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## Promoting Fair and Impartial Courts through Recusal Reform

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[N]ow as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the “crown jewel” of our American experiment.

The Honorable Thomas R. Phillips  
Retired Chief Justice, Supreme Court of Texas<sup>2</sup>

Reforming judicial disqualification practice in the states is vital to combat mounting threats to public confidence in the judiciary. In particular, recusal reform is necessary to defeat the growing perception that judges’ decisions in the courtroom are influenced by partisan political concerns and — in the 39 states that elect judges — judicial campaign spending. State and national surveys have repeatedly shown that large, bipartisan majorities are extremely wary of the role that money plays in judicial elections and believe that campaign funding support buys favorable legal outcomes.<sup>3</sup>

In 2009, the U.S. Supreme Court recognized the corrosive effect that outsized judicial campaign spending can have on public perceptions of judicial legitimacy. In *Caperton v. A.T. Massey Coal Co.*,<sup>4</sup> the Court concluded that it violated the Constitution’s guarantee of a fair, impartial tribunal when a judge who had benefitted from more than \$3 million in campaign spending by the CEO of the Massey coal company — more than the total amount spent by all the judge’s other supporters, and by his own campaign committee — cast the tie-breaking vote to throw out a \$50 million damages award Massey was appealing. Recognizing that there was a “serious, objective risk of actual bias”<sup>5</sup> when the judge ruled on his principal benefactor’s case, the Supreme Court disqualified the judge. At the same time, the Court emphasized that states would be well served to adopt recusal rules “more rigorous” than the Constitution requires.<sup>6</sup>

Since the first formal ethics rules for American judges were drafted in 1924 by an American Bar Association (“ABA”) committee led by then-Chief Justice (and former President) William Howard Taft, the ABA has taken a leadership role in defining the ethical obligations that govern judicial conduct. In 1999, a provision was added to the ABA’s Model Code of Judicial Conduct that called for disqualifying an elected judge who, within a specific number

of years, had received campaign contributions exceeding a certain threshold from a party or party's counsel.<sup>7</sup> Most recently, the ABA's Standing Committee on Judicial Independence has researched judicial disqualification practice in the states, and, in 2011, the ABA's House of Delegates will take up the issue of recusal reform.

It is commendable, and could not be more timely, for the ABA as a whole to debate disqualification, an issue of crucial significance to judicial independence and the public's faith in fair, impartial courts. Whatever form any final ABA resolution on recusal takes, two fundamental principles should be at its center — and should represent a minimum first step in recusal reform efforts throughout the nation. *First*, states must provide for review of recusal motions by neutral judges, so that a challenged judge doesn't have the last, only word on whether to step aside. To facilitate meaningful review, states should require reasoned, transparent decisions on recusal requests. *Second*, states should adopt rules recognizing that a judge's impartiality may reasonably be questioned, and disqualification may be necessary, because of judicial campaign spending by litigants or their attorneys. To facilitate informed recusal decisions in cases concerning campaign spending, states should mandate disclosure of campaign contributions and independent expenditures.

To assist state courts in responding to the need for reform, the Brennan Center for Justice has collected model rules that provide a blueprint for state implementation.

In response to the need for clearly articulated procedures for handling recusal requests (and for review of recusal decisions), we identify existing best practices that other states should emulate. We survey existing state rules and highlight the most promising models that states should replicate when adopting guidelines on when campaign contributions mandate disqualification. Finally, we offer a model disclosure rule that can assist states in bringing transparency to judicial campaign finance and recusal practice.

The Brennan Center has consistently advocated substantive and procedural recusal rules that protect due process and reassure citizens that their courts are fair and free of actual or apparent partiality. In 2008, we issued a comprehensive report, *Fair Courts: Setting Recusal Standards*, which detailed the increasing threats to the impartiality of state courts and the ways in which robust recusal standards help safeguard due process and public trust in the judiciary; we have also advocated in support of recusal reform in numerous states.<sup>8</sup> Here, we draw on our national research regarding recusal practice to offer models for new disqualification standards and procedures, all of which will help safeguard the impartiality of state judiciaries.

**1. States should not rely on a challenged judge to make the final decision on whether his or her impartiality can reasonably be questioned. If a judge denies a recusal request, states should provide for prompt, meaningful review of the denial.**

To ensure public confidence in the judiciary, states should adopt rules under which the final decision on recusal is not made by the challenged judge him or herself. This is an issue of fundamental importance: one of the most criticized features of recusal practice is the fact that in many states, the judge subject to a recusal request has the unreviewable last word on whether to step aside from a case. It flies in the face of fundamental notions of disinterested, impartial decision-making to allow a judge accused of bias to be the only one who decides whether he or she should be disqualified.

