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FOR JUSTICE



**Justice at Stake**  
c a m p a i g n

October 31, 2011

Mike Catalano, Clerk  
Tennessee Appellate Courts  
100 Supreme Court Building  
4017th Avenue North  
Nashville, TN 37219-1407

*IN RE: PETITION FOR THE ADOPTION OF AMENDED  
TENNESSEE CODE OF JUDICIAL CONDUCT TOGETHER WITH  
CHANGES IN RULES AND STATUTES*  
No. M2011-00420-SC-RL1-RL

Dear Mr. Catalano:

We write on behalf of the Brennan Center for Justice at N.Y.U. School of Law<sup>1</sup> and the Justice at Stake Campaign<sup>2</sup> to comment on the new Tennessee Code of Judicial Conduct and accompanying court rules proposed by the Tennessee Bar Association on February 25, 2011. We commend the Bar for its rigorous and meticulous study of the 2007 ABA Model Code

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<sup>1</sup> 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.

<sup>2</sup> 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.

of Judicial Conduct, and we believe the proposed new Tennessee Code of Judicial Conduct provides a strong foundation for the Tennessee Supreme Court as it considers changes to the existing Code of Judicial Conduct.

We therefore strongly urge the adoption of the proposed rules, and write to underline the importance of several elements of the proposed rules.

*First*, we believe proposed Rule 2.11(A)(4) provides a promising solution to the problems posed by campaign contributions and independent expenditures in judicial elections. The rising costs of judicial elections across the country have created a need for rules that clarify when recusal is appropriate based on campaign spending. In the last decade, spending on state supreme court elections more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009. Of the 22 states that hold competitive elections for judges, 20 set all-time spending records during the last decade. And in 2010, we saw this trend spill over from contested judicial elections into retention elections.

The United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*<sup>3</sup> recognized the serious threats to public perceptions of judicial impartiality that arise when judges preside over cases involving campaign supporters. There, the Court ruled that due process required a justice to recuse himself when one of the parties had spent \$3 million on independent expenditures to elect that justice. That \$3 million exceeded the total amount spent by all of the justice's other supporters, and by his campaign committee. The Court concluded that the spending created a "serious objective risk of actual bias."<sup>4</sup> With million-dollar judicial campaigns becoming the norm across the country, disqualification in cases where campaign spending raises reasonable questions about a judge's impartiality has become imperative to preserving public confidence in the courts.

We endorse the Tennessee Bar's proposed response to the problems posed by judicial campaign spending, and believe it represents a more effective approach than several existing rules.<sup>5</sup> In particular, we believe it represents a preferable approach to that taken in the American Bar Association's Model Code of Judicial Conduct. The Model Code contains a *per se* recusal rule, which requires disqualification when campaign contributions to a judge exceed a specified threshold amount. We believe this approach has several shortcomings not present in the rule proposed by the Tennessee Bar. First, the ABA rule fails to address the full array of campaign spending that occurs today. It applies only to contributions made directly to judicial candidates, not independent campaign expenditures, which account for a large portion of spending on judicial elections: in the most recent cycle, independent campaign spending in state high court elections—by definition uncontrolled by and

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<sup>3</sup> 129 S. Ct. 2252 (2009).

<sup>4</sup> *Id.* at 2265.

<sup>5</sup> See Adam Skaggs and Andrew Silver, Promoting Fair and Impartial Courts through Recusal Reform 13-14 (Brennan Center 2011), available at [http://www.brennancenter.org/recusal\\_reform](http://www.brennancenter.org/recusal_reform) (describing Bar's proposal as "very promising" and urging "[s]tates in which judges sit for elections [to] adopt recusal rules patterned on" the Bar's proposal).

unaccountable to candidates—represented nearly one of every three dollars spent.<sup>6</sup> Second, pinpointing a *per se* campaign contribution limit in each state can be a daunting and insurmountable task, and any chosen number may prove to be far too high or too low. Finally, the ABA’s automatic rule opens the door to gamesmanship by litigants who may attempt to engage in judge-shopping by making a disqualifying contribution to a disfavored judge.

The Tennessee Bar’s Proposed Rule 2.11(A)(4) avoids these pitfalls, and provides a promising solution to concerns campaign spending may raise about the impartiality of Tennessee’s courts. By including contributions and other support, the rule adequately addresses both direct contributions to a judicial candidate and independent expenditures like those that caused disqualification in *Caperton*. Additionally, by replacing a *per se* threshold with language requiring recusal where support gives rise to reasonable questions about a judge’s ability to remain impartial, the rule avoids concerns of gamesmanship and judge-shopping that arise with the ABA Model Code. Finally, the comments to the proposed Rule 2.11(A)(4) guide both judges and litigants in its application, to avoid a flood of unnecessary requests and disqualifications. The factors listed in Comment 7, which mirror those the Court described in *Caperton*, provide a workable set of guidelines for judges and litigants when confronting recusal questions related to campaign contributions.

We are also encouraged by Comment 5 to the proposed recusal rule, which asks judges to disclose on the record information they believe the parties might consider relevant to a possible motion for disqualification. While we prefer statutory rules requiring judges and litigants to disclose all campaign contributions and expenditures, we are nevertheless confident that judges in Tennessee will apply this directive fairly and faithfully.

*Second*, we strongly support proposed Rule 2.11(D) and the associated changes to the Tennessee Rules of Civil, Criminal and Appellate Procedure, which provide for written orders on recusal motions that state the reasons for the ruling, and which provide a process for litigants to obtain *de novo* review of recusal requests denied at the trial, appellate, and supreme courts.

One of the most criticized features of the recusal rules in many states is that the judge subject to a recusal motion has the unreviewable last word on whether to step aside. For many, it flies in the face of fundamental notions of disinterested, impartial decision-making to allow judges accused of bias to be the only ones who decide whether or not they are, in fact, subject to disqualification. *De novo* review of a recusal motion denied in writing promotes public confidence in the judiciary by ensuring that the final disqualification decision is made by a judge or group of judges who is impartial both in fact and in appearance.

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<sup>6</sup> See Adam Skaggs, Maria da Silva, Linda Casey and Charles Hall, *The New Politics of Judicial Elections 2009-2010* 11 (Justice at Stake 2011), available at <http://www.newpoliticsreport.org> (noting that outside groups accounted for 29.8 percent of all spending in the 2009-2010 supreme court election cycle).

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By providing independent, *de novo* review of denied recusal motions, Tennessee's courts would take an important step forward in promoting public confidence in their recusal practices. And by adopting the proposed recusal rule on to campaign spending, Tennessee will take a significant step toward ensuring that the public believes decisions are reached based on the facts and the law, not on which side provided the most support to the judge's campaign. Together, these proposed rules, if adopted, will make important advancements that help ensure the perception and reality of impartial justice in the state of Tennessee.

We thank the Court for the opportunity to submit the comment, and for the reasons we have outlined, we urge the Court to adopt each of the rules addressed above.

Respectfully submitted,



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