REPORT OF THE TEXAS JUDICIAL COUNCIL
COMMITTEE ON JUDICIAL SELECTION
August 2010

Executive Summary

At the March 19, 2010 Texas Judicial Council meeting, Chief Justice Jefferson announced the creation of a committee to examine judicial selection in Texas. The committee has examined potential changes related to the judicial selection process in light of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), and *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

This committee report addresses several topics:

- the Judicial Campaign Fairness Act;
- recusal standards;
- frequency of campaigns;
- straight-ticket voting; and
- criteria for judicial qualifications.

This report will provide a starting point for the Texas Judicial Council to evaluate particular proposals in anticipation of the Texas Legislature's 82nd Legislative Session, which begins on January 11, 2011.

In preparing this report, the committee has communicated with Texas Judicial Council member Senator Duncan and with Representative Lewis. Since the 1990s, Senator Duncan has worked on various reforms to the judiciary and has advocated for proposed changes to judicial selection in Texas. During the last legislative session,

Senator Duncan filed a bill that would have created a merit selection system for the appellate courts. Senator Duncan's institutional knowledge on this issue is invaluable and the committee hopes to continue working with him through this process. As a member of the House Judiciary & Civil Jurisprudence Committee, Representative Lewis is examining potential legislative changes to aspects of judicial selection in Texas pursuant to the committee's interim charge number 6.

While the committee invites continued dialogue on proposals to replace partisan judicial elections with alternatives such as appointment followed by retention elections, this report explores changes that are less sweeping and, perhaps, more attainable in the short term. *See, e.g.*, James Sample, *Caperton: Correct Today, Compelling Tomorrow,* 60 SYRACUSE L. REV. 293, 303 (2010) ("[W]hile opinions differ as to optimal selection methods, the judiciary, regardless of how selected, must respect — and protect — core minimum fairness values."). The proposals discussed below address potential modifications related to the Texas selection process that could be implemented within a framework of continuing partisan judicial elections.

This report draws on commentary regarding judicial selection and statistical information from sources including the Office of Court Administration and the National Center for State Courts. Analysis of potential changes includes discussion of practical ramifications; comparisons to practices in other states; and consideration of whether such changes would require amendments to the Texas Constitution in addition to legislation.

Analysis

I. The Impact of *Citizens United* and *Caperton* on Judicial Selection in Texas

The council's consideration of potential changes related to judicial selection in Texas is prompted in significant part by the decisions in *Citizens United*, 130 S. Ct. at 886, and *Caperton*, 129 S. Ct. at 2257. These decisions also have prompted renewed attention to the subject of judicial elections nationwide. *See generally* JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER, LINDA CASEY, AND CHARLES HALL, THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE 1, 55-64 (2010), http://brennan.3cdn.net/c223cc1310d3b42314_g1m623rkz.pdf.

A. *Citizens United*

Citizens United addresses a First Amendment challenge to a federal statute that was amended by the Bipartisan Campaign Reform Act of 2002 to prohibit "corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." *See Citizens United*, 130 S. Ct. at 886 (citing 2 U.S.C. § 441b).

"An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Id.* at 887 (citing 2 U.S.C. § 434(f)(3)(A)). "Section 441b makes it a felony for all corporations — including nonprofit advocacy corporations — either to expressly advocate the election or defeat of

candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." *Id*. at 897.

The Court invalidated this restriction and reasoned that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id*. at 886.

The Texas Ethics Commission applied *Citizens United* to the Texas campaign finance statute in Ethics Advisory Opinion No. 489 issued on April 21, 2010. An overview of some key statutory terms will put the commission's conclusions in context.

The Texas statute does not use the phrase "independent expenditure" that was discussed in *Citizens United*. With certain exceptions, the Texas Election Code prohibits corporations and labor organizations from making a "political contribution" or a "political expenditure." *See* Tex. Elec. Code Ann. § 253.094 (Vernon 2010).[1] The term "political expenditure" encompasses a "campaign expenditure." *Id*. § 251.001(10) (Vernon 2010). The term "campaign expenditure" encompasses a "direct campaign expenditure." *Id*. § 251.001(8). The term "direct campaign expenditure" describes a campaign expenditure that is not a "campaign contribution." *Id*. § 251.001(8).[2] The

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[1] A "political contribution" is defined as a "campaign contribution" or an "officeholder contribution." *Id*. § 251.001(5) (Vernon 2010). A "political expenditure" is defined as an "officeholder expenditure" or a "campaign expenditure." *Id*. § 251.001(10). A "campaign expenditure" is defined as "an expenditure made by any person in connection with a campaign for an elective office or on a measure." *Id*. § 251.001(7).

[2] "For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent

Texas Election Code also prohibits any person from knowingly making or authorizing a "direct campaign expenditure," again with certain exceptions. *Id.* § 253.002.

The Texas Ethics Commission concluded that the terms "independent expenditure" discussed in *Citizens United* and "direct campaign expenditure" used in the Texas Election Code are "interchangeable for the limited purpose of determining the effects of *Citizens United* upon title 15 of the Election Code." Op. Tex. Ethics Comm'n No. 489 at 2 (2010).

After equating the terms "independent expenditure" and "direct campaign expenditure," the commission analyzed *Citizens United*'s application to Texas election law. "Although a federal statute was at issue in *Citizens United*, its holding raises the question of whether it renders unconstitutional the state prohibition on corporations making direct campaign expenditures to support or oppose a candidate for elective office." *Id.* "[W]e believe the Texas Legislature intended the laws under our jurisdiction to prohibit political expenditures made by corporations to the full extent allowed by the United States Constitution as interpreted by the United States Supreme Court." *Id.* "It is clear that under *Citizens United*, sections 253.094 and 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by corporations or labor organizations." *Id.* "Furthermore, based on *Citizens United*, section 253.002 of the

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or approval from the candidate, would make a direct campaign expenditure." Op. Tex. Ethics Comm'n No. 489 at 2 (2010). "If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *Id.* (citing Op. Tex. Ethics Comm'n No. 331 (1996)).

Elections Code cannot be enforced to prohibit direct campaign expenditures by any other person." *Id.*

The Texas Ethics Commission concluded that *Citizens United*'s reach is limited to prohibitions on ***direct campaign expenditures***. "The decision of *Citizens United* does not impact the restrictions under our jurisdiction that prohibit a corporation or labor organization from making a ***political contribution*** to a candidate or officeholder." *Id.* (emphasis added). "Thus, we will continue enforcing the restrictions that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder." *Id.*

The commission also concluded that *Citizens United* "does not impede us from continuing to enforce the political advertising disclosure requirements under chapter 255 of the Election Code." *Id.* at 5. "In addition, title 15 requires a corporation, labor organization, or other person that makes one or more direct campaign expenditures from its own property in connection with an election of a candidate to comply with the reporting requirements that apply to an individual as set out in section 253.062 of the Election Code." *Id.*

B. *Caperton*

In contrast to *Citizens United*, which focuses on the permissibility of prohibiting certain types of political speech, *Caperton* focuses on the circumstances under which permissible political speech directed at a judicial election can require recusal of an elected judge under the Fourteenth Amendment's Due Process Clause. *See Citizens*

United, 130 S. Ct. at 910 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's speech could be banned.").

