



State Judicial Ethics Rules Fail to Address Flood of Campaign Cash from Lawyers and Litigants

By Billy Corriher and Jake Paiva May 7, 2014

Only a few countries in the world elect their judges, and the United States is the only one in which some judicial candidates need to raise millions of dollars to get elected and stay on the bench. The amount of campaign cash in judicial elections has risen sharply in recent decades.¹ After the U.S. Supreme Court “unleashe[d] the floodgates” of independent spending in *Citizens United*,² judicial candidates spent a record \$33.7 million on ads in the 2011–2012 election cycle.³ A 2013 report from three groups that advocate for fair courts noted, “In recent years, as the cost of judicial campaigns has soared, the boundaries that keep money and political pressure from interfering with the rule of law have become increasingly blurred.”⁴

Most of this campaign cash comes from lawyers and businesses with a financial interest in the rulings of the judges they help elect. This has led to glaring conflicts of interest, and the U.S. Supreme Court addressed these ethical dilemmas in *Caperton v. A.T. Massey Coal Co.* The Court ruled in 2009 that “extraordinary” campaign donations by a defendant corporation violated the plaintiff’s due process rights.⁵ Hugh Caperton was the owner of a mining company who sued a much larger corporation⁶ and was awarded \$50 million by a West Virginia jury. But while the case was pending before the West Virginia Supreme Court, Don Blankenship, then-CEO of Massey Coal, helped elect a Republican justice to that court with \$3 million in campaign cash—around three times the total amount that the justice’s campaign spent.⁷ The newly elected justice refused to recuse himself and cast the deciding vote to overturn the verdict against Massey Coal.⁸

The U.S. Supreme Court ruled that the plaintiff’s right to due process was violated when the justice declined to recuse himself. Justice Anthony Kennedy’s opinion said that Blankenship’s “extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when ... a man chooses the judge in his own cause.”⁹ The

court noted that most states had adopted recusal rules which require judges to recuse themselves in cases in which their “impartiality might reasonably be questioned”—circumstances that go beyond actual bias to include cases that could lead to perception of bias.¹⁰ Justice Kennedy said the Constitution “demarcates only the outer boundaries of judicial disqualifications” and that states could implement stronger recusal rules.¹¹

Some states took the Supreme Court’s advice. The Brennan Center for Justice surveyed state recusal rules in 2011 and concluded, “Although a handful of states have adopted promising new rules, the majority of state courts have failed to adopt any reforms that respond to the threats identified by the U.S. Supreme Court.”¹² A few states actually weakened their recusal rules. The Wisconsin Supreme Court, for example, approved a recusal rule in 2010 that says that campaign cash can never be the sole basis for a judge’s recusal.¹³

Opponents of mandatory recusal often cite a judge’s “duty to sit,” a legal doctrine with roots in English common law that emphasizes a judge’s obligation to hear cases.¹⁴ As one federal court put it, “The right to an impartial judge cannot be advanced so broadly as to permit the parties to engage in ‘judge-shopping’ under the guise of a motion to recuse ... or to permit a litigant to disqualify without reasonable grounds.”¹⁵ State supreme court justices—members of their states’ highest tribunals—have often cited this notion in declining to recuse themselves.¹⁶ But the idea of a duty to sit predates the multimillion-dollar campaigns that are now the norm in many states, and the American Bar Association eliminated this notion from its model rules in 1973.¹⁷ This outdated axiom ignores the damage that campaign cash inflicts on the public’s perception of the judiciary.

The test

The Center for American Progress created a grading scale to assess whether the states that elect judges have addressed the conflicts of interest that come with multimillion-dollar judicial elections. See Appendix A for additional details on the grading criteria summarized here.

Each state was graded on a 100-point scale and awarded a letter grade commensurate to that score: 90 to 100 points earned an A, 80 to 89 points earned a B, 70 to 79 points earned a C, 60 to 69 points earned a D, and 59 points or lower earned an F. The grading criteria were partially based on the American Bar Association, or ABA, Model Code of Judicial Conduct, and they were informed by reform proposals from the Brennan Center for Justice and other fair-courts advocates, as well as the U.S. Supreme Court’s opinion in *Caperton v. A.T. Massey Coal Co.*

The eight categories include:

1. Whether campaign cash is listed as a basis for recusal
2. Whether independent spending is listed as a basis for recusal
3. Whether the judge alone makes the initial decision to recuse
4. Whether the judge is required to respond on the record
5. Whether the judge is required to disclose campaign contributions on the record
6. Whether the judge must recuse whenever his or her “impartiality might reasonably be questioned”
7. Whether parties may agree to waive recusal
8. Whether the state allows peremptory recusal

The first five criteria were each valued at a 15-point maximum. Ten points were awarded for having a disqualification rule that requires recusal whenever a judge’s “impartiality might reasonably be questioned.” Five points were awarded for allowing parties to waive recusal, and 10 points were awarded to states that allow peremptory disqualification, an automatic right to recusal that does not require the litigant to articulate any reason or justification.

