall not, except as permitted by law or the judicial code, "solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office"); and ABA Model Code of Judicial Conduct, Model Rule 4.1(A)(5) (providing that a judicial candidate shall not, except as permitted by law or the judicial code, "attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office").

33 For a discussion of additional ways to regulate coordination, such as treating outside spending that is coordinated with a candidate as a direct contribution to that candidate's campaign (and therefore subject to contribution limits) or providing a "cooling off period" before outside spending is presumed to be coordinated, see Brennan Center for Justice, *Components of an Effective Coordination Law*, 2018, https://www.brennancenter.org/sites/default/files/stock/2018_10_MiPToolkit_CoordinationLaw.pdf.

34 The Federal Rules of Civil Procedure require corporate parties to file a disclosure statement identifying any parent corporations or any publicly held corporations that own more than 10 percent of its stock. See Fed. R. Civ. P. 7.1. The Federal Rules of Appellate Procedure impose a similar requirement for corporate parties in the court of appeals. See Fed. R. App. P. 26.1. Both rules were adopted to help judges determine whether they must recuse themselves because of a financial conflict of interest. See Fed. R. Civ. P. 7.1 committee's notes to 2002 amendment. See also Fed. R. App. P. 26.1 advisory committee's notes to 1989 amendment.

ABOUT THE AUTHORS

▶ **Patrick Berry** is counsel in the Brennan Center's Democracy Program, where he has promoted voting rights and fair, diverse, and impartial courts. During law school, Berry was a law clerk at Citizens for Responsibility and Ethics in Washington and Open Primaries. He received his BA from the University of Central Florida, where he graduated summa cum laude, and JD from the University of Pennsylvania Law School, where he participated in the legislative clinic and was an executive editor of the *Journal of Law & Public Affairs*.

▶ **Janna Adelstein**, a former research and program associate in the Brennan Center's Democracy Program, is an incoming staff attorney in the Legal Aid Society's juvenile rights practice, where she will represent children and youth in civil and criminal matters in New York City. Adelstein received her BA with honors from Vanderbilt University and her JD from Harvard Law School.

ACKNOWLEDGMENTS

The Brennan Center extends deep gratitude to our supporters, who make this Insight and all our work possible. See them at brennancenter.org/supporters.

The authors are grateful to their Brennan Center colleagues, past and present, who lent their support to the creation of this report. Alicia Bannon and Douglas Keith provided strategic guidance and vision throughout the research and writing process. Chisun Lee, Ian Vandewalker, and Daniel Weiner provided helpful comments. Gloria Dickson, Michelle Fleurantin, Jennifer Friedmann, Chihiro Isozaki, Chris Leaverton, Zoe Merriman, Sonali Seth, and Andrew Wells provided crucial research and editorial assistance. Zachary Laub, Elise Marton, and Janet Romero-Bahari brought this project to publication. We are also indebted to Charles Geyh for his invaluable feedback regarding the model rules.

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