Caperton arose from a case in which the Supreme Court of Appeals of West Virginia reversed a trial court judgment in connection with a 2002 jury verdict awarding $50 million in favor of Caperton and against A.T. Massey Coal Co. *Caperton*, 129 S. Ct. at 2256. "The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion." *Id*. "The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages." *Id*. at 2256-57.

The Court held that "[u]nder our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id*. at 2257 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). "Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal." *Id*.[3]

The circumstances in *Caperton* included a series of donations by Don Blankenship, who serves as Massey's chairman, chief executive officer, and president:

[3] Pre-*Caperton* decisions from Texas courts rejected recusal arguments predicated on campaign contributions in judicial elections. *See, e.g., Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.—El Paso 1993, writ denied); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 844-45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.—San Antonio 1983, no writ).

(1) $1,000 contributed directly to the campaign committee of Brent Benjamin, who was running for election in 2004 to the West Virginia appellate court against an incumbent justice; (2) $2.5 million contributed to a separate political organization supporting Benjamin and opposing the incumbent; and (3) $500,000 in independent expenditures for direct mailings and letters soliciting donations to Benjamin's campaign, as well as television and newspaper advertisements supporting Benjamin. *Id.* Benjamin prevailed in the 2004 election. *Id*.

In October 2005, Caperton moved to recuse Justice Benjamin under the Due Process Clause based on Blankenship's election-related spending. *Id*. Justice Benjamin denied the motion. *Id.*

In December 2006, Massey filed its petition seeking review of the $50 million judgment by the West Virginia Supreme Court of Appeals to which Justice Benjamin had been elected. *Id*. at 2258. The court ruled in Massey's favor in November 2007 and reversed the judgment by a 3-2 vote; Justice Benjamin voted with the majority and joined the opinion reversing the trial court's judgment. *Id.* Thereafter, Justice Benjamin rejected two additional recusal requests. *Id*.

The United States Supreme Court concluded that these circumstances created "an extraordinary situation where the Constitution requires recusal." *Id*. at 2265. The Court applied "objective standards that do not require proof of actual bias," and it disclaimed any determination as to "whether there was actual bias" on Justice Benjamin's part

arising from Blankenship's spending on his behalf in connection with the 2004 election. *Id*. at 2263.

The Court stated, "We conclude that there is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64. "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 2264.

In concluding that Blankenship's campaign efforts "had a significant and disproportionate influence in placing Justice Benjamin on the case," the Court stressed that (1) Blankenship's $3 million "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee;" (2) the election was decided by fewer than 50,000 votes; and (3) "[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 2264-65. "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id*. at 2265.

The *Caperton* majority rejected contentions that recognizing a constitutional violation under these circumstances would prompt a flood of recusal motions and give rise to "unnecessary interference with judicial elections." *Id.* The majority reasoned that

existing codes of judicial conduct directing judges to avoid the appearance of impropriety would address most situations involving recusal issues related to election activity. *Id.* at 2267.

C. Impact in Texas

Citizens United and *Caperton* pull in opposite directions.

Under *Citizens United*, First Amendment protections invalidate the Texas Election Code's prohibition against direct campaign expenditures by corporations, labor organizations, and individuals. Under *Caperton*, "objective and reasonable perceptions" arising from newly permissible expenditures in judicial elections by corporations, labor organizations, or individuals require recusal if those expenditures reach an unquantified level creating a "significant and disproportionate influence" and a "serious risk of actual bias" — regardless of whether evidence of actual bias exists.

Texas judges now sit at the uneasy intersection of *Citizens United* and *Caperton*.

Corporations, labor organizations, and individuals cannot be prohibited from making direct campaign expenditures in connection with the partisan election process used to select Texas judges. But these same expenditures can result in recusal — or a due process violation if recusal does not occur — based on criteria that are imprecise at best. *See Caperton*, 129 S. Ct. at 2263 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."). According to Chief Justice Roberts, "[T]he standard the majority articulates — 'probability of bias' — fails to provide clear, workable guidance for future

cases." *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting). "Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?)." *Id*. at 2272 (Roberts, C.J., dissenting). The dissent identified 40 open questions concerning the circumstances and procedures governing recusal under *Caperton*. *Id*. at 2269-72 (Roberts, C.J., dissenting).

The *Caperton* majority contemplated that existing recusal standards and codes of judicial conduct will serve as a primary mechanism for determining when judges must decline participation in particular matters for election-related reasons. "Almost every State — West Virginia included — has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.'" *Id*. at 2266 (quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004)). "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Id.* at 2267.[4] "Application of the constitutional standard implicated in this case will thus be confined to rare instances." *Id.*

[4] Although the Supreme Court referred to disqualification and recusal interchangeably in *Caperton*, these are separate concepts under Texas law. Disqualification of a judge who has an interest in a case or a relationship to a party, or who has served as counsel in a case, is absolute under the Texas Constitution. Tex. Const. art. V, § 11. Disqualification can be raised at any time, including by collateral attack on the judgment. *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 146 Tex. 18, 20, 202 S.W.2d 218, 220 (1947). In contrast, recusal on any ground not enumerated as disqualifying under the Texas Constitution is governed by statute and rule, and can be waived. *See Glaser*, 632 S.W.2d at 148.

As described below, the Texas Supreme Court Advisory Committee is discussing post-*Caperton* revisions to the recusal procedures set forth in Texas Rule of Civil Procedure 18a and the recusal standards set forth in Rule 18b.

While attention to recusal procedures and standards is warranted at this juncture, recusal alone is not necessarily a complete response. *See* Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. at 303-04 (After *Caperton*, "[s]trengthened recusal practice is not a panacea for the courts, but it is an important step."). Resolution of a single recusal dispute addresses the particular circumstances of a particular judge involved in a particular matter. But the approach adopted in *Caperton* sweeps beyond the circumstances surrounding any one judge by framing the due process standard in terms of "objective and reasonable perceptions" that "do not require proof of actual bias." *Caperton*, 129 S. Ct. at 2263.

By grounding its analysis upon public perceptions rather than proof of actual bias, *Caperton* unavoidably raises larger questions about decision-making in the context of an elected judiciary.