CAP scored the 39 states that elect their judges, and the results were rather discouraging. Only eight states passed the test, and none scored higher than a C. California has long been a model for mandatory recusal, and it tied with Utah for the highest score of 75 points.* Georgia and Michigan earned scores of 70 for the reforms they implemented in the wake of the *Caperton* decision. Washington scored 65 points.* Alabama—a pioneer of big-money elections in the 1990s—could have earned a passing grade, but it failed because Gov. Robert Bentley (R) signed a repeal of the state’s mandatory recusal rule on April 10. This legislation repealed a rule that required high court justices to recuse themselves in cases involving campaign donors who gave more than \$4,000 and replaced it with a rule that will likely only apply to those who give tens of thousands of dollars to state supreme court justices’ campaigns.

The vast majority of states scored a D or an F. Most of these states have failed to update their ethics rules in the era of big-money judicial elections. Only a few states have ethics rules that require recusal for cases involving campaign donors, and most states leave recusal decisions in the hands of the judges with the alleged conflicts of interest.

This issue brief examines five failing states, followed by one state that has strengthened its rules. See Appendix B for a detailed scoring of each state. The grading system may have set a high bar, but in the era of exploding judicial campaign cash, strong ethics rules are crucial to maintaining the public’s faith in the impartiality of the judicial branch.

Wisconsin: F (35 points)

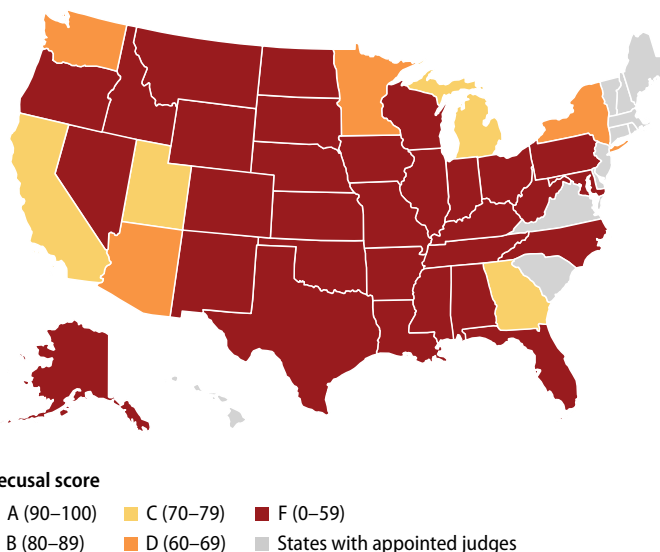
Wisconsin received a failing grade after its state supreme court adopted a recusal rule that literally instructs judges not to recuse themselves from cases involving campaign contributors. In 2010, the four-justice conservative majority on the Wisconsin Supreme Court voted to institute a recusal rule¹⁸ written by the Wisconsin Realtors Association and Wisconsin Manufacturers & Commerce, a group that subsequently donated nearly \$1 million to support conservative Justice David Prosser's re-election in 2011.¹⁹ The rule says that recusal is not required "based solely on ... a lawful campaign contribution."²⁰ The majority's comments that accompany the rule say that requiring recusal for campaign cash "would create the impression that receipt of a contribution automatically impairs the judge's integrity."²¹ In other words, the four justices in the conservative majority are worried that mandatory recusal would lead the public to think that judges are biased.

The majority rejected a proposal from the League of Women Voters to mandate recusal for campaign cash.²² Justice Ann Walsh Bradley dissented, arguing that "judges must be perceived as beyond price." She criticized the majority for adopting "word-for-word the script of special interests that may want to sway the results of future judicial campaigns."²³ Justice Michael Gableman was criticized for failing to recuse himself from cases involving a law firm that had represented him for free in an ethics investigation—and for failing to even disclose the gift from the firm.²⁴

Around the same time, Justices Gableman and Prosser did choose to recuse themselves from a case involving the prosecution of a billionaire heir for sexual assault. They did not appear at oral arguments or vote in the court's decisions.²⁵ The defendant—Curt Johnson, one of the heirs to the SC Johnson fortune—was accused of repeatedly raping his teenage stepdaughter, starting when she was 12 years old.²⁶ The court's recusal rules do not require the justices to articulate a reason for their recusal; these two justices are sitting out the prosecution of an accused child rapist without offering their constituents any justification.

FIGURE 1
Most States Flunk a Test of Their Recusal Rules

A CAP analysis finds that states have failed to strengthen their judicial ethics rules to address the growth in campaign cash



Source: See appendices.

Corrections: May 7, 2014: This map was updated to correctly reflect Appendix B and to show that Arizona and California passed and Alaska and Arkansas failed. **June 6, 2014:** This map was updated to reflect a correction to Utah's score.