One way to ensure wholly impartial consideration of disqualification requests is to remove the challenged judge from the decision entirely — by referring it either to another judge or to a panel of judges for resolution. Another solution allows the subject judge to issue an initial ruling on recusal, but provides for prompt *de novo* review if the judge denies the request. Under such a rule, either a judge receiving a recusal motion steps aside or, if he or she declines to do so, the party seeking recusal may appeal the denial to another judge or group of judges. States may wish to adopt different procedures for different courts — a recusal procedure that makes sense for a trial court with dozens of judges may not be well suited for a supreme court of seven justices — but at all levels of court, states should rely on a decision-maker other than the judge whose impartiality is in question to render a final decision on disqualification. Such a common sense procedure ensures an objective assessment of whether an alleged conflict of interest calls into question a challenged judge's impartiality, and increases public confidence that courts are truly fair and impartial.

*A. Trial and Intermediate Appellate Courts*

States that have rules pertaining to recusal decisions at the trial and intermediate appellate levels generally follow one of three basic models. Under the first model, the challenged judge has sole discretion to decide any recusal motion on the merits.<sup>9</sup> Appropriately, such procedures have been widely questioned.

The two alternative procedures are preferable. Under the second model — used in states including Kentucky, Montana, Texas, Utah, and Vermont — the challenged judge either grants a recusal motion and steps aside or simply transfers the matter to a designated judge at the same court level (often the chief judge), without addressing any aspect of the recusal decision. The designated judge then decides the motion.<sup>10</sup>

The third model, used in states like Georgia, borrows aspects of the first two. The targeted judge initially reviews the recusal request for facial sufficiency, timeliness, and/or compliance with other procedural requirements. If the targeted judge determines that the motion was properly filed, he or she may then either grant it or transfer the matter to another judge to render a decision.<sup>11</sup> Other states use a slightly different version of this model in which the challenged judge is permitted to rule on the merits of a recusal motion, but if he or she

denies the request, the chief judge or the remaining members of the court review that decision. In Michigan’s lower courts, for instance, if a challenged judge denies a recusal motion, the motion is referred to the chief judge, who decides it *de novo*.<sup>12</sup>

The latter two options provide alternative means of ensuring that an objective decision maker evaluates the disqualification request, and are preferable to allowing the challenged judge to have absolute authority to decide whether recusal is necessary. In deciding between these promising procedures, each state will have to examine a variety of factors — including, among other things, the size of the court and its relative workload. For instance, in smaller court systems, it may be less of a strain on the judiciary to eliminate procedurally insufficient or frivolous claims before giving another judge the responsibility of making a decision on the merits. Regardless of the specific factors facing a given court system in a particular state, however, both options are viable — they are routinely used in numerous states without problems. States that currently leave the final recusal decision to the challenged judge should adopt some version of them for their trial and intermediate appellate courts.

### B. *Courts of Last Resort*

Recusal practice in state high courts has become an issue of great public concern in the years after *Caperton*,<sup>13</sup> but only one state supreme court — Michigan’s — has fundamentally changed its process to ensure that the challenged justice does not have the last — and only — word on a disqualification request. Numerous other state supreme courts have rules predating *Caperton* that call for such procedures. Because ensuring objective, disinterested decisions on disqualification requests in state supreme courts is a goal of the utmost importance, we highlight the following model rules that apply to recusal by state supreme court justices:

- Under the Rules of the Supreme Court of Georgia, if a justice subject to a disqualification request declines to recuse, the remaining Justices decide the motion to disqualify.<sup>14</sup> To ensure a full quorum, the disqualified or non-participating justice is replaced “by a senior appellate justice or judge, a judge of the Court of Appeals or a judge of a superior court whenever deemed necessary.”<sup>15</sup>
- In Mississippi, a targeted justice makes the first decision on a recusal motion. If the justice denies the motion, the decision is subject to review by the entire court upon the filing of a motion for reconsideration.<sup>16</sup> If a justice of the Supreme Court is disqualified, the governor may appoint a replacement.<sup>17</sup>
- Under Michigan’s new rule,<sup>18</sup> if a challenged justice denies a motion for disqualification, the litigant may appeal to the full court, and “[t]he entire Court shall then decide the motion for disqualification *de novo*.”<sup>19</sup>
- In the Vermont Supreme Court, a challenged justice must either disqualify him or herself or turn the disqualification decision over to the other members of the Court. The challenged justice may not take part in this decision.<sup>20</sup> The Chief Justice is authorized by statute to appoint a retired justice or judge, or a superior judge, to a