According to the United States Supreme Court, "[O]bjective standards may . . . require recusal whether or not actual bias exists or can be proved." *Id.* at 2265. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Public perceptions of an elected judiciary may be affected regardless of whether particular recusal motions succeed or fail

in particular circumstances under *Caperton*'s fact-bound approach. *See id*. at 2274 (Roberts, C.J., dissenting) ("[O]pening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.").

These circumstances make it appropriate to look beyond modified recusal standards alone, and to consider additional measures aimed at reinforcing public confidence in a judiciary selected through a partisan election process. *See* Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. at 303-04.

II. Potential Responses

The committee has identified several potential responses to these issues, taking into consideration whether these responses would involve rulemaking, legislative changes, or amendments to the Texas Constitution. The potential responses are discussed more fully below. Additional responses warranting further consideration also may be suggested, such as public financing of elections and provision of voter guides.

The committee has included an appendix containing comparative information relating to other states that rely in whole or in part upon partisan elections to select judges. The primary states for comparison purposes are Alabama, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, New York, Ohio, Pennsylvania, Tennessee, and West Virginia. The appendix presents comparative information assembled by the National Center for State Courts focusing on judicial qualifications in ***Table 1***; straight-

ticket voting in ***Table 2***; length of terms in ***Table 3***; length of initial term after appointment in ***Table 4***; contribution limits and recusal standards in ***Table 5***; and post-*Caperton* changes to court rules in ***Table 6***. The appendix also includes ***Table 7*** compiled by the Brennan Center For Justice, which summarizes proposed rule and legislative responses to the issues raised in *Caperton*.

A. Judicial Campaign Fairness Act

Attention to existing statutes governing Texas judicial elections is warranted in light of *Citizens United* and *Caperton*.

The Judicial Campaign Fairness Act limits the time frame during which a judicial candidate can accept a "political contribution"[5] and sets contribution limits for judicial races. *See* Tex. Elec. Code Ann. §§ 253.153, 253.155, 253.157 (Vernon 2010).[6] A

[5] In an election for a full term, the window for accepting a "political contribution" opens 210 days before the date an application for a place on the ballot or for nomination by convention for the office is required to be filed. Tex. Elec. Code Ann. § 253.153(a)(1)(A) (Vernon 2010). The window closes on the 120th day after the date of the election in which the candidate or officeholder last appeared on the ballot. *Id*. § 253.153(a)(2).

[6] Subject to certain exceptions, a judicial candidate or officeholder may not knowingly accept "political contributions" from a person that in the aggregate exceed the following limits: $5,000 for a statewide judicial office; $1,000 for any other judicial office if the population of the judicial district is less than 250,000; $2,500 for any other judicial office if the population of the judicial district is between 250,000 and one million; and $5,000 for any other judicial office if the population of the judicial district is greater than one million. *Id*. § 253.155(b). Under section 253.157, aggregate contributions by a law firm, a member of a law firm, or a general-purpose committee of a law firm are limited to six times the contribution levels established in section 253.155. *Id*. § 253.157(a)(2). Penalties apply if a recipient fails to timely return contributions that exceed the limits established in sections 253.155 and 253.157. *Id*. §§ 253.155(e), (f); 253.157 (b), (c).

separate provision establishes aggregate limits on political contributions from and direct campaign expenditures by a general-purpose committee. *Id.* § 253.160.

Persons other than candidates, officeholders, or certain political party officials must file a written declaration of intent to make "political expenditures" exceeding $5,000 "for the purpose of supporting or opposing a candidate for an office other than a statewide judicial office or assisting such a candidate as an officeholder unless the person . . . ." *Id.* § 253.163(a). The aggregate limit for such expenditures in connection with candidates for statewide judicial office is $25,000. *Id.* § 253.163(b).

Additionally, section 253.168 establishes expenditure limits under which a judicial candidate may not knowingly make or authorize political expenditures exceeding certain aggregate levels. *Id.* § 253.168(a). "A person who violates this section is liable for a civil penalty not to exceed three times the amount by which the political expenditures made in violation of this section exceed the applicable limits prescribed by Subsection (a)." *Id.* § 253.168(b).

If applicable expenditure limits are exceeded by a candidate for judicial office, or if the requisite notice of intent to exceed expenditure limits is not provided, then an opponent of the non-complying candidate for judicial office is not required to comply with the limits on contributions, expenditures, and the reimbursement of personal funds. *Id.* § 253.165; *see also id.* § 253.170 (addressing third-party expenditures).

For the most part, the limits discussed above do not specifically address direct campaign expenditures by corporations or labor organizations. This omission is not

surprising because, subject to certain exceptions, the current versions of sections 253.094 and 253.002 of the Election Code prohibit direct campaign expenditures by corporations, labor organizations, and other persons. As noted earlier, the Texas Ethics Commission has concluded that sections 253.094 and 253.002 of the Election Code no longer can be enforced in light of *Citizens United* to prohibit a corporation, a labor organization, or any other person from making a direct campaign expenditure. *See* Op. Tex. Ethics Comm'n No. 489 at 2. This conclusion would apply to direct campaign expenditures in judicial and non-judicial races alike. *See id.*

Available options for addressing recusal and related issues in light of *Citizens United* and *Caperton* include the following approaches.

- Focus solely on revisions to the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, and/or the Code of Judicial Conduct to articulate updated recusal standards reflecting *Caperton*'s holding.
- Focus solely on amendments to the Texas Election Code, leaving existing rules unchanged.
- Combine rule revisions with statutory amendments.

If statutory revisions are to be considered, available options include the following approaches to amending the Texas Election Code.

- Incorporate restrictions specifically aimed at previously prohibited (but now permissible) direct campaign expenditures by corporations, labor organizations, and other persons. *See* Op. Tex. Ethics Comm'n No. 489 at 2. Such restrictions could address specific dollar limits on, the timing of, and reporting requirements for direct campaign expenditures by corporations, labor organizations, and other persons.

- Incorporate revised expenditure limits directed at judicial candidates/officeholders.
- Incorporate revised campaign contribution limits. This approach would be a more indirect response to the concerns animating the *Caperton* majority. The majority did not focus on Blankenship's $1,000 campaign contribution to Justice Benjamin's campaign; instead, it focused on Blankenship's $2.5 million contribution to a separate political organization supporting Justice Benjamin, and on Blankenship's $500,000 independent expenditure on Justice Benjamin's behalf. *See Caperton*, 129 S. Ct. at 2257. Additionally, the Texas Ethics Commission has concluded that *Citizens United* does not affect the prohibitions that currently preclude a corporation or labor organization from making a political contribution to a candidate or officeholder. *See* Op. Tex. Ethics Comm'n No. 489 at 2. The commission will continue to enforce the restrictions that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder. *Id*.
- Incorporate recusal standards into the Texas Election Code. Such standards could be framed in terms of requiring recusal based upon certain criteria (such as specific dollar amounts, or amounts exceeding specified limits) for contributions, candidate expenditures, or third-party expenditures. Such standards also could be framed to create a presumption ***against*** recusal based upon certain criteria — for example, in circumstances in which the judicial officeholder has complied with voluntary contribution or expenditure limits.

