BRENNAN CENTER FOR JUSTICE

Justice at Stake campaign

April 30, 2010

Ronald R. Carpenter
Clerk
Washington State Supreme Court
415 12th Ave SW
PO Box 40929
Olympia, Washington 98504-0929

*Re: Washington State Supreme Court Code of Judicial Conduct Task Force Proposed New Washington State Code of Judicial Conduct*

Dear Mr. Carpenter:

We write on behalf of the Brennan Center for Justice at NYU School of Law[1] and the Justice at Stake Campaign[2] to comment on the proposed new Washington State Code of Judicial Conduct presented on September 8, 2009 by the Washington State Supreme Court Code of Judicial Conduct Task Force. We commend the Task Force for its thorough and meticulous study of the 2007 ABA Model Code of Judicial Conduct, and believe that the proposed new Code of Judicial Conduct for Washington State provides a useful starting point as the Court considers amending the existing Code to reflect changes in the new ABA Model Code. We write, however, to highlight two areas of concern which we urge the Court to consider as it evaluates the Task Force's Final Report.

---

[1] The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Its research, public education, and advocacy in this area focuses on improving selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches.

[2] Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom — so judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

In particular, we would encourage the Court to revisit the proposed Rule 1.2, and to include language requiring judges to avoid not just impropriety, but also "the appearance of impropriety." We would also urge the Court to consider a number of minor additions to the proposed Rule 2.11, on disqualification. With these modifications, we believe that the proposed Code of Judicial Conduct will effectively protect the independence, integrity and impartiality of the Washington State judiciary, and will promote the public confidence and respect that it requires to carry out its constitutionally vital role. To that end, we respectfully submit the following comments.

## I. Rule 1.2

In formulating the proposed new Code of Judicial Conduct, the Task Force has removed language regarding the appearance of impropriety from Rule 1.2. We would urge the Court to reject this proposed modification of Rule 1.2 of the ABA's 2007 Model Code of Judicial Conduct. Because there are no compelling reasons to jettison the "appearance of impropriety" language from the Code of Judicial Conduct, and because the provision plays a vital role in protecting the reputation of the judiciary, we urge the Court to restore this language to the Code of Judicial Conduct.

The ABA's "appearance of impropriety" language represents a longstanding and well established standard that has governed judicial conduct for nearly a century. The appearance of impropriety standard has proved workable; it is flexible enough to reach inherently fact-bound circumstances that, almost by definition, are impossible to define in advance with certainty. And, contrary to suggestions from its critics — however well-intentioned their criticisms — the rule has not been abused, or applied indiscriminately. Any judge subject to possible discipline for violating the command to avoid the appearance of impropriety has, and would continue to have, the due process protections associated with a hearing before the Commission on Judicial Conduct, which applies an objective, reasonable person standard. Moreover, such a judge would also have the right to a *de novo* appeal of Commission action before the Washington State Supreme Court. These procedural protections seriously undermine any fears of unwarranted prosecutions under a vague rule.

The ABA's model judicial ethics canons have included some version of the appearance of impropriety doctrine for nearly a century, and during the most recent revision of the Model Code in 2007, the provisions were retained in Rule 1.2.[3] The drafters of the 2007 Model Code chose to maintain the language on the appearance of impropriety at the vigorous urging of the Conference of Chief Judges, which made clear "in the strongest possible terms" that it would not support a draft model code that did not include language in Rule 1.2 requiring judges to avoid the appearance of impropriety.[4] The appearance of impropriety language is enforced in nearly every other state in the country, and eliminating this language from the Code would render Washington

[3] For a brief history of the proceedings which led to the ABA's retention of the "appearance of impropriety" language in the 2007 Model Code, *see generally* Nancy J. Moore, Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?, 41 Loyola U. Chi. L.J. 285 (2009).

[4] *See id.*at 286.

an outlier, and could unintentionally suggest that the State takes a more lax approach to judicial misconduct than does the rest of the nation.

As documented in the Task Force's Minority Report, retaining the appearance of impropriety standard — currently the applicable standard of conduct in Washington — will promote trust and confidence in the judiciary. There has been no persuasive reason given to abandon this time-tested standard of conduct, and loosening the standards of judicial conduct can only raise additional public questions about the judiciary.