The conservative justices will soon face another ethical dilemma if the court intervenes in a criminal investigation of several groups that have spent big money in Wisconsin state elections. The groups are reportedly under investigation for violating a Wisconsin law that prohibits independent groups from “coordinating” with the campaigns of candidates whom they support.²⁷ After an appeals court allowed the investigation to proceed, the groups under investigation appealed to the state supreme court.²⁸ The Wisconsin Club for Growth and Citizens for a Strong America—two of the investigation’s targets—also spend enormous sums of money on judicial races. According to an analysis from the Brennan Center for Justice, they spent \$1.8 million in 2011 on a single candidate—Justice Prosser.²⁹ Wisconsin Manufacturers & Commerce, the state’s chamber of commerce and one of the groups that wrote the court’s recusal rule, spent more than \$900,000 to help Justice Prosser’s 2011 campaign³⁰ and donated nearly the same amount to the Wisconsin Club for Growth.³¹ Even though these groups spent millions of dollars to get some of the justices on the bench, the justices are under no obligation to recuse themselves in a criminal investigation that targets the same groups.

North Carolina: F (35 points)

A stormwater pipe at one of Duke Energy’s coal-fired power plants ruptured in February and released an estimated 82,000 tons of coal ash and 27 million gallons of contaminated water into the Dan River,³² a source of drinking water for more than 42,000 people.³³ At the time of the spill, there were two lawsuits in North Carolina state courts aimed at requiring Duke Energy to clean up its coal ash ponds. The first, filed in 2012 by environmental groups, resulted in a court order requiring Duke Energy to clean up groundwater pollution.³⁴ The company recently appealed this decision to the North Carolina Court of Appeals.³⁵ The second lawsuit was an enforcement action brought by the N.C. Department of Environment and Natural Resources, or DENR, as a result of pressure from environmental groups.³⁶ DENR circulated a draft settlement in July 2013 that required Duke Energy to pay a mere \$99,111 in fines.³⁷ Before the court agreed to the settlement, coal ash began to pour into the Dan River, and DENR subsequently withdrew its settlement offer in the face of criticism.³⁸ If either of these cases reaches the North Carolina Supreme Court, Duke Energy will face a bench with a four-justice conservative majority, thanks in part to the company’s spending in the 2012 election.

The Institute for Southern Studies recently reported that Duke Energy contributed \$175,000 to a super Political Action Committee, or super PAC, that played a key role in the 2012 North Carolina Supreme Court race between incumbent Justice Paul M. Newby and challenger Samuel J. Ervin Jr.³⁹ Justice Newby’s campaign benefited from more than \$2.5 million in independent spending,⁴⁰ and he has refused to recuse himself from cases involving one group that made a large donation to keep him on the bench. Justice Newby has not recused himself in a redistricting lawsuit filed by civil rights advocates, even though the Republican State Leadership Committee—

the group that drew the redistricting map at issue—contributed nearly half of the \$2.5 million in independent expenditures that supported his campaign.⁴¹ The same Republican group recently announced plans to spend big on judicial races in North Carolina and other states in 2014.⁴²

Justice Newby could soon preside over a case involving Duke Energy’s 2012 merger with Progress Energy. The two companies completed a \$32 billion merger on July 2, 2012, becoming the largest electric utility in the United States.⁴³ The North Carolina Waste Awareness and Reduction Network, or NC WARN, was skeptical of Duke Energy’s claims that the merger would lead to \$650 million in savings for its customers⁴⁴ and challenged the North Carolina Utilities Commission’s approval of the merger. NC WARN argued that the commission did not require the two companies to disclose information about whether the merger was in the best interest of customers, including information on billions of dollars in planned repairs to nuclear power plants. According to NC WARN, these costs would be passed on to the merged company’s customers.⁴⁵ The court of appeals upheld the commission’s approval in a unanimous opinion,⁴⁶ but NC WARN plans to take the case to the North Carolina Supreme Court.⁴⁷

Although the North Carolina Code of Judicial Conduct suggests that “a judge should disqualify himself/herself in a proceeding in which the judge’s impartiality may reasonably be questioned,” the code was amended in 2003 to remove the instruction to “avoid ... the appearance of impropriety” from Canon 2.⁴⁸ Justice Newby alone decides whether to recuse himself in cases involving those who gave hundreds of thousands of dollars to help keep him on the bench.⁴⁹ Duke Energy could soon find itself before Justice Newby for the merger or the coal ash spills, and until the North Carolina legislature or the state supreme court strengthens the state’s judicial ethics rules to address campaign cash, major campaign donors will continue to face judges whom they helped elect.