Judicial Council members and other interested parties may have further ideas warranting discussion.

For comparison purposes, ***Table 5*** includes a summary of relevant statutory provisions from Alabama, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia. ***Table 6*** summarizes rule changes in those states. ***Table 7*** summarizes post-*Caperton* proposals being considered in California, Florida, Georgia, Massachusetts, Montana, North Carolina, Nevada, Washington, and Wisconsin.

Table 5 also references H.B. 4548, a bill filed in the Texas House of Representatives before *Caperton* was decided. This bill illustrates one approach to creating a statutory recusal standard. It would have required recusal of a supreme court justice or court of criminal appeals judge from any case in which the justice or judge had accepted political contributions in the preceding four years totaling $1,000 or more from a party to the case, an attorney of record in the case, the law firm of an attorney of record in the case, the managing agent of a party to the case, a member of the board of directors of a party to the case, or a general-purpose committee established or administered by a person who is a party to the case. H.B. 4548 was left pending in the House Judiciary and Civil Jurisprudence Committee at the end of the 81st Legislative Session in 2009. Similar proposals relying on particular dollar amounts as a recusal trigger have been discussed in California, Montana, Nevada, and Wisconsin. *See* ***Table 7***.

Consideration is warranted to address how a Texas recusal standard predicated on political contributions in a specific dollar amount would mesh with existing contribution and expenditure limits under the Judicial Campaign Fairness Act. As a practical matter, a

mechanism requiring recusal based on contributions at a specific dollar level ***below*** the current statutory limits could make those existing limits more theoretical than real. Existing contribution limits may mesh more smoothly with a recusal mechanism that creates a presumption in favor of recusal when existing statutory limits are exceeded — or, alternatively, a presumption against recusal when existing statutory limits have not been exceeded. Such an approach would give effect to current statutory limits while maintaining flexibility to address individual circumstances in individual cases by creating a rebuttable presumption rather than an absolute recusal trigger.

B. Recusal Standards Under Rule 18b

The Texas Supreme Court Advisory Committee currently is addressing revisions to Texas Rule of Civil Procedure 18a's recusal procedures and Rule 18b's recusal standards.[7] The advisory committee recently drafted revisions to Rule 18a for the Texas Supreme Court's consideration; among other things, these proposed procedural revisions address the timing of recusal motions, required specificity in setting forth recusal grounds, efforts to obtain discovery from the respondent judge, and requests to recuse the presiding judge who hears a motion to recuse. The committee also is considering changes to Rule 18b's recusal standard in light of *Caperton*. Because the advisory committee currently is deliberating on the formulation of rule-based recusal standards in

[7] The Texas Supreme Court has authority to promulgate or amend the rules of civil procedure. *See* Tex. Gov't Code Ann. § 22.004 (Vernon Supp. 2009). Proposed amendments must be filed with the secretary of state and notice to the bar must be provided before an amendment's effective date. *Id.* § 22.004(b). The secretary of state must report amendments to the next regular session of the Legislature. *Id.*

light of *Caperton*, no specific recommendations are being made to the Texas Judicial Council at this time for consideration of changes to Rules 18a or 18b.[8]

Michigan has amended its court rules to provide for recusal 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 v. Massey* . . . ." *See* ***Table 6***.

C. Frequency of Campaigns

Requiring less frequent campaigns would diminish the effect of campaigning on judicial functioning in Texas.

1. Length of terms

The most direct way to reduce the frequency of campaigns is to adjust the length of terms. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1279 (2008) (increase in length of judicial terms will "reduce the frequency with which judicial tenure is put at risk"); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1100 (2007) ("Longer terms also mean fewer elections, less need to campaign, raise funds and grapple with the ever-more-daunting questions about campaign conduct, and less concern about decisions' vulnerability to distortion."); *see also Call to Action:*

[8] The grounds for recusal of an appellate judge under Texas Rule of Appellate Procedure 16 include all of the grounds identified for recusal of a trial judge under Texas Rule of Civil Procedure 18b; in addition, an appellate judge "must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending." Tex. R. App. P. 16.2.

Statement of the National Summit on Improving Judicial Selection, 34 LOY. L.A. L. REV. 1353, 1355 (2001).

A comparison of current judicial terms in Texas — four years for district courts and six years for appellate courts — to those in other states that rely upon partisan judicial elections demonstrates that terms in Texas are among the shortest. *See* ***Table 3***. Adjusting terms in Texas to six years for district courts and eight years for appellate courts would help to equalize those terms in relation to the terms mandated in other states. *See id.*; *see also* Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. at 1100 ("[E]very judicial selection system has pluses and minuses, and every aspect of any system has pluses and minuses. But longer terms are, on balance, a clear plus."). Such an adjustment would require a constitutional amendment. *See* Tex. Const. art. V, §§ 2, 4, 6, 7.

2. Back-to-back elections

A separate approach would focus on modifying Section 28(a) of Article V of the Texas Constitution, under which a judge who has been appointed to fill a vacancy must serve "until the next succeeding General Election for state officers, and at that election the voters shall fill the vacancy for the unexpired term." Depending on the timing of a vacancy, this provision can compel a recent judicial appointee to run in back-to-back elections — first to serve out the remaining years of an unexpired term, and then to seek a full term in the next election. The frequency of campaigns would be reduced if appointed judges were allowed to serve a full term before undertaking a second election. *See Call*

to Action, 34 LOY. L.A. L. REV. at 1355 ("All judges appointed to fill a vacant judicial position should serve a substantial period in office before initial election. After initial election, all judges should serve a full term before a second election."). Pursuing this option would require revision to staggered term requirements. *See, e.g.*, Tex. Const. art. V, § 2(c).

A comparison to the practice in other states with partisan judicial elections appears in ***Table 4***.

D. Straight-Ticket Voting

Partisan sweeps have become a recurring aspect of judicial elections; for example, sweeps occurred in district court elections in Houston in 1994 and 2008, and in Dallas in 2006. "Highly qualified judicial candidates can be defeated simply because, in a particular election year, they bear the wrong party label." Anthony Champagne, *Politics and Judicial Elections,* 34 LOY. L.A. L. REV. 1411, 1413 (2001). The effects of political party identification "are especially noticeable when highly qualified judges are defeated simply because they had the wrong party label in a year when a presidential nominee of the opposing party was unusually popular . . . ." *Id.* at 1426. Working within a framework of partisan judicial elections, a statutory amendment to eliminate straight-ticket voting in judicial elections could ameliorate the most extreme sweeps arising in connection with partisan identification of judicial candidates. Legislative proposals to eliminate straight-ticket voting in Texas judicial elections date back to at least 1997, when this feature was included in S.B. 621 filed by Senators Duncan, Armbrister and

Patterson. A possible alternative approach would be to schedule judicial elections for a date other than the date of the general election.