“special assignment” on the Supreme Court as a result of a disqualification.<sup>21</sup> The Court will generally replace a disqualified Justice with a retired former Justice.<sup>22</sup>

- In Texas, a justice presented with a motion for recusal must either recuse from all participation in the case or certify the question to the rest of the court sitting *en banc*. The rest of the court then decides the disqualification question by a majority vote.<sup>23</sup> If a justice of the Supreme Court is disqualified, the chief justice will certify to the governor, who can appoint a replacement judge.<sup>24</sup>

In addition to these states, there are several others in which the challenged justice does not have the sole, unreviewable discretion to decide a recusal request.<sup>25</sup> Other states should adopt similar rules.

All the rules cited above would represent an important step forward in states that currently vest justices with unreviewable discretion to decide their own recusal motions. The language from Georgia’s Supreme Court Rules is among the most straight-forward, simple formulations of a procedure that ensures a challenged justice is not the final arbiter of a motion for his or her disqualification:

A motion to disqualify shall be decided by the remaining Justices of the Court. A Justice may, however, voluntarily disqualify himself or herself prior to the matter being decided by the remaining Justices.<sup>26</sup>

Other states should adopt a rule like Georgia’s.

## **2. States should require transparent decision-making on recusal requests.**

For the reasons outlined above, review by an objective decision-maker is critically important. Absent transparent, written rulings on recusal requests, however, meaningful review is impossible because there is no record of the reasoning supporting denial that can be reviewed on appeal. Accordingly, states should adopt rules requiring disqualification decisions to offer transparent and reasoned decision-making.

As explained in the Brennan Center’s recusal report, a failure to explain recusal decisions offends the fundamental principle “that officials must give public reasons for their actions in order for those actions to be legitimate.”<sup>27</sup> Failing to explain the reasoning behind a recusal decision makes it impossible for a reviewing court to grapple with the underlying rationale or facts. It denies other judges and courts precedent for use in later cases. In a state that holds judicial elections, a failure to explain disqualification decisions deprives the public of valuable information concerning how judges or justices address challenges to their impartiality. Perhaps most significantly, it leaves a litigant who believes a judge’s impartiality can be questioned with no explanation as to why the judge rejects this position.

For all these reasons, states should adopt a requirement that recusal decisions be rendered in writing or on the record. To be sure, courts must retain the flexibility to reject frivolous disqualification requests and motions that are facially or procedurally insufficient without

requiring written decisions; to require otherwise would impose an unnecessary administrative burden that would drain judicial resources. But for procedurally sound disqualification motions alleging facts which, if true, would necessitate disqualification, states should require reasoned, transparent decisions.

We urge states to adopt rules based on the straightforward procedure in the Michigan Supreme Court, which requires that when a justice is faced with a disqualification decision, “the challenged justice shall decide the issue and publish his or her reasons about whether to participate.” If the justice denies the request, the denial is reviewed by the full court, and on review:

The Court’s decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.<sup>28</sup>

**3. States should adopt rules recognizing that judges’ impartiality may reasonably be questioned, and disqualification may be necessary, because of judicial campaign spending by litigants or their attorneys.**

Rules clarifying when recusal is appropriate based on campaign spending have grown increasingly necessary in today’s world of progressively more expensive judicial elections.

The U.S. Supreme Court’s decision in *Caperton* recognized that serious threats to public perceptions of judicial impartiality can arise when judges preside over the cases of campaign contributors or parties who make independent expenditures in the judges’ election campaigns. As discussed above, *Caperton* involved campaign spending by the CEO of the Massey coal company during the 2004 judicial elections in West Virginia, when Massey was appealing a \$50 million damages award. Knowing that the State Supreme Court of Appeals would consider the appeal, Massey’s CEO spent \$3 million in support of Judge Brent Benjamin, who was challenging an incumbent justice on the high court. The CEO’s independent expenditures on Benjamin’s behalf exceeded the total amount spent by all other Benjamin supporters — and by Benjamin’s own campaign committee. After Benjamin won by fewer than 50,000 votes, he cast the tie-breaking vote to throw out the \$50 million damages award being appealed by his principal benefactor’s company.

The U.S. Supreme Court concluded that, given the circumstances of Benjamin’s election — and the extraordinary support he had received from Massey’s CEO — there was a “serious, objective risk of actual bias”<sup>29</sup> that disqualified Benjamin from hearing the case. The Court recognized, further, that it is imperative for states to adopt recusal rules targeting campaign spending, even in circumstances less extreme than those in *Caperton*.