Alabama: F (50 points)

Alabama received a failing grade but would have passed, if not for a recent change to its ethics laws. The Alabama state legislature recently repealed a law that required judges to recuse themselves in any cases involving litigants or attorneys who donated more than \$4,000 to their campaigns and replaced this rule with a much lower standard. The now-repealed mandatory recusal law was passed in the wake of the 1994 election, in which one law firm contributed more than \$60,000 to five state supreme court candidates, including a \$25,500 donation to one candidate.⁵⁰ The legislature’s 1995 mandatory recusal law, however, was never actually enforced.⁵¹ The campaign cash continued to flow from litigants and attorneys. Lawyers and litigants gave tens of thousands of dollars

to the campaigns of judges hearing their cases, and the justices could ignore the mandatory recusal rule with impunity.⁵² One Alabama law firm, Cunningham Bounds, contributed \$27,000 to the 2012 campaign of Chief Justice Roy Moore, according to *The Birmingham News*.⁵³ Chief Justice Moore, who was re-elected to a position from which he was ousted a decade earlier for defying a federal court order, then voted in favor of a Cunningham Bounds client in a 2013 case.⁵⁴

Rather than requiring recusal for campaign cash, the new Alabama law creates a “rebuttable presumption” that recusal is required for cases involving donors who contributed more than a certain percentage of a judge’s campaign contributions—10 percent for appellate court judges and justices and a higher threshold for lower court judges.⁵⁵ Based on the average contributions for the eight victorious candidates in the past two supreme court elections, this would mean recusal is only required when litigants or attorneys contribute more than \$50,000.⁵⁶ For the four high court candidates who defeated an opponent in the past two general elections, 10 percent of their campaign contributions equal around \$85,000.⁵⁷ The new rule will only require recusal for cases involving a few donors who give enormous amounts of money. Instead of demanding implementation of a rule that could ensure judicial integrity, the legislature decided to allow judges to decide cases involving those who give tens of thousands of dollars to their campaigns.

Ohio: F (35 points)

Lisa Huff was severely injured by a falling tree limb during a heavy thunderstorm in 2004.⁵⁸ The tree that struck Huff stood about 20 feet from utility lines maintained by an electrical utility company.⁵⁹ It had been three years since the tree had been inspected.⁶⁰ Huff and her husband brought suit against the utility company and FirstEnergy, its parent company and primary shareholder, for negligence in failing to inspect or maintain the tree.⁶¹ The trial court threw out the suit,⁶² but the state court of appeals reversed this decision.⁶³ The Ohio Supreme Court denied the company’s appeal on August 25, 2010, citing a lack of jurisdiction.⁶⁴

In the next two months, FirstEnergy, its affiliates, and their employees contributed \$12,100 to Chief Justice Maureen O’Connor⁶⁵ and \$6,675 to Justice Judith Ann Lanzinger, according to the National Institute on Money in State Politics.⁶⁶ On October 27, 2010, the state supreme court agreed to reconsider the power company’s appeal.⁶⁷ The court then issued a 7-0 opinion, ruling in favor of FirstEnergy and the other defendants.⁶⁸ Huff later filed a federal lawsuit alleging that FirstEnergy circumvented judicial campaign contribution limits through the use of a “straw donor scheme” to contribute more than the maximum amount allowed to five members of the court.⁶⁹ A federal judge dismissed the lawsuit in September 2013, citing recent U.S. Supreme Court cases that heightened the requirements for plaintiffs filing lawsuits, even pro se plaintiffs similar to

the Huffs.⁷⁰ Justice Bill O’Neill, who won a seat on the court in 2012 after railing against the influence of campaign cash, said during the campaign that FirstEnergy’s donations were “an attempt to buy the court.”⁷¹

A few years before Huff’s appeal, a 2006 *New York Times* article discussed campaign contributions from three companies that were before the Ohio Supreme Court as defendants in two class action lawsuits involving defective cars and toxic substances.⁷²

*Justice [Terrence] O’Donnell accepted thousands of dollars from the political action committees of three companies that were defendants in the suits. ... Weeks after winning his race, Justice O’Donnell joined majorities that handed the three companies significant victories.*⁷³

In one of these cases, Justice O’Donnell provided the deciding vote.⁷⁴ The *Times* examined 1,500 cases involving campaign contributors and found that O’Donnell “voted for his contributors 91 percent of the time,” far higher than the court’s average of 70 percent.⁷⁵ The *Times* also found that, “In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just nine times.”⁷⁶

The *Times* article quotes then-Chief Justice Thomas Moyer describing the court’s standard as requiring recusal only when “sitting on the case is going to be perceived as just totally unfair.” The Ohio Code of Judicial Conduct actually says, “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality *might reasonably be questioned*” (emphasis added)⁷⁷—a much broader standard than “perceived as just totally unfair.” The rules state, however, that a judge’s knowledge of campaign contributions or public support from a lawyer or litigant “does not, in and of itself, disqualify the judge.”⁷⁸ Ohio is failing to address the influence of campaign cash in courtrooms.