Straight-ticket voting is not a part of judicial elections in Illinois, Louisiana, Ohio, Kansas, Missouri, New York and Tennessee. The practice is allowed in judicial elections in Alabama, Michigan, Indiana, Pennsylvania, Texas and West Virginia. *See* ***Table 2***.

E. Judicial Qualifications

To the extent that participation in the election process bears on the public's confidence in the judiciary, that confidence can be bolstered by supplementing the requirements for holding judicial office.

The justices of the Texas Supreme Court, the judges of the Court of Criminal Appeals, and the justices of the intermediate courts of appeals must (1) be licensed to practice law in Texas; (2) be United States citizens; (3) be at least 35 years old and less than 75 years old; and (4) have "been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years." Tex. Const. art. V, § 2; *see also id*. §§ 1-a, 4, 6. District judges are constitutionally required to (1) be citizens of the United States and Texas; (2) be licensed to practice law in Texas; (3) be less than 75 years old; (4) have "been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election;" (5) have "resided in the district . . . for two (2) years next preceding . . . election; and (6) reside in the district during the term of office.

Tex. Const. art. V, §§ 1-a, 7. By statute, district judges must be at least 25 years old. Tex. Gov't Code Ann. § 24.001 (Vernon 2004).[9]

During the Texas Legislature's 81st Legislative Session in 2009, Representative Gattis sponsored Joint Resolution Nos. 105 and 106; these resolutions proposed constitutional amendments to change the qualifications for serving as an appellate or district court judge.

Joint Resolution No. 105 proposed amending Sections 2, 4, and 6 of Article V to require that justices on the Texas Supreme Court, judges on the Court of Criminal Appeals, and justices on the intermediate courts of appeals must be board certified by the Texas Board of Legal Specialization. Joint Resolution No. 105 was referred to the Judiciary and Civil Jurisprudence Committee, but was not voted out of that committee.

Joint Resolution No. 106 proposed amending Section 7 of Article V governing district judges to (1) raise the minimum age from 25 to 35; (2) raise the minimum required years of legal practice and/or prior judicial service from four to ten; (3) require three years of legal practice in Texas immediately preceding judicial service; (4) require completion of at least 60 hours of continuing legal education in the three years immediately preceding judicial service; and (5) require that at least five persons be willing to attest to the judge's competence in the practice of trial law. Additionally, Joint Resolution No. 106 would have set minimum requirements based on detailed criteria for the number and types of civil or criminal cases tried prior to judicial service.

[9] In 2007, Texas voters approved a constitutional amendment allowing judges who reached the mandatory retirement age of 75 to finish their terms in office.

Joint Resolution No. 106 was referred to the Judiciary and Civil Jurisprudence Committee, but was not voted out of that committee.

The number and complexity of the revisions proposed in Joint Resolution No. 106 may have affected its progress towards passage during the 81st Legislative Session. Consideration should be given to selecting a subset of the qualification criteria set forth in Joint Resolutions Nos. 105 and 106 for application to district court and appellate judges during the 82nd Legislative Session.

Additional criteria that have been suggested for consideration include requiring (1) an absence of disciplinary actions or suspensions while practicing law during a set number of years before going on the bench; (2) appearances as counsel of record in a certain number of cases in the court for which election is sought; and (3) prior judicial service by candidates for election to an appellate bench.[10]

Potential alternatives to the board certification requirement referenced in Joint Resolution Nos. 105 and 106 would include (1) a statutory requirement for district court and appellate judges to become board certified within a set timeframe ***after*** going on the bench; or (2) a statutory incentive for district court and appellate judges to become board

[10] This proposed requirement would not apply to appointed appellate judges during the interim period between appointment to a vacancy and the first required election after appointment to fill the unexpired term. *See* Tex. Const. art. V, § 28(a). According to statistics from the Office of Court Administration, as of March 2010, one justice went directly from private practice to the Texas Supreme Court; two judges went directly from private practice to the Court of Criminal Appeals; and at least 23 intermediate court of appeals justices went directly from private practice to the bench. Another justice joined the Texas Supreme Court after serving in the Attorney General's office.

certified in the form of additional compensation or retirement benefits. *Cf.* Tex. Gov't Code Ann. § 24.001 (Vernon 2004) (establishing minimum age requirement for district court judges by statute).

A further alternative approach would be the creation of a Judicial Qualification Commission to establish criteria for judicial service.

Selection of any of the options outlined above would result in judicial qualification requirements exceeding those in other states that select their judges through partisan judicial elections. *See* ***Table 1***.

Conclusion

Continued reliance on partisan elections to select Texas judges does not foreclose adjustments to the current process. Issues raised by *Citizens United* and *Caperton* warrant discussion of potential responses within a framework of continuing partisan judicial elections. States are exploring a wide array of responses to these issues. The variety of responses reflects the variety of existing circumstances — including, in some states, an absence of well-defined contribution limits, disclosure requirements, or recusal procedures. These important components already are in place in Texas. The next step for the Texas Judicial Council is to weigh potential responses against this backdrop in conjunction with other interested parties, and to explore whether a consensus can be reached that achieves an appropriate balance among the important interests at issue.

Characteristics of Courts in States with Partisan Judicial Elections

The following tables were compiled by the National Center for State Courts in August 2010. In reviewing the contents of the tables, please note that in some states partisan elections are used for only certain levels of courts or only certain counties in a state.

Indiana: Appellate judges do *not* face partisan elections.

Kansas: Appellate judges and trial judges in large metropolitan counties do *not* face partisan elections.

Michigan: Supreme court candidates are nominated through party primaries but party affiliations are not listed on the general election ballot. All other judicial elections are strictly non-partisan.

Missouri: Appellate judges and trial judges in large metropolitan counties do *not* face partisan elections.

New York: Supreme Court (called the Court of Appeals) justices are appointed by the Governor and do not face elections. Intermediate appellate judges are selected by the governor from the main trial court bench (called the Supreme Court), where judges run in partisan elections, as do all trial judges.

Ohio: All judicial candidates are nominated through party primaries but party affiliations are not listed on the general election ballot.

Tennessee: Appellate judges do *not* run in partisan elections.

August 2010

Table 1.