The need for such rules is growing as the price-tags associated with running for judicial office rise. A comprehensive survey released last year revealed a series of sobering statistics.<sup>30</sup> Spending on state Supreme Court elections more than doubled in the past

decade, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009. Twenty of the 22 states that hold competitive elections for judges set all-time spending records in the last decade. Meanwhile, a select group of “super spenders” is outgunning small donors: in 29 of the costliest elections of the last decade, the top five spenders each averaged \$473,000 per election to install judges of their choice, while all other contributors averaged only \$850 apiece. Finally, a TV spending arms race has arisen, creating a need for money that only special interests can satisfy. In 2007-08, \$26.6 million was spent on TV ads in elections for state high courts, the record for a two-year election cycle. In 2008, special interest groups and political parties paid for 52% of all television advertising — and 87% of negative TV ads.

With million-dollar judicial campaigns bankrolled by special interest groups becoming the norm in judicial elections across the country, states — consistent with the landmark *Caperton* decision — should make disqualification mandatory when campaign spending raises reasonable questions about judicial impartiality.

Since 1999, the ABA’s Model Code of Judicial Conduct has contained a provision providing for automatic disqualification when a judge learns that a party or the party’s lawyers have made campaign contributions exceeding a specific threshold within a particular number of years.<sup>31</sup>

To date, however, only Utah and Arizona have adopted the rule. Utah’s new Rule 2.11(A)(4) was adopted effective April 1, 2010. It requires recusal when a party, party’s lawyer, or party’s lawyer’s law firm has within the previous three years contributed more than \$50 to the judge.<sup>32</sup> Arizona’s Supreme Court amended its code effective September 1, 2009, and now requires recusal if a party, party’s lawyer, or party’s lawyer’s law firm has within the previous 4 years made aggregate contributions to the judge exceeding a threshold tied to the state’s campaign finance laws (and currently set at \$840).<sup>33</sup>

All judges in Utah and most judges in Arizona are appointed and run only in unopposed retention elections; only some superior court judges in Arizona run in traditional, contested elections. None of the judicial elections in these states have featured the same outsized spending witnessed in states with contested judicial elections for their high courts, and none of the 25 states with the highest levels of judicial election spending in the last decade have adopted a version of the ABA’s Rule 2.11(A)(4).<sup>34</sup> Moreover, while the *per se* rule adopted in Utah and Arizona is simple to apply — when contributions exceed a preset level, disqualification is automatic, with no further analysis required — the rule applies only to *contributions* made directly to judicial candidates. It does not call for recusal based on *independent campaign expenditures* of the sort that triggered disqualification in *Caperton*. As a result, Rule 2.11(A)(4) does not sufficiently address the full array of contemporary campaign spending, seriously undermining its value even if it were adopted in the highest spending election states. Because a bright-line contribution rule does not respond to conflicts of interest that can result from independent expenditures, states must go further than Utah and Arizona and adopt disqualification rules that address all forms of campaign spending, including both contributions and independent expenditures.<sup>35</sup>

The ideal rule should take into account the overall amount a party (or counsel) spent on contributions and expenditures. But it should also respond to a number of additional factors

that bear on perceptions of a judge's impartiality, including the relative size of a party's contributions in comparison to the total amount of money raised by a judge and his or her opponent(s); the ratio of the party's spending to the total amount spent in the election; the apparent effect of the party's spending on the results of the election; and whether the party's spending occurred while the litigation in question was pending or imminent.<sup>36</sup>

Since *Caperton*, several states have implemented new rules that, to varying degrees, respond to the different forms of spending seen in today's expensive judicial election environment.<sup>37</sup> The Supreme Court of Washington, for example, adopted a rule, effective January 1, 2011, which provides that recusal may be appropriate when a judge's impartiality can reasonably be questioned based on a party's financial support for the judge — including direct contributions or independent spending.<sup>38</sup> The rule appropriately suggests consideration of the amount of financial support provided by a party relative to the total amount of the financial support for the judge's election, as well as the timing between the financial support and the pendency of the matter in question. Washington's rule, however, evidently allows a judge subject to a recusal request to make a subjective decision as to whether an objective observer could reasonably question the judge's impartiality. An ideal rule would eliminate this subjectivity and give the final word on disqualification to an independent decision-maker.