Nevada: F (45 points)

The Nevada Supreme Court established a commission in 2008 to examine the ABA model rules, which include a specific recusal threshold for campaign cash.⁷⁹ The state of Nevada could have earned a passing grade, but the commission voted not to adopt the ABA’s threshold, recommending that the court await the U.S. Supreme Court’s ruling in *Caperton v. A.T. Massey Coal*.⁸⁰ Six months after the *Caperton* ruling, the court adopted new judicial ethics rules that did not mention *Caperton* or specify when campaign contributions require recusal.⁸¹ A 2006 *Los Angeles Times* article described the Nevada judicial system as “a good-old-boy culture of cronyism and chumminess that accepted conflicts of interest as ‘business as usual.’”⁸² A judicial candidate recently said in a sworn affidavit that a political consultant offered him “a bribe to withdraw from challenging” a certain judge in 2014, in the words of the *Las Vegas Review-Journal*.⁸³ A Las

Vegas attorney also claimed that a representative of casino billionaire Sheldon Adelson “offered substantial financial support” if he would run against a judge who recently fined Adelson’s Sands Macao casino \$25,000 for an “intention to deceive the court.”⁸⁴

The state’s casinos are among the biggest contributors to the campaigns of Nevada Supreme Court justices. Billionaire casino mogul Steve Wynn, whose name adorns buildings on the Las Vegas skyline, found his company before the state supreme court in 2013 to resolve a labor dispute. Wynn’s casinos had instituted a policy requiring card dealers to share tips with their managers, prompting the dealers to organize a union.⁸⁵ A lower court ruled that the policy violated a state labor law, but the Nevada Supreme Court disagreed.⁸⁶

The casino and tourism industries have also supported lawsuits seeking to strike down efforts to tax big businesses in order to finance the state’s underfunded education system.⁸⁷ Wynn donated thousands of dollars to two state supreme court justices in 2008,⁸⁸ around the time that the court struck down two ballot initiatives to transfer public money from promoting tourism to education.⁸⁹ Casinos began spending more money in Nevada Supreme Court elections after a 2003 court ruling allowed the state legislature to raise taxes on casinos and other big businesses,⁹⁰ but these conflicts of interest are nothing new to lower courts.

A trial court judge recused himself in 1999 from hearing a lawsuit filed by homeowners whose land was seized through eminent domain for a private redevelopment project.⁹¹ The plaintiffs asked the judge to recuse himself because several casinos that would benefit from the redevelopment project had donated to his campaign after the case was assigned to him.⁹² But after three other judges recused themselves for similar reasons, the state supreme court ordered the original judge to hear the case. The high court noted “this recurring problem of campaign contributions” but said a rule requiring recusal due to campaign contributions would “severely and intolerably obstruct the conduct of judicial business.”⁹³ A 2012 CAP report described the ruling as an admission that “campaign cash from litigants and attorneys is so pervasive that requiring recusal would make it impossible for judges to do their jobs.”⁹⁴ This dilemma, however, likely did not comfort the landowners who sought a judge whose impartiality could not be questioned because of campaign cash from casinos.

Michigan: D (75 points)

Before 2009, the Michigan Supreme Court was governed by an amorphous recusal standard implemented amid “a tradition of secrecy and inadequacy,”⁹⁵ in the words of one justice. The court was experiencing a turbulent time in which campaign cash poured in and majority control shifted from the liberal faction to the conservative faction and back again. The justices were sharply and bitterly divided over the question of when they should recuse themselves.⁹⁶ In 2006, a conservative justice described a colleague’s call for stronger recusal rules as “an unwarranted and intentionally personal diatribe” that was intended “to denounce and injure” the conservative justices.⁹⁷

The court implemented new rules in 2009 that require recusal for “the appearance of impropriety.” The justices must also respond in writing to requests for their recusal, and the party requesting recusal can ask the entire court to review an individual justice’s decision not to recuse.⁹⁸ Two of the court’s seven justices, however, have refused to rule on motions to recuse their colleagues. Former Justice Maura Corrigan argued that the new standard “effectively gives a majority of justices carte blanche to disqualify their colleagues simply by articulating its impressions of why a challenged justice’s participation appeared improper, without regard to the existence of the traditional, more objective grounds for recusal such as personal bias, involvement in the case, or economic interest in the case.”⁹⁹ Justice Corrigan said the rule “nullifies the electoral choice of the people of Michigan by permitting the Court to decide which justices may participate in a given case.”¹⁰⁰

A 2012 CAP report stated:

*Justice Corrigan’s objections are based on outdated notions of judicial impartiality ... A personal financial stake in a case is no longer the only basis for demanding recusal. In Caperton, the U.S. Supreme Court quoted the then-existing version of the American Bar Association Model Code of Judicial Conduct, which instructed judges to avoid “the appearance of impropriety,” and the Court noted that this rule has been adopted by “almost every state.” The Court explicitly did not find any actual bias or impartiality on the part of the judge in Caperton, but recusal was still required because of the risk of bias.*¹⁰¹

Despite Justice Corrigan’s fears that one faction of the court could use the recusal process to disqualify justices in the other faction, the court’s recent recusal decisions—unlike other decisions¹⁰²—have not broken down along ideological or partisan lines.¹⁰³ Her position does illustrate, however, why judges should not be left to police themselves when it comes to recusal. A majority on the court could revoke the rule at any time. A 2012 task force co-chaired by Justice Marilyn Kelly warned, “Michigan voters already believe that campaign spending has infected the decision-making of their judiciary.”¹⁰⁴