Judicial Qualifications

State	Appellate Courts	Trial Courts
Alabama	Licensed to practice law 10 years; 1 year resident; maximum age of 70.	Licensed to practice law 5 years; 1 year resident of circuit; maximum age of 70.
Illinois	U. S. Citizen; district resident; licensed to practice law in state.	U. S. Citizen; circuit/county resident; licensed to practice law in state.
Louisiana	10 years state practice; 1 year district/circuit resident; maximum age of 70.	8 years state practice; 1 year district resident; maximum age of 70.
Ohio	6 years practice of law; maximum age of 70 (Court of Appeals: resident of district.)	6 years practice of law; resident of county; maximum age of 70.
Pennsylvania	1 year state resident; maximum age of 70; state bar member.	1 year district resident; maximum age of 70; state bar member.
Texas	U. S. Citizen; state resident; licensed in state; between 34 and 74 years of age; 10 years practicing lawyer and/or judge.	U. S. Citizen; state resident; licensed in state; between 25 and 74 years of age; 4 years practicing lawyer and/or judge; resident of judicial district 2 years.
West Virginia	State citizen 5 years; minimum age of 30; 10 years practice of law.	State citizens 5 years; minimum age of 30; 5 years practice of law; circuit resident.
Michigan	Qualified elector; licensed to practice law in state; 5 years practice of law; less than 70 years of age.	N/A
Indiana		Circuit resident; admitted to practice law in state (some circuits impose additional qualifications.)
Kansas		State resident; maximum age of 70; member in good standing with bar for at least 5 years.
Missouri		U.S. Citizen 10 years; qualified state voter 3 years; circuit resident 1 year; licensed to practice in state; minimum age of 30; mandatory retirement age of 70.
New York		State or county resident; 10 or 5 years minimum practice, minimum 18 years of age; mandatory retirement age of 70.
Tennessee		Authorized to practice law in state; minimum age 30; state resident 5 years and district resident 1 year.

Table 2.

Does the State Include Judicial Officers in Straight Ticket Voting*

State	
Alabama	Yes
Illinois	No
Louisiana	No
Ohio	No
Pennsylvania	Yes
Texas	Yes
West Virginia	Yes
Michigan	Yes
Indiana	Yes
Kansas	No
Missouri	No
New York	No
Tennessee	No

*National Conference of State Legislators, Straight-Ticket Voting, (update October 22, 2008,) http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/StraightTicketVotingStates/tabid/16597/Default.aspx.

Table 3.

Length of Judicial Terms

State	Appellate Courts	Trial Courts
Alabama	6	6
Illinois	10	6
Louisiana	10	6
Ohio	6	6
Pennsylvania	10	10
Texas	6	4
West Virginia	12	8
Michigan[1]	8	X
Indiana	X	6
Kansas	X	4
Missouri	X	6
New York	X	10 or 14
Tennessee	X	8

[1]Supreme Court.

Table 4.

Length of Initial Term after Appointment

State	
Alabama	Stand in next general election after 1 yr in office.
Illinois	Stand in next general election more than 60 days after appointment.
Louisiana	Stand in general election after expiration of unexpired term.
Ohio	Stand in next general election more than 40 days after appointment; hold office for remainder of unexpired term.
Pennsylvania	Appellate court judges traditionally stand in election upon expiration of unexpired term; trial court judges either stand in the next municipal election more than 10 months after vacancy occurs or upon expiration of term.
Texas	Stand in next general election for unexpired term.
West Virginia	Stand in next general election; hold office for remainder of unexpired term.
Michigan	Stand in next general election; hold office for remainder of unexpired term.
Indiana	Stand in next general election.
Kansas	Stand in next general election.
Missouri	Stand in next general election.
New York	Stand in next general election more than three months after vacancy.
Tennessee	Stand in next general election at least 30 days after vacancy occurs; hold office for remainder of unexpired term.

"Term Allowed" and "Qualification Requirements" information taken from American Judicature Society website, www.judicialselection.us.

Table 5.

Limits on Campaign Contributions: Judicial Races and Recusal Standards

State	Limits on Campaign Contributions	Recusal Presumption*
Alabama	According to The Fair Campaign Practices Act: Section 17-22A there is no limit on contributions from individuals, political action committees, labor unions, and party organizations to judicial candidates. However, there is a $500 contribution limit for corporations.	ALA CODE § 12-24-1: The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2. [Never enforced.]
Illinois	A law was passed in 2009 imposing the first-ever limits on campaign contributions to judicial candidates. Limits were set at $125,000 for candidates in the first judicial district and at $75,000 for candidates in all other districts. The limits apply to contributions from individuals, businesses, and special interest groups in both the primary and general elections, but only apply to contributions from political leaders and leadership committees in the primaries. 10 ILCS 5 (Election Code).	There is no such provision.
Louisiana	Individuals, PACs, labor unions, and corporations may contribute up to $5,000 per candidate per election to supreme court and court of appeals candidates and to district court candidates in Orleans parish. Large PACs (more than 250 members) may contribute up to $10,000 per candidate per election to candidates for these offices, but candidates may not accept more than $80,000 from all PACs combined in any election cycle. Contributions to all other judicial candidates are limited to $2,500 per candidate per election, except for large PACs, which may donate up to $5,000 per candidate per election. For these candidates, contributions from all PACs combined are capped at $60,000 per election cycle. Campaign Finance Disclosure Act which references R.S. 18:1505.2 H, K (§1505.2).	There is no such provision.

State	Limits on Campaign Contributions	Recusal Presumption*
Ohio	As of 2009, limits on campaign contributions from individuals are set at $3,450 for supreme court candidates; $1,150 for court of appeals candidates; and $575 for candidates for the court of common pleas, municipal court, and county court. PAC contribution limits are set at $6,325 for supreme court candidates and $3,450 for candidates for other courts. Limits are the same for both the primary and general elections. However, if a primary is uncontested, the general election limits apply throughout the fundraising period. Ohio Code of Judicial Conduct Rule 4.4 (which references.)	There is no such provision.
Pennsylvania	There are no limits on campaign contributions from individuals and PACs. However, contributions from corporations, labor unions, and regulated industries are prohibited. Code of Judicial Conduct, Canon 7.	There is no such provision.
Texas	The contribution limits are: $5,000 for candidates for statewide judicial offices; $5,000 for candidates for courts of appeals, district courts, statutory county courts, or statutory probate courts if the population of the judicial district is more than one million; $2,500 for candidates for courts of appeals, district courts, statutory county courts, or statutory probate courts if the population of the judicial district is from 250,000 to one million; and $1,000 for candidates for courts of appeals, district courts, statutory county courts, or statutory probate courts if the population of the judicial district is less than 250,000.These limits apply to total contributions, both monetary and in-kind, from an individual or from an entity in connection with an election. (Judicial Campaign Fairness Act passed in 1995). Corporations and labor organizations are no longer generally prohibited from making political contributions. Professional corporations, however, were not subject to this prohibition. Elec. Code § 253.091, et seq. Partnerships that include one or more corporate partners are subject to the prohibition.	There is no such provision.
West Virginia	Contributions from individuals, PACs, and unions are limited to $1,000 per candidate per election. Contributions from corporations and regulated industries are prohibited. §3-8-12	There is no such provision.