The Oklahoma Supreme Court adopted a rule in December 2010 that requires recusal when a judge knows or learns that a party (or counsel) has, within the previous four years, made "aggregate contributions" to the judge "in an amount that a reasonable person would believe could affect the fairness of the judge's consideration of a case involving the party [or counsel]. The judge should consider what the public perception would be as to such contributions affecting the judge's ability to be fair to the parties." While the Oklahoma rule appropriately clarifies that perceptions of impartiality should be answered from the point of view of an objective, reasonable observer, the rule by its terms is limited to contributions, and does not explicitly reach independent expenditures. The rule notes that "[c]ontributions within the limits allowed by the Oklahoma Ethics Commission will not normally require disqualification unless other factors are present." While the "other factors" language arguably leaves room for recusal in a case of extraordinary independent spending, a better rule would explicitly address independent expenditures.

Iowa's Supreme Court adopted a new Rule 51:2.11(A)(4), effective May 3, 2010, that mandates disqualification when "[t]he judge knows or learns . . . that the judge's participation in a matter or proceeding would violate due process of law as a result of: (a) Campaign contributions . . . or (b) Independent campaign expenditures . . . ." The rule wisely acknowledges that perceptions of judicial impartiality may be affected by independent spending as much as by contributions. In requiring recusal only in situations extraordinary enough to represent a constitutional due process violation, however, the rule fails to reach circumstances that, while not giving rise to questions of constitutional significance, still involve substantial conflicts of interest and raise doubts about judges' impartiality. The *Caperton* Court urged — or at a minimum, invited — states to adopt recusal rules more rigorous than the due process floor it recognized.<sup>39</sup> The new rule in Iowa leaves this challenge unanswered: by tying its new recusal trigger to the constitutional threshold, Iowa's rule is silent on a range of circumstances that would prompt reasonable questions about judicial impartiality and render recusal appropriate.



Changes recently adopted by the high courts of Missouri and Michigan also explicitly incorporate *Caperton's* due process holding — and are therefore open to the same criticism as Iowa's new rule. The Missouri Supreme Court in December 2010 added a comment to its judicial conduct code urging candidates for judicial office “to consider whether his or her conduct may create grounds for recusal . . . pursuant to *Caperton* . . . or whether the conduct otherwise may create grounds for recusal . . . if the candidate is elected to or retained in judicial office.”<sup>40</sup> The Michigan Supreme Court adopted a rule in November 2009 that, similarly, provides that judicial disqualification is warranted when “the judge, based on objective and reasonable perceptions, has . . . a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton*.”<sup>41</sup>

The high courts of Washington, Oklahoma, Iowa, Missouri and Michigan must be applauded for their national leadership in recognizing the impact that campaign spending can have on the perception — if not reality — of judicial impartiality. The rules these courts adopted represent important steps forward in modernizing recusal practice. As supreme courts in other states look to develop rules responding to judicial campaign spending, they should take the best aspects of these courts' rules and implement comprehensive rules.

Model language for an exemplary recusal rule can be found in a proposed amendment to Georgia's Code of Judicial Conduct. The proposal conditions the disqualification decision on a broad range of factors that could affect impartiality, including contributions and independent spending, and does not limit recusal to situations of constitutional magnitude. Moreover, because Georgia already has procedures to ensure that final decisions on disqualification are not made by the challenged judge him or herself, the proposed rule would be applied by objective decision-makers. Georgia's proposal would require a judge to recuse when his or her impartiality might reasonably be questioned because:

[T]he judge has received an aggregate amount of campaign contributions or support so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered:

- (i) amount of the contribution or support;
- (ii) timing of the contribution or support;
- (iii) contributor's or supporter's relationship to the parties
- (iv) impact of contribution or support;
- (v) nature of contributor's prior political activities or support and prior relationship with judge;
- (vi) nature of case pending and its importance to the parties or counsel;
- (vii) contributions made independently in support of judge over and above the maximum amount which may be contributed directly to the candidate; and
- (viii) any other factor relevant to the issue of campaign support that causes the judge's impartiality to be questioned.<sup>42</sup>

The factors considered under Georgia’s proposed rule received the imprimatur of a majority of the U.S. Supreme Court in *Caperton*, and were endorsed by the Conference of Chief Justices.<sup>43</sup> States in which judges sit for elections should adopt recusal rules patterned on Georgia’s proposed rule.

**4. States should require litigants (and counsel) to disclose campaign contributions or expenditures made in support of (or opposition to) any judge or judges hearing their case.**

Since meaningful disqualification practice vis-à-vis campaign spending is impossible without disclosure of the spending involved in judicial campaigns, robust disclosure provisions are of paramount importance: without West Virginia’s campaign finance disclosure rules, for example, the fact that Justice Benjamin’s primary benefactor was Massey’s CEO may not have ever come to light, and the *Caperton* litigation would have taken a different course.

