

Testimony of Rich Robinson, Michigan Campaign Finance Network
to the
House Judiciary Committee
October 10, 2007

Thank you for allowing me the opportunity to testify on the matter of standards of recusal for the Michigan Supreme Court. The Michigan Campaign Finance Network (MCFN) identified this as an issue of concern in our April 2007 publication, *A Case for Political Reform in Michigan*.

I will focus my remarks on campaign finances in Michigan Supreme Court election campaigns and the inherent hazards for conflicts of interest, both in appearance and reality. This is an area from which the discussion of recusal, or self-disqualification, is a natural outgrowth. I will also briefly discuss policy measures that would diminish the likelihood of conflicts of interest and, therefore, the need for recusal.

According to a study by the National Institute on Money in State Politics, throughout the decade of the 1990s, 86 percent of the cases that were heard by the Michigan Supreme Court involved at least one campaign contributor to at least one of the justices. Many of those contributions were small and relatively inconsequential; others were large and should be cause for concern.

Michigan Supreme Court campaigns were transformed in 2000, when candidate-focused television issue advertisements first became a major feature of the marketing of the candidates. By MCFN accounting, \$23.5 million has been spent in the last four election cycles, beginning with 2000.

Summary of Michigan Supreme Court Campaigns, 2000 through 2006

	2000	2002	2004	2006
Candidate receipts	\$ 6,825,031	\$ 958,427	\$ 1,544,278	\$ 1,087,344
Independent expenditures	\$ 1,587,831	\$ 30,690	\$ 647,393	\$ 1,021
Issue advertising *	\$ 7,500,000	\$ 840,000	\$ 1,377,000	\$ 800,000
Total spending	\$ 15,912,862	\$ 1,829,117	\$ 3,568,671	\$ 1,888,365
Number of seats	3	2	2	2
Cost per seat	\$ 5,304,287	\$ 914,559	\$ 1,784,336	\$ 944,183

* estimated

The candidates' campaign committees have raised \$10.4 million since 2000. This represents great potential for conflicts of interest, even though there are limits on contributions to these committees: \$68,000 from the political parties; \$34,000 from political action committees; and \$3,400 from individuals. But don't take my word that this should be a concern. Take it from someone who has been in the eye of the storm. In July 2000, Justice Robert Young, Jr. told *George* magazine: "My advisers tell me I'll have to raise \$1 million or more to run a Supreme Court race. How can this not be a problem? The public has a right to ask: 'If you have to raise \$1 million, can you really be impartial?'" In fact, Justice Young raised \$1.3 million in 2000 and \$622,000 in 2002.

The American Bar Association's newly revised Model Code of Judicial Conduct, Rule 2.11.A.4, recommends that campaign contributions to a judge or justice from a party in a case, the party's lawyer or the law firm of the party's lawyer, of an amount to be recommended by a state advisory committee, should be grounds for disqualification from a case involving the contributor. Presently, 18 states and the District of Columbia have committees reviewing the new Model Code and developing recommendations for implementation in their respective jurisdictions. Our neighbors in Ohio and Indiana are among the 18. Michigan is not.

Independent expenditures represent another sort of peril. Because Michigan has no limits on contributions to political parties or political action committees, and the independent expenditures of such committees cannot be limited, independent expenditures present an unlimited opportunity for an individual or an interest group to support or oppose a candidate, and, thereby, influence the outcome of an election. I will give you two examples.

In 2000, Thomas Monaghan put \$655,000 into the Ann Arbor PAC, 86 percent of its funds for the election cycle. The PAC, in turn, gave \$34,000 each to Justices Markman, Taylor and Young; and it made over \$200,000 worth of independent expenditures supporting those justices. This should invite a question: If Monaghan has a case before the Michigan Supreme Court, should those justices recuse themselves? Should it be a matter of personal conscience, or should there be a standard?

In 2004, Geoffrey Fieger spent more than \$450,000 as the sole contributor to a PAC called Citizen's for Judicial Reform for independent expenditures attacking Justice Stephen Markman. Should Fieger's attack cause Justice Markman to have to recuse himself from a case involving Fieger? I would submit that the answer must be 'no.' Otherwise prospective litigants could pursue an active strategy of forced disqualification. But what if Fieger had contributed to a successful challenge to Justice Markman. Would the beneficiary of Fieger's effort be expected to recuse in a case involving Fieger?