State	Limits on Campaign Contributions	Recusal Presumption*
Michigan	Individual and political PAC contributions to supreme court and court of appeals candidates and to circuit court candidates in larger circuits are limited to $3,400 per candidate per election cycle. Individual and political PAC contributions to circuit court candidates in smaller circuits are limited to $1,000 or $500 per candidate per election cycle, based on the size of the circuit. Candidates' campaign committees are prohibited from soliciting contributions greater than $100 from lawyers. Michigan Campaign Finance Act- Mich. Comp. Laws Ann. § 169.252(4).	There is no such provision.
Indiana	There are no limits on contributions to judicial candidates from individuals and PACs. In Allen County, however, candidates for the superior court may collect no more than $10,000 in contributions from all sources, and contributions from political parties and political action committees are prohibited (IC 33-33-2-11). A special statute which only applies to Lake County superior court judges (IC 33-33-45-44(c)) provides that a political party shall not directly or indirectly campaign for or against a judge who is subject to a retention vote under IC 33-33-45.	Commentary to Canon 4.4 of the Indiana Judicial Code of Conduct: " Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11."
Kansas	Campaign financing regulations are relevant to judges standing for retention whose retention is opposed and to district court judges who run in partisan elections. Individuals and organizations may contribute up to $2000 per candidate per election to statewide candidates and up to $500 per candidate per election to district court candidates.	Commentary to Kansas Supreme Court Rule 4.4 (Canon 4): " Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11."
Missouri	Under Missouri law, there are no limits on contributions to judicial candidates.	There is no such provision.

State	Limits on Campaign Contributions	Recusal Presumption*
New York	Limits on contributions to judicial candidates are determined according to a formula, which is based on the number of enrolled party members in the candidate's district for the primary election and the number of registered voters in the candidate's district for the general election. There are different limits for family and non-family contributors. The limit on non-family contributions is determined by the following formula: $0.05 x the number of party members or the number of registered voters in the candidate's district. Non-family contribution limits are at least $1,000, with a maximum of $50,000. The aggregate limit on contributions from a candidate's family is calculated as follows: $0.25 x the number of party members or the number of registered voters. Aggregate family contribution limits are at least $1,250, with a maximum of $100,000. New York also imposes aggregate calendar-year limits on political contributions. Individuals may contribute up to a total of $150,000 in a calendar year, and corporations may contribute up to $5,000.	No such provision found in court rules.
Tennessee	Individuals may contribute up to $1,000 to judicial candidates. PACs may contribute up to $5,000 to judicial candidates.	Commentary to Canon 5C2 of the Tennessee Code of Judicial Conduct: "Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E." Section 3E does not explicitly address campaign contributions or contribution limits.

*Contains information on any explicit reference to contribution limits and recusal within Supreme Court Rules or Judicial Codes of Conduct as well as Fair Campaign Practices Acts.

Table 6.

Post-*Caperton* Changes to Recusal Standards

State	
Alabama	No change to court rules.
Illinois	No change to court rules.
Louisiana	No change to court rules.
Ohio	No change to court rules.
Pennsylvania	No change to court rules.
Texas	No change to court rules.
West Virginia	No change to court rules.
Michigan	Michigan Court Rule 2.003 (C) 1 (b) amended as follows: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*...."
Indiana	No change to court rules.
Kansas	No change to court rules.
Missouri	No change to court rules.
New York	No change to court rules.
Tennessee	No change to court rules.

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
CA	Campaign conduct; public accountability and education	Commission for Impartial Courts, reporting to the Judicial Council of California	Proposals include: • Add provision to canon of judicial ethics for disqualification of sitting judge who has made public statement while campaigning that a reasonable person would believe predisposes judge to biased ruling in pending case • Trial judges will be required to disclose in court all contributions of $100 or more • Judges automatically disqualify themselves in cases involving parties whose contributions exceeded specific threshold levels	• Currently, Provision 3E(2) of the Judicial Code of Conduct makes no mention of disqualification on grounds either of a judge's public statements or the receipt of campaign contributions • Provision 3E(2) does not currently require any disclosure based received contributions	• Commission issued final report on December 15, 2009	• Final Report: Recommendation for Safeguarding Judicial Quality, Impartiality, and Accountability in CA (12/15/2009) • Recommendations Conversions Chart (12/15/2009) • Chart of Comments (12/15/2009) • Consolidated List of Recommendations (12/15/2009) • Related Press: Ventura County Star (6/10/2009) • California Judicial Code of Conduct (amended 4/29/2009)
FL	Disqualification	State Bar Association	• The Judicial Administration and Evaluation Committee (JAEC) and the Rules of Judicial Administration and Education Committee of the Florida Bar have formed a joint subcommittee to address recusal reform	• Provision 3E(1) of the Judicial Code of Conduct states that a judge should disqualify himself/herself when the judge's impartiality might reasonably be questioned	• On October 8, 2009, JAEC met to discuss parameters of recusal reform; Judicial Ethics Advisory Committee also attended; Charlie Geyh (of Indiana University) gave comments	• Florida Bar News (11/1/2009) • Florida Bar News (8/1/2009)

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
GA	Disqualification	State House	• **H.B. 601:** Specifies when a judge is required to recuse, and states that recusal is required when a judge fails to set up a campaign committee to accept contributions and instead directly solicits contributions from a party, attorney, or law firm in a pending case	• Canon 3 of GA Judicial Code of Conduct states that a judge should disqualify himself/herself when the judge's impartiality might reasonably be questioned	• 4/1/2009 Session ends without bill's passage; all bills carry over to 2010 session (which began 1/11/2010)	• H.B. 601
MA	Disqualification	State Senate	• **S.B. 1807:** Specifies when a judge is required to recuse and requires judges refer all disqualification motions to another judge assigned to hear such a proceeding • **S.B. 1567:** Specifies when a judge is required to recuse	• Canon 4(E) of MA Judicial Code of Conduct states that a magistrate should disqualify himself/herself when the judge's impartiality might reasonably be questioned	• 12/31/2009 Session ends without bills' passage; all bills carry over to 2010 session (which began 1/4/2010) • 6/2/2009 Public hearing held • 1/20/2009 Bills referred to Joint Committee on Judiciary	• S.B. 1807 • S.B. 1567