Planting seeds of doubt in the public's mind must be avoided at all costs, since, as the United States Supreme Court has repeatedly noted, "[t]he legitimacy of the Judicial Branch ultimately depends on *its reputation* for impartiality and nonpartisanship,"[5] and "justice must satisfy *the appearance of justice*."[6] As the Supreme Court of Pennsylvania observed:

> For generations . . . it has been taught that a judge must possess the confidence of the community; that [a judge] must not only be independent and honest, but, equally important, believed by all . . . to be independent and honest. '[J]ustice must not only be done, it must be seen to be done.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.[7]

Relaxing the relevant provisions of the Code of Judicial Conduct to eliminate the directive to avoid the appearance of impropriety cannot increase public faith in the judiciary — and, indeed, is virtually certain to undermine public confidence in judges. For these important reasons, we respectfully urge the Court to reject the proposed new Rule 1.2, and, as the Minority Report advocates, to replace it with the appropriate language from the ABA's Model Code.

## II. Rule 2.11

Proposed Rule 2.11, on judicial disqualification, represents an important reform of judicial disqualification practice by recognizing that campaign spending can, under certain circumstances, give rise to reasonable questions about judges' impartiality. We commend the Task Force for proposing a rule that would respond to campaign spending issues, and that aims to safeguard due process and public trust in the judiciary.

The Brennan Center and the Justice at Stake Campaign have long urged states to adopt recusal standards that will reassure citizens that their courts are fair and impartial, in fact and in appearance. In 2008, the Brennan Center issued a report, *Fair Courts: Setting Recusal Standards*, which details the increasing threats to the impartiality of state courts and the ways in which robust recusal standards may help to safeguard due process and public trust in the

---

[5] *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

[6] *Offut v. United States*, 348 U.S. 11, 14 (1954) (emphasis added).

[7] *In re Greenberg*, 442 Pa. 411, 416 (1971).

judiciary.[8] The Brennan Center and Justice at Stake have also filed *amicus curiae* briefs in cases involving impartial courts and recusal standards — including, most recently, in the landmark U.S. Supreme Court case of *Caperton v. A.T. Massey Coal Co*.[9]

In *Caperton*, the U.S. Supreme Court held that under certain circumstances, the Due Process Clause of the constitution requires recusal when a party who has given extraordinary campaign support appears before the judge he or she has supported. Specifically, the Court held that disqualification was mandated "'when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable'"[10] — when, that is, there is a "serious, objective risk of actual bias"[11] — because a party appearing before the judge has spent substantial campaign funds to elect the judge.

Proposed Rule 2.11 would respond to *Caperton* by requiring recusal when a judge is assigned the case of a party who has contributed financial support in excess of ten times the permissible dollar amount under RCW 42.17 within the last six years, and by providing for discretionary recusal when a judge hears the case of a party who has contributed an amount of more than two times but less than 10 times the permissible dollar amount under RCW 42.17. We believe that the proposed rule is a useful and important response to the perception that campaign support can influence judicial decision-making.[12] And we endorse the rule's inclusion, in the definition of "financial support," of both direct contributions to a judge's campaign as well as independent expenditures in support of the judge (or against the judge's opponent). *Caperton* itself indicates why including independent expenditures within the scope of the rule is crucial: in that case, all but $1,000 of the $3 million of financial support spent in favor of the disqualified judge took the form of independent expenditures. The fact that the campaign spending in question took the form of independent expenditures, rather than direct contributions, did not undermine the potential impact of the spending on the judge's impartiality because, as Justice John Paul Stevens has noted, "some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates

---

[8] *See* James Sample *et al.*, Fair Courts: Setting Recusal Standards (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/.

[9] 129 S. Ct. 2252 (2009).

[10] *Id.* at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

[11] *Id.* at 2265.

[12] Firm recusal standards that respond to the influence of money in judicial campaigns enjoy overwhelming public support. For example, a February 2009 national poll conducted for Justice at Stake by Harris Interactive revealed that more than 80 percent of the public believes judges should avoid cases involving major campaign supporters. Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), *available at* http://www.justiceatstake.org/node/125. And a USA Today/Gallup Poll also conducted in February 2009 found that 89% of those surveyed believe the influence of campaign contributions on judges' rulings is a problem. More than 90% of the respondents said judges should not hear a case if it involves an individual or group that contributed to the judge's election campaign. *See* Joan Biskupic, *Supreme Court Case With The Feel Of A Best Seller*, USA Today, Feb. 16, 2009.

and the public, and the way they taint the decisions that the [judge] thereafter takes."[13] For proposing a rule that reaches both forms of spending, we commend the Task Force.