State legislatures should adopt comprehensive disclosure rules that cover all campaign spending, including contributions and independent spending in judicial elections. But even in the absence of such legislation, state courts can adopt rules that will protect due process when those spending money in judicial campaigns appear in court.

To assist judges in determining whether grounds for disqualification exist, state courts should adopt rules requiring disclosure of campaign contribution data from judges and litigants and their counsel. With respect to spending by litigants and lawyers, state courts should require parties to file a disclosure affidavit listing any campaign contributions or expenditures that they or their counsel have made in favor of (or against) the judge or judges hearing their case (or to state that no such contributions or expenditures have been made). Such a disclosure requirement would be similar to those already routinely required in federal courts: corporate parties must file a statement identifying any parent corporation or publicly held company that owns a significant portion of the corporate party’s stock,<sup>44</sup> for example, and entities filing *amicus curiae* briefs with the Supreme Court must disclose any support they have received from a party.<sup>45</sup> By ensuring disclosure of all relevant facts pertaining to campaign spending and its potential effects on judicial impartiality, such a rule would ensure that judges are provided with all the information necessary to make informed, reasoned decisions on recusal questions. It would also promote public confidence that every judicial proceeding takes place before a fair, unbiased, and impartial tribunal.

The U.S. Supreme Court has repeatedly affirmed the role that campaign finance disclosure rules play in ensuring the transparency that is vital to maintaining public confidence in government institutions. As the Court recently observed in *Citizens United v. FEC*, “[t]he First Amendment protects political speech; and disclosure permits citizens . . . to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>46</sup> If a voter’s interest in making “informed choices in the political marketplace”<sup>47</sup> is a vital one, a litigant’s interest in information that bears on the impartiality of the tribunal hearing her case is equally — if not more — important: it implicates not just First Amendment rights, but the foundational due process right to a fair proceeding before an impartial tribunal.

To ensure that judges evaluating recusal requests based on campaign spending have the facts necessary to assess whether their impartiality could reasonably be questioned, states should impose rigorous disclosure standards on litigants and their counsel. We suggest the following language as the basis for an effective disclosure rule:

At each stage of a proceeding, all parties shall file an affidavit disclosing any contributions or independent expenditures exceeding \$[insert amount] that were made in the previous [insert number] years by the party, the party's lawyer, or the party's lawyer's law firm in support of or against any judge or judges hearing the case. If no such contributions or independent expenditures have been made, a party shall so state in the affidavit.

States should adopt a rule based on this language to ensure that litigants have full knowledge of any campaign spending by opposing parties or their counsel that might call into question the fairness of the tribunal in which their causes are heard.

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Shoring up public confidence in, and support for, the courts will be furthered by procedures that provide independent review of recusal decisions; transparent, reasoned decisions on disqualification requests; disclosure of spending in judicial campaigns; and recusal in cases where this campaign spending raises reasonable questions about judicial impartiality. The Brennan Center stands ready to work with state court leaders as they continue to develop and implement recusal rules that advance judicial independence and increase the public's faith in fair, impartial courts.

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<sup>2</sup> James Sample et al., Brennan Center for Justice, *Fair Courts: Setting Recusal Standards* 3 (2008), available at [http://www.brennancenter.org/recusal\\_standards](http://www.brennancenter.org/recusal_standards) ("Setting Recusal Standards").

<sup>3</sup> See, e.g., Adam Skaggs, Brennan Center for Justice, *Buying Justice: The Impact of Citizens United on Judicial Elections* 4-7 (2010), available at [http://www.brennancenter.org/buying\\_justice](http://www.brennancenter.org/buying_justice) (collecting survey data on national and state level data demonstrating that Americans believe, by significant margins, that campaign spending has an impact on judicial decision-making). A recent national survey conducted by Harris Interactive showed widespread, bipartisan concern about the escalating influence of money in judicial elections and its potential to erode impartiality. See Press Release, Justice at Stake, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions

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(Sept. 8, 2010), *available at* <http://tinyurl.com/2c422fs>. Among the findings of the survey were the following: 71 percent of Democrats, and 70 percent of Republicans, believe campaign expenditures have a significant impact on courtroom decisions. *Id.* Only 23 percent of all voters believe campaign expenditures have little or no influence on elected judges. *Id.* In addition, 82 percent of Republicans, and 79 percent of Democrats, say a judge should not hear cases involving a campaign supporter who spent \$10,000 toward his or her election. *Id.* Finally, 88 percent of Republicans, and 86 percent of Democrats, say that “all campaign expenditures to elect judges” should be publicly disclosed, so that voters can know who is seeking to elect each candidate. *Id.*

<sup>4</sup> 129 S. Ct. 2252 (2009).