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
MI	Disqualification	Michigan Supreme Court	• Supreme Court adopts formal rules for recusal requiring state Supreme Court justices to disqualify themselves in cases in which their impartiality might reasonably be questioned • The adopted rules require recusal decisions to be rendered in writing • The new rules also allow the full Supreme Court to review an individual justice's decision not to recuse.	Prior to adoption of rules: • Judges decided on motions concerning their own disqualification • Judges were not required to issue reason for denial of such motions • Michigan had not formally adopted the ABA's general disqualification standard, Rule 2.11(A) of the Model Code	• 11/25/2009 Supreme Court formally adopts recusal rules • 11/5/2009 Supreme Court announces decision to adopt rules for recusal, patterned on "Proposal C" (see "Proposals" in adjacent column)	• Court Order (11/25/2009) • Related Press: • Michigan Free Press (1/11/2010); Detroit News (12/1/2009); Michigan Free Press (11/26/2009); Associated Press (11/27/2009) • Proposals (3/18/2009) • Joint Brennan Center and Justice at Stake Letter to Michigan Supreme Court (7/31/2009)
MI	Disqualification	State House	• **House Joint Resolution P:** Adds a section to the State Constitution to clarify the circumstances under which justices of the Supreme Court must disqualify themselves from cases in which their impartiality might reasonably be questioned	• Judges decide on motions concerning their own disqualification • Judges are not required to issue reason for denial of such motions • Michigan has not formally adopted the ABA's general disqualification standard, Rule 2.11(A) of the Model Code	• 12/31/2009 Session ends without bill's passage; all bills carry over to 2010 session (which began 1/13/2010) • 3/17/2009: Bill introduced	• HJRP • Michigan Policy Network Bill Summary and Analysis
MT	Disqualification	State House	• **LC 2027:** Requires recusal of a justice of the supreme court if he or she received campaign contribution in excess of $250	• List of grounds for recusal in state code does not include campaign contributions	• 4/28/2009: Bill died in draft process	• LC2027 • Bill history

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
NC	Disqualification	State Senate	• **S.B. 659:** States that judges, in response to a disqualification motion, can either recuse or refer the disqualification motion to the Chief Justice for reassignment	• Canon 3(C) of N.C. Judicial Code of Conduct states that a judge should disqualify himself/herself when the judge's impartiality may reasonably be questioned; judges are not currently required to refer disqualification motions to another judge for consideration	• 8/7/2009: Session ends without bill's passage; all bills carry over to 2010 session (which begins 5/10/2010) • 3/19/2009 Referred to Committee on Judiciary	• S.B. 659
NC	Disqualification	State Senate	• **S.B. 797:** Clarifies that a judge may recuse for any reason rendering him/her unable to perform the duties required of a judge in an impartial manner; requires that reasons for disqualification be put in writing	• Canon 3 of N.C. Judicial Code of Conduct states that a judge should disqualify himself/herself when the judge's impartiality may reasonably be questioned	• 8/7/2009: Session ends without bill's passage; all bills carry over to 2010 session (which begins 5/10/2010) • 5/28/2009: In Committee on Judiciary; reported favorably • 5/11/2009: Bill passes Senate	• S.B. 797

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
NV	Disqualification	Commission on the Amendment to the Nevada Code of Judicial Conduct, reporting to Supreme Court	• Commission recommended disqualification in the event that a judge receives campaign contributions of $50,000 or more from a party appearing before judge; these benchmarks vary in smaller districts where less aggregate money is spent on elections	• Nevada has adopted ABA's general disqualification standard, Rule 2.11(A) of the Model Code	• Effective 1/19/2010 – Supreme Court revises Judicial Code of Conduct and rejects initial proposal for $50,000 threshold to trigger recusal • Committee issued its report on disqualification 7/20/ 2009	• Related Press: Associated Press (1/1/2010); Las Vegas Journal (7/21/2009); Las Vegas Review Journal (6/23/2009)
TX	Disqualification	State House	• **H.B. 4548:** States that a justice of the supreme court or judge of the court of criminal appeals shall recuse him/herself from any case in which he/she has accepted political contributions totaling $1,000 over preceding 4 years from party to case	• Disqualification provision of Government Code does not consider campaign contributions made to judges	• 4/20/2009: Bill died in committee	• H.B. 4548

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
WA	Disqualification	Judicial Conduct Task Force, reporting to Supreme Court	• Proposal for new Code of Judicial Conduct includes, as mandatory grounds for disqualification, financial support of judge's campaign within last six years by active litigant, when such support amounts to more than ten times the state contribution limit. (Financial support is defined as campaign contributions or independent expenditures made in support of judge's campaign and/or against opposing candidate, and includes a percentage of money given to PACs that support the judge's candidacy and/or attack his opponent's) • Judge may disqualify himself if such financial support is more than two times but less than ten times the state contribution limit	• Washington has adopted ABA's general disqualification standard, Rule 2.11(A) of the Model Code	• Public comment period on proposed Judicial Code of Conduct through April 30, 2010	• Proposed New Washington State Code of Judicial Conduct (9/8/2009)

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Recusal Reform in the States, 2009-2010

State	Issue	Forum	Proposal or Initiative	Current Practice	Status	Information
WI	Disqualification	Petitions to Supreme Court of Wisconsin	• Four petitions to amend the Code of Judicial Conduct: • One proposed rule (by League of Women Voters) would require recusal when a party to a case contributed $1,000; • One proposed rule (by retired Justice William Bablitch) would require recusal when a party to a case contributed $10,000; • One proposed rule (by Wisconsin Realtors Association) provides that a judge shall not be disqualified solely because of a lawful contribution; • The last proposed rule (by Wisconsin Manufacturers and Commerce ("WMC")) provides that a judge shall not be disqualified solely because of a party's independent expenditures.	• Prior to 10/28/2009, campaign contributions were not among the grounds for recusal specifically enumerated in state code of judicial conduct	• 1/15/2010 Justice David Prosser, Jr. submitted proposed revisions to rule petitions 08-25 and 09-10 • 12/7/2009 Supreme Court withdraws October 28 vote • A public hearing was held on 10/28/2009. Following the hearing, the Supreme Court voted 4-3 to grant the petitions filed by the Realtors Association and WMC, and to deny the remaining two petitions.	• Justice Prosser's proposed revisions to Rule Petitions 08-25 and 09-10 • Petition by League of Women Voters (5/2009) • Petition by William Bablitch (10/16/2009) • Petition by Wisconsin Realtors Association (9/30/2008) • Petition by WMC (10/16/2009) • Brennan Center Letter to Wisconsin Supreme Court (10/9/2009) • Related Press: Milwaukee Journal Sentinel (1/18/2010); State Bar of Wisconsin (12/9/2009); Milwaukee Journal Sentinel (10/28/2009) Milwaukee Journal Sentinel (editorial) (10/20/2009) Milwaukee Journal Sentinel (10/16/2009)

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Recusal Reform in the States, 2009-2010