BRENNAN
CENTER
FOR JUSTICE

Justice at Stake
campaign

February 10, 2011

Stephen N. Zack
President, American Bar Association

William K. Weisenberg
Chair, ABA Standing Committee on Judicial Independence

Re: Recusal and Judicial Disqualification

Dear Mr. Zack and Mr. Weisenberg:

On behalf of the Justice at Stake Campaign[1] and the Brennan Center for Justice at NYU School of Law,[2] we write to commend your efforts to improve the American Bar Association's guidance on judicial disqualification issues. Reforming disqualification practice in the states is critical to protecting judicial independence and maintaining the public's faith in fair, impartial courts.

The ABA has been working hard for some time on proposed standards for judicial recusal and disqualification reform. The explosion in judicial election spending over the last decade[3] has created a need to review and strengthen recusal rules as they relate to election campaigns. As national groups working to protect the courts, we write to offer some thoughts on what is at stake.

In its 2009 amicus brief in *Caperton v. Massey*, the Conference of Chief Justices wrote, "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled. Disqualification is an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal."[4] Added the ABA's own amicus brief in *Caperton*: "Few actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor."[5]

Public confidence is indeed in peril. Three in four Americans believe that campaign spending affects courtroom decisions. More than 80 percent believe judges should not hear cases involving major campaign supporters. In its decision in *Caperton*, the

Supreme Court agreed that large campaign expenditures can cause "a serious risk of actual bias" in courtroom decisions.[6]

As the ABA discussion goes forward, we believe any final recommendations should build on two fundamental principles articulated in a recent proposal from the Standing Committee on Judicial Independence. We also believe that these principles should represent a minimum first step in recusal reform efforts throughout the states.

First, it is important to provide for review of recusal motions by neutral judges, so that a challenged judge doesn't have the last and only word on whether to step aside. This would eliminate one of the most criticized features of recusal systems in many states and increase public trust in final decisions made in recusal cases. A large majority of Americans agrees that a neutral judge, not the judge who is being challenged, should have the last word on recusal motions.[7]

Second, the final ABA recommendation should recognize that because of judicial campaign spending by litigants or their attorneys, a judge's impartiality might reasonably be questioned, and disqualification may be necessary. Such a recommendation would conform with the constitutional standard set by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*[8]

Over the past decade, Justice at Stake and the Brennan Center have built a strong record of defending America's courts from outside interference. We consider ourselves friends of impartial courts, and do not believe that robust recusal standards in any way encroach on the independence of the judicial branch. Indeed, addressing public unease over soaring judicial election spending is in the direct interest of the thousands of honorable men and women who serve on state benches.

Our organizations stand ready to assist. As a first step in this effort, the Brennan Center has written a paper entitled *Promoting Fair and Impartial Courts through Recusal Reform* that identifies best practices in states that already have in place rules like those described above. We attach a copy of the paper for your convenience.

Respectfully submitted,

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

[2] The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy.

[3] *See generally* James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* (2010), *available at* http://www.brennancenter.org/NPJE09.

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

[5] *See Caperton v. Massey*, Brief of the American Bar Ass'n as Amicus Curiae In Support Of Petitioners (No. 08-22) (U.S. 2009), *available at* http://www.brennancenter.org/ABA_amicus.

[6] 129 S. Ct. at 2265.

[7] *See* Press Release, Justice at Stake, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions (Sept. 8, 2010), *at* http://tinyurl.com/2c422fs.

[8] 129 S. Ct. 2252 (2009).