<sup>5</sup> *Id.* at 2265.

<sup>6</sup> *Id.* at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

<sup>7</sup> See Model Code of Judicial Conduct, Canon 2, R.2.11(A)(4) (2007).

<sup>8</sup> See Sample, *Setting Recusal Standards*, *supra* note 2. In addition, the Brennan Center has filed *amicus curiae* briefs in cases involving recusal standards (including in the landmark case *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009)); testified on recusal before the Supreme Court of Wisconsin in 2009 (our testimony is available at [http://www.brennancenter.org/WI\\_recusal](http://www.brennancenter.org/WI_recusal)); and commented on proposed recusal rules in numerous other states (see, e.g., comments for Washington, at [http://www.brennancenter.org/WA\\_recusal](http://www.brennancenter.org/WA_recusal); Iowa, at [http://www.brennancenter.org/IA\\_recusal](http://www.brennancenter.org/IA_recusal); and Michigan, at [http://www.brennancenter.org/MI\\_recusal](http://www.brennancenter.org/MI_recusal)).

<sup>9</sup> See, e.g., *Gunter v. Murphy's Lounge, L.L.C.*, 105 P.3d 676, 684 (Idaho 2005) (“The decision to disqualify is left to the sound discretion of the trial judge himself.”); *Fid. Mgmt. & Research Co. v. Ostrander*, 662 N.E.2d 699, 705 (Mass. 1996) (explaining that the trial judge has discretion over recusal decisions).

<sup>10</sup> See, e.g., Ky. Rev. Stat. Ann. § 26A.020 (LexisNexis 2010); Mont. Code Ann. § 3-1-805 (2010); Utah R. Civ. P. 63(b)(2)-(3) (2010); Vt. R. Civ. P. 40(e)(3) (2010); Tex. R. Civ. P. 18a; *Johnson v. Purnjani*, 56 S.W.3d 670, 672 (Tex. App. 2001) (noting that disqualification motion should pass to another judge automatically even if it is untimely or states insufficient grounds for recusal).

<sup>11</sup> See, e.g., Ga. Super. Ct. R. 25.3 (2010) (requiring another judge to decide the merits of a recusal motion after the targeted trial judge determines the motion is timely, the affidavit is legally sufficient, and recusal would be authorized if some or all of the facts in the motion were true).

<sup>12</sup> Mich. Ct. R. 2.003(D)(3)(a) (2010).

<sup>13</sup> See generally James Sample, *Court Reform Enters the Post-Caperton Era*, 58 Drake L. Rev. 787 (2010) (describing state recusal reform efforts after *Caperton*); Letter from J. Adam Skaggs, Counsel, Brennan Center for Justice, to Hon. Henry Johnson, Jr., Chair, Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary (Dec. 15, 2009), *available at* [http://www.brennancenter.org/recusal\\_hearing](http://www.brennancenter.org/recusal_hearing) (same).

<sup>14</sup> Ga. Sup. Ct. R. 26 (2010).

<sup>15</sup> *Id.* R. 57.

<sup>16</sup> Miss. R. App. P. 48C(a)(iii) (2010).

<sup>17</sup> Miss. Const. art. VI, § 165.

<sup>18</sup> See Mich. Court Rule 2.003 (2010).

<sup>19</sup> *Id.*

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<sup>20</sup> Vt. R. App. P. 31(e)(2) (2010).

<sup>21</sup> Vt. Stat. Ann. tit. 4, § 22 (West 2010).

<sup>22</sup> *Id.*, Reporter's Notes, 1986 Amendment.

<sup>23</sup> Tex. R. App. P. 16.3 (2010).

<sup>24</sup> Tex. Gov't Code Ann. § 22.005 (West 2010).

<sup>25</sup> *See, e.g.*, Alaska Stat. § 22.20.020(c) (2010); La. Code Civ. Proc. Ann. art. 159 (2010); Nev. Rev. Stat. Ann. §1.225(4) (2010); Or. R. App. P. 8.30(3) (2010).

<sup>26</sup> Ga. Sup. Ct. R. 26 (2010).

<sup>27</sup> Sample, *Setting Recusal Standards*, *supra* note 2, at 32 (footnote omitted).

<sup>28</sup> Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 (Mich. S. Ct. 2009).

<sup>29</sup> *Id.* at 2265.

<sup>30</sup> *See generally* James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* (2010), available at <http://www.brennancenter.org/NPJE09> (“*New Politics: Decade of Change*”).