Conclusion

The results of this study should alarm anyone who cares about impartial justice. Given the exponential increase in campaign cash in recent decades, justices in state supreme courts across America are hearing more and more cases that involve their campaign contributors. Polls show that this is causing the public to doubt judicial impartiality.¹⁰⁵

States have failed to heed the American Bar Association’s call for mandatory recusal. If Americans insist on electing their judges, they must also pressure elected judges and legislators to ensure that campaign cash does not sway judges or cause the public to think that it does. Voters must demand that their representatives ensure that litigants who

have contributed money to judges cannot buy favorable treatment. Litigants who sue large corporations—such as Lisa Huff in Ohio and Hugh Caperton in West Virginia—could face judges who rely on the defendants’ campaign cash for their political futures. If judges favor their campaign donors, then those litigants who do not have the money to contribute cannot expect equal treatment.

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Brent de Beaumont, a former intern with Legal Progress, contributed to the Ohio section of this brief.

***Correction: June 6, 2014:** *Corrections and updates have been made to reflect that Utah received 15 points in the “campaign cash as a basis for recusal” category and therefore tied with California for the highest grade.*

Appendix A: Grading criteria

I. Is campaign cash listed as a basis for recusal? (15 points possible)

- If recusal is required for a specific dollar amount in contributions to the judge’s campaign, the state receives full credit. (15 points)
- If recusal is required for contributions in excess of a reasonable contribution limit, the state receives partial credit. (10 points)
- If the recusal rules, commentary, ethics agency rulings, or case law mention contributions to the judge’s campaign as a potential basis for recusal, the state receives partial credit. (5 points)
- If there is no mention of campaign contributions as a basis for recusal in the recusal rules, commentary, ethics agency rulings, or case law, the state receives no credit. (0 points)
- If the recusal rules explicitly state that campaign cash may never be the basis for recusal, points are deducted from the state’s score. (-5 points)

II. Is independent spending listed as a basis for recusal? (15 points possible)

- If recusal is required for a specific dollar amount in independent expenditures, the state receives full credit. (15 points)
- If the recusal rules, commentary, ethics agency rulings, or case law mention independent expenditures as a potential basis for recusal, the state receives partial credit. (5 points)
- If there is no mention of independent expenditures as a basis for recusal in the recusal rules, commentary, ethics agency rulings, or case law, the state receives no credit. (0 points)

III. How does the decision-making process for recusal work? (15 points possible)

- If any entity besides the judges at issue—such as an entire court, a lower court, or an independent entity—makes the initial decision, the state receives full credit. (15 points)
- If the entire court or an independent entity can review a decision not to recuse, the state receives partial credit. (10 points)
- If the judge in question alone makes the decision, the state receives no credit. (0 points)

IV. Is the judge required to respond to motions for disqualification on the record? (15 points possible)

- If the judge is required to disclose on the record the basis of his or her disqualification, the state receives full credit. (15 points)

- If the judge is required to respond on the record the basis of his or her disqualification in order to waive disqualification, the state receives partial credit. (10 points)
- If the judge is only required to respond in writing and is not required to provide a reason, the state receives partial credit. (5 points)
- If the judge is not required to respond in writing, the state receives no credit. (0 points)

V. Is the judge required to disclose campaign contributions on the record?
(15 points possible)

- If the judge is required to disclose campaign contributions on the record, the state receives full credit. (15 points)
- If the judge is required to disclose campaign contributions on the record in order to waive disqualification, the state receives partial credit. (10 points)
- If the judge is required to disclose any information that could be relevant to disqualification, the state receives partial credit. (5 points)
- If the court rules, commentary, and case law do not require the judge to disclose campaign contributions on the record, the state receives no credit. (0 points)

VI. Does the state require judges to recuse themselves from cases that raise “the appearance of bias?” (10 points possible)

- If the state requires recusal for the appearance of bias, the state receives full credit. (10 points)
- If the state requires recusal only for actual bias, the state receives no credit. (0 points)

VII. Does the state allow peremptory disqualification? (10 points possible)

- If the state allows peremptory disqualification without a showing of prejudice or another cause, the state receives full credit. (10 points)
- If the state allows peremptory disqualification only upon a showing of prejudice or another cause, the state receives partial credit. (5 points)
- If the state does not allow peremptory disqualification, the state receives no credit. (0 points)

VIII. Are parties able to waive recusal? (5 points possible)

- If recusal may be waived if all parties and lawyers agree, independently of judges’ participation, the state receives partial credit. (5 points)
- If the ability to waive is not mentioned in court rules, commentary, or case law, the state receives no credit. (0 points)

Appendix B: Detailed scoring

TABLE 1
Most States Flunk a Test of Their Recusal Rules

States have failed to strengthen their judicial ethics rules to address the growth in campaign cash