We believe, however, that proposed Rule 2.11 would be strengthened further with the addition of several small modifications.

*First*, the proposed rule calls for recusal because of campaign spending only when a judge "learns by means of a timely motion by a party" that an adverse party has spent more than ten times the contribution limit established by RCW 42.17.[14] By its terms, the rule does not require recusal if the judge knows of one party's substantial spending through means other than through the adverse party's motion. This limitation is in sharp tension with Comment 2 to the Rule, which provides that a judge's obligation to recuse is required "*regardless of whether a motion to disqualify is filed.*"[15] To reconcile Proposed Rule 2.11(A)(4) with the commentary, and with the principle that judges should be disqualified *whenever* there is a significant, objective risk of bias, we would urge that Rule 2.11(A)(4) be amended to require recusal when "The judge **knows or** learns by means of a timely motion ~~by a party~~ that ~~an adverse~~ **a** party" has provided financial support sufficient to trigger the rule. We urge, further, that the same modification be made to comment 7 to the proposed rule.

*Second*, the commentary to the proposed rule appropriately calls for judges to disclose on the record information potentially relevant to a motion for disqualification, whether or not the judge believes disqualification is appropriate.[16] We believe this is an important requirement, because without robust disclosure of the spending involved in judicial campaigns, meaningful recusal practice is impossible. To further assist judges in determining whether grounds for disqualification exist, however, we would urge the Court to adopt a Court Rule that requires disclosure not just from judges, but also from litigants. Under such a rule, at the outset of litigation proceedings, litigants and their attorneys would be required to file a disclosure affidavit, listing any campaign contributions to or expenditures in favor of or against presiding judges (or to state that no such contributions or expenditures have been made). By ensuring the disclosure of all relevant facts pertaining to campaign spending and its potential effects on judicial impartiality — whether by judges or by litigants — such a rule would promote public confidence that every judicial proceeding takes place before a fair, unbiased, and impartial tribunal.

*Finally*, to facilitate the effective implementation of a new disqualification rule, we would urge the Court to adopt a Court Rule that requires transparent and reasoned decision making for recusal decisions and provides for prompt, *de novo* review when disqualification requests are denied. A court rule recently adopted by the Michigan Supreme Court provides an effective example of such a provision. The Michigan rule provides that, in the state Supreme Court, if a justice's participation in a case is challenged, the justice must publish his or her

---

[13] *Citizens United v. FEC*, 130 S.Ct. 876, 968 (2010) (Stevens, J., dissenting).

[14] Proposed rule 2.11(A)(4).

[15] *Id.*, cmt. 2 (emphasis added).

[16] *Id.*, cmt. 5.

reasons about whether to participate, and if the justice denies the request, the requesting party may move for the full court to consider the disqualification issue *de novo*.[17] By adopting such a rule, the Court would ensure that Washington State judges offer public reasons for their actions on recusal requests; that those reviewing a specific disqualification decision understand the underlying rationale or facts; that the state judiciary will develop a body of disqualification precedents for use in future cases; and that the public has a valuable tool to understand how Washington State judges address challenges to their impartiality, a central tenet of their fitness for judicial office.

## Conclusion

We commend the Task Force for the impressive accomplishment that its Final Report represents, and thank the Court for the opportunity to submit the foregoing comments. Though we believe that the proposed Code of Judicial Conduct makes important strides toward ensuring that both the perception and the reality of independent, impartial justice are maintained, we are convinced that adopting the changes we recommend, above, will further ensure that Washington State courts can carry out their constitutionally mandated role effectively and protect the public confidence and trust.

Respectfully submitted,


J. Adam Skaggs
Counsel
Brennan Center for Justice
161 Avenue of the Americas
New York, New York 10013
(212) 992-8976

Bert Brandenburg
Executive Director
Justice at Stake Campaign
717 D Street, NW Suite 203
Washington, DC 20004
(202) 588-9700


Cc: Honorable Alan R. Hancock, Co-Chair, Code of Judicial Conduct Task Force
Honorable Joel M. Penoyar, Co-Chair, Code of Judicial Conduct Task Force

[17] *See Amendment of Rule 2.003 of the Michigan Court Rules*, ADM File No. 2009-04 (Mich. S. Ct. 2009).