<sup>31</sup> The rule was adopted in 1999 as Canon 3(E)(1)(e), and was retained in the 2007 revisions to the model code as Rule 2.11(A)(4). It does not prescribe the specific monetary threshold that triggers disqualification; rather, it contemplates that different states would adopt different thresholds tied to the levels of judicial campaign spending in each state. In full, Rule 2.11(A)(4) provides for disqualification when:

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

ABA Model Code of Judicial Conduct, Canon 2, Rule 2.11(A)(4) (2007).

<sup>32</sup> Utah Code of Judicial Conduct, Canon 2, Rule 2.11(A)(4) (2010).

<sup>33</sup> Ariz. Code of Judicial Conduct, Canon 2, Rule 2.11(A)(4) (2010).

<sup>34</sup> For details on campaign spending in the states with the most expensive judicial elections over the last decade, see generally *New Politics: Decade of Change*, *supra* note 31.

<sup>35</sup> Because of the extremely low disqualification threshold adopted in Utah (\$50) and Arizona (\$840), the rules adopted in those states are also likely to spur lawsuits attacking the rules as First Amendment violations that chill campaign speech. While the theory behind such challenges is fundamentally misguided — the First Amendment, of course, entitles no party to choose the judge who hears its case — the inevitability of litigation raises further questions about the viability of establishing *per se* disqualification rules for *de minimis* campaign spending.

<sup>36</sup> *See generally Caperton*, 129 S. Ct. 2252, 2263-64 (2009) (discussing how these factors determine whether an interested party in a matter had a “significant and disproportionate influence in placing the judge on the case . . .”).

<sup>37</sup> Prior to *Caperton*, only two states — Alabama and Mississippi — had rules that furthered the same goals as the ABA's model rule, but these rules were not effective. Alabama's statutory provision would require recusal of an appellate judge who received more than \$4,000 (or a circuit

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judge who received more than \$2,000), but it was never precleared under the Voting Rights Act by the U.S. Department of Justice, and has never been enforced. *See* Ala. Code § 12-24-2(c); *Finley v. Patterson*, 705 So. 2d 834, 835 n.1 (Ala. 1997) (noting that enforcement of Alabama’s rule is “in legal limbo” and not enforced because of concerns regarding the lack of preclearance under the Voting Rights Act); Alabama Judicial Inquiry Comm’n, *Advisory Opinion 99-725* (Apr. 30, 1999), available at <http://www.alalinc.net/jic/opinions/Ao99-725.htm>. Mississippi’s judicial ethics code contains a provision permitting litigants to file a recusal motion when an opposing party (or counsel) is a “major donor” to the judge, but Mississippi has not defined the threshold that determines “major donor” status. Mississippi’s provision also merely permits litigants to seek recusal; it does not mandate recusal when a specific contribution threshold is exceeded. *See* Miss. Code of Judicial Conduct Canon 3E(2).

<sup>38</sup> *See In re Adoption of the New Code of Judicial Conduct*, No. 25700-A-963, Rule 2.11(Wash. Sept. 9, 2010), <http://www.courts.wa.gov/newsinfo/content/pdf/cjcOrder.pdf>. Washington’s new Rule 2.11(D) provides, in full:

A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge’s judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider: (1) the total amount of financial support provided by the party relative to the total amount of financial support for the judge’s election, (2) the timing between the financial support and the pendency of the matter, and (3) any additional circumstances pertaining to disqualification.

<sup>39</sup> Justice Kennedy’s majority opinion noted that “[s]tates may choose to ‘adopt recusal standards more rigorous than due process requires.’” 129 S.Ct. at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)). On this point, even the dissenting Justices agreed. *See id.* at 2268-69 (Roberts, C.J., dissenting).

<sup>40</sup> Mo. Code of Judicial Conduct Rule 2, comment (2010).

<sup>41</sup> Mich. Code of Judicial Conduct, Rule 2.003(C)(1)(b) (2010).

<sup>42</sup> *See Recusal Amendments to Code of Judicial Conduct: Canon 3* (July 16, 2010), [www.gabar.org/public/pdf/news/Recusal\\_AM10.pdf](http://www.gabar.org/public/pdf/news/Recusal_AM10.pdf).

<sup>43</sup> *See Caperton v. Massey*, Brief of the Conference of Chief Justices as Amicus Curiae In Support Of Neither Party (No. 08-22) (U.S. 2009), available at [http://www.brennancenter.org/CCJ\\_amicus](http://www.brennancenter.org/CCJ_amicus).

<sup>44</sup> *See* Fed. R. App. P. 26.1.

<sup>45</sup> *See* S. Ct. R. 37.6.

<sup>46</sup> 130 S. Ct. 876, 916 (2010).

<sup>47</sup> *Id.* at 914.