	Campaign cash as a basis for recusal (15 points)	Independent spending as a basis for recusal (15 points)	Judge's decision or others' decision (15 points)	Require judges to respond in writing or on the record (15 points)	Require judges to disclose contributions on the record (15 points)	Impartiality "might reasonably be questioned" (10 points)	Right to peremptory recusal (10 points)	Allow the parties to waive recusal (5 points)	Total
Alabama	5	5	10	10	5	10	0	5	50
Alaska	5	0	10	15	5	10	5	5	55
Arizona	10	0	15	10	5	10	5	5	60
Arkansas	-5	0	10	15	5	10	0	5	40
California	15	0	15	10	15	10	5	5	75
Colorado	5	0	10	10	5	10	0	5	45
Florida	0	0	15	15	5	10	0	5	50
Georgia	10	5	15	10	15	10	0	5	70
Idaho	0	0	0	0	5	0	10	0	15
Illinois	0	0	15	10	0	10	0	5	40
Indiana	5	0	0	0	5	10	10	0	30
Iowa	5	5	0	10	5	10	0	5	40
Kansas	5	0	10	10	5	10	5	5	50
Kentucky	0	0	15	15	5	10	0	0	45
Louisiana	0	0	15	15	0	10	0	0	40
Maryland	0	0	0	10	5	10	0	5	30
Michigan	5	5	10	15	15	10	5	5	70
Minnesota	5	0	15	10	5	10	10	5	60
Mississippi	5	5	10	10	5	10	0	5	50
Missouri	5	5	0	10	0	10	10	5	45
Montana	0	0	15	0	10	10	10	5	50
Nebraska	5	0	0	10	5	10	0	5	35
Nevada	-5	0	15	10	0	10	10	5	45
New Mexico	5	5	0	10	5	10	10	5	50
New York	15	0	15	10	5	10	0	5	60
North Carolina	0	0	0	10	10	10	0	5	35
North Dakota	5	0	0	10	5	10	10	5	45
Ohio	-5	0	10	10	5	10	0	5	35
Oklahoma	5	5	10	10	0	10	0	5	45
Oregon	0	0	10	10	0	10	10	5	45
Pennsylvania	5	5	0	10	5	10	0	5	40

	Campaign cash as a basis for recusal (15 points)	Independent spending as a basis for recusal (15 points)	Judge's decision or others' decision (15 points)	Require judges to respond in writing or on the record (15 points)	Require judges to disclose contributions on the record (15 points)	Impartiality "might reasonably be questioned" (10 points)	Right to peremptory recusal (10 points)	Allow the parties to waive recusal (5 points)	Total
South Dakota	0	0	0	10	5	10	10	5	40
Tennessee	10	5	0	15	5	10	0	5	50
Texas	0	0	10	10	0	10	0	5	35
Utah*	15	5	10	15	15	10	0	5	75
Washington	5	5	10	15	5	10	10	5	65
West Virginia	5	0	15	15	5	10	0	0	50
Wisconsin	-5	0	0	10	5	10	10	5	35
Wyoming	0	0	0	10	5	10	10	5	40

*Correction: June 6, 2014: Corrections and updates have been made to reflect that Utah received 15 points in the "campaign cash as a basis for recusal" category and therefore tied with California for the highest grade.

Appendix C: Citations for scoring

Alabama

Alabama H.B. 543 (2014); Alabama Rules of Judicial Administration Rule 13; Alabama Canons of Judicial Ethics Canon 3.

Alaska

Alaska Code of Judicial Conduct Canon 3; Alaska Code of Judicial Conduct Canon 5; Alaska Stat. § 22.20.020; Alaska Stat. § 22.20.022.

Arizona

Arizona Code of Judicial Conduct Rule 2.11; Arizona Code of Judicial Conduct Rule 4.4; Arizona Rev. Statutes § 12-409; Arizona Rules of Civil Procedure 42(f)(5).

Arkansas

Arkansas Code of Judicial Conduct 2.11; Arkansas Supreme Court & Court of Appeals Rule 6-4.

California

California Code of Civil Procedure § 170.1; California Code of Civil Procedure § 170.3; California Code of Civil Procedure § 170.4; California Code of Civil Procedure § 170.6.

Colorado

Colorado Code of Judicial Conduct Canon 2; Colorado Code of Judicial Conduct Canon 4; C.R.C.P. 97.

Florida

Florida Statutes § 38.02; Florida Code of Judicial Conduct Canon 3.

Georgia

Georgia Code of Judicial Conduct Rule 3; Supreme Court of Georgia Rule 26.

Idaho

Idaho Rules of Civil Procedure Rule 40(d)(2).

Illinois

Illinois Supreme Court Rule 63; Illinois Supreme Court Rule 67; 735 Illinois Compiled Statutes § 5/2-1001; 725 Illinois Compiled Statutes § 5/114-5.

Indiana

Indiana Code of Judicial Conduct 1.3; Indiana Code of Judicial Conduct 2.11; Indiana Code of Judicial Conduct 4.4; Indiana Trial Rule 79 (C); Indiana Trial Rule 76.

Iowa

Iowa Code of Judicial Conduct Rule 51:2.11.

Kansas

Kansas Supreme Court Rules, Canon 2; Kansas Statutes Ann. § 20-311d.

Kentucky

Kentucky Supreme Court Rule 4.300; Kentucky Supreme Court Rule 4.090.

Louisiana

Louisiana Supreme Court Rule XXXVI; Louisiana Gen. Admin. Regulations § 5.

Maryland

Maryland Code of Judicial Conduct Rule 16-813.

Michigan

Michigan Court Rule 2.003; Michigan Judicial Ethics Opinions, JI-2, January 28, 1989.

Minnesota

Minnesota Code of Judicial Conduct Rule 4.4, Comments; Minnesota Code of Judicial Conduct Rule 2.11; Minnesota Rules of Civil Procedure 63.03; Minnesota Statutes § 542.16; Minnesota Rules of Civil Procedure 63.03.

Mississippi

Mississippi Code of Judicial Conduct Canon 3; Mississippi Code of Judicial Conduct Canon 5.

Missouri

Missouri Supreme Court Rule 2-4.2, Comment 1; Missouri Supreme Court Rule 2-2.11; Missouri Supreme Court Rule 51.05.

Montana

Montana Code § 3-1-804.

Nebraska

Nebraska Code of Judicial Conduct § 5-304.4; Nebraska Code of Judicial Conduct § 5-302.11.

Nevada

City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court, 5 P.3d 1059 (Nev. 2000); Nevada Commission on Judicial Discipline, Standing Committee on Judicial Ethics and Election Practices, Opinion JE02-001, March 14, 2002; Nevada Stat. Ann. § 1.225; Nevada Code of Judicial Conduct Rule 2.11; Nevada Supreme Court Rule 48.1.

New Mexico

New Mexico Code of Judicial Conduct Rule 21-211; New Mexico Code of Judicial Conduct, Comments and Terminology; New Mexico Stat. Ann. § 38-3-10.

New York

New York CLS Standards & Admin Pol § 151.1; New York Code of Judicial Conduct Canon 100.3.

North Carolina

North Carolina Code of Judicial Conduct Canon 3.

North Dakota

North Dakota Code of Judicial Conduct Rule 2.11.

Ohio

Ohio Judicial Rule 2.11; Ohio Judicial Rule 4.6.

Oklahoma

20 Oklahoma Statute § 1403; Oklahoma Code of Judicial Conduct Canon 2; *Ward v. Ward*, 895 P.2d 749, 751 (Okla. Civ. App. 1995).

Oregon

Oregon Code of Judicial Conduct Rule 2.11; Oregon Rev. Statutes § 14.260.

Pennsylvania

Pennsylvania Code of Judicial Conduct Rule 2.11.

Tennessee

Tennessee Code of Judicial Conduct Rule 2.11; Tennessee Code of Judicial Conduct Rule 2, Comments; Tennessee Supreme Court Rule 10.

South Dakota

South Dakota Codified Laws § 15-12-21; South Dakota Codified Laws § 15-12-22; *State v. Hoadley*, 651 N.W.2d 249, 257 (S.D. 2002); South Dakota Code of Judicial Conduct Canon 3.

Texas

Texas Code of Judicial Conduct Canon 2; Texas Code of Judicial Conduct Canon 3.

Utah

Utah Code of Judicial Conduct Rule 2.11; Utah Code of Judicial Conduct Rule 4.2.

Washington

Washington Code of Judicial Conduct Rule 2.11.

West Virginia

West Virginia Code of Judicial Conduct Canon 3; West Virginia Trial Court Rules 17.01.

Wisconsin

Wisconsin Supreme Court Rules 60.06; Wisconsin Supreme Court Rules 60.04; Wisconsin Statutes Ann. § 757.19; *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*, Nos. 08-16, 08-25, 09-10, and 09-11 (Wis. July 7, 2010).

Wyoming

Wyoming Rules of Civil Procedure Rule 21.1; Wyoming Rules of Civil Procedure Rule 40.1; Wyoming Code of Judicial Conduct Rule 2.11.

Endnotes

- 1 A recent report from fair-courts advocates surveyed the rise in judicial campaign cash from 2000 to 2009 and found that, “Campaign fundraising more than doubled, from \$83.3 million in 1990–1999 to \$206.9 million in 2000–2009. Three of the last five Supreme Court election cycles topped \$45 million. All but two of the 22 states with contestable Supreme Court elections had their costliest-ever contests in the 2000–2009 decade.” See James Sample and others, “The New Politics of Judicial Elections, 2000–2009: Decade of Change” (New York; Helena, MT; and Washington: Brennan Center for Justice, National Institute on Money in State Politics, and Justice at Stake, 2010), available at <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.
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