To borrow from Chief Justice John Roberts' baseball analogy where he characterizes judges as the umpires of society: If one team pays to hire the umpire, can the umpire be expected to call balls and strikes fairly and impartially when that team comes to bat? Do we suppose that this would be agreeable to the opposing team? Would spectators and future players think that this was a fair practice?

Since 2000, candidate-focused television issue advertisements have accounted for more than \$10 million of spending in Supreme Court campaigns. The Michigan Chamber of Commerce spent more than \$6 million of that total supporting the candidacies of the five Republican incumbents on the Court, or opposing their Democratic opponents. In each of the last four election cycles, the Chamber has spent more than any candidate on the ballot. This is particularly important to our discussion today because these advertisements are not considered to be campaign expenditures under the Michigan Campaign Finance Act. That means that the spending is not disclosed in any campaign finance report, the contributors to the sponsoring entity are not disclosed and there are no

restrictions against corporate or union treasury funds, as there are for candidate committees or political action committees. Therefore, it is next to impossible to determine whether there is a conflict of interest because we can't tell whose money was used for the marketing campaign to promote prospective 'umpires.'

We have had only one good opportunity to look inside the black box of Supreme Court issue ad finances. That occasion came in a front-page story in the Wall Street Journal by Jim VandeHei on September 11, 2001, that I have provided to you. Among the major story lines in VandeHei's reporting is a synopsis of the U.S. Chamber of Commerce's five-state issue ad campaign to elect business-friendly state Supreme Court justices in 2000. The U.S. Chamber's target states were Alabama, Mississippi, Ohio, Indiana and Michigan. The million-dollar contributors to the Chamber for that effort included Wal-Mart, Home Depot, the American Council of Life Insurers and DaimlerChrysler.

On the record in Michigan during the 2000 campaign, DaimlerChrysler's then-CEO, James P. Holden, hosted a fundraising reception for Justices Markman, Taylor and Young at Meadow Brook Hall on October 10th. DaimlerChrysler's PAC, employees, Board members and their spouses made direct contributions of \$39,000 to Justices Markman, Taylor and Young, after giving \$58,000 to Justices Corrigan and Taylor in 1998.

Before the 2002 election, the Michigan Supreme Court had heard oral arguments on one case involving DaimlerChrysler and moved a second case onto its docket. In the second case, *Gilbert v. DaimlerChrysler*, the Michigan Supreme Court ultimately overturned a *per curiam* opinion of the Court of Appeals and wiped out a \$21 million damage judgment against DaimlerChrysler plus \$9 million in interest. None of the justices who benefited from the Chamber of Commerce 2000 issue ad campaign or the \$98,000 in DaimlerChrysler direct contributions recused themselves from the case.

There are no proofs to establish that DaimlerChrysler's \$1 million was routed to the Michigan Chamber's \$3 million issue ad campaign in 2000, but certain facts are known.

- The funders of the Citizens for a Strong Ohio issue ad campaign were forced out of the closet through litigation. DaimlerChrysler was not one of them.
- Neither the Alabama nor Mississippi Supreme Court has taken a DaimlerChrysler case since 2000.
- Indiana's Supreme Court has taken only two DaimlerChrysler cases since 2000. DaimlerChrysler sought to compel arbitration in the cases, its motion was denied and the cases were sent to trial court.
- DaimlerChrysler's Assistant General Counsel for Government, Steven B. Hantler, is, or was, a Board member of the Michigan Chamber of Commerce.

I urge you to apply the 'reasonable person' test: Recount these facts to citizens in your home districts and ask them whether recusal should be a matter of personal conscience, or something more objectively defined. MCFN polled 600 likely voters a few

years ago and we learned that 88 percent believed that it is important for judges to be independent from the influence of contributors to their election campaigns. But 80 percent believed that campaign contributions do influence decisions that judges make. These perceptions neatly capture the corrosive impact of big-money judicial campaigns in undermining citizens' trust and confidence in the ideal of a fair and impartial judiciary.

Earlier this year on the occasion of the release of the report *The New Politics of Judicial Elections, 2006*, former United States Supreme Court Justice Sandra Day O'Connor said, "Justice at Stake's report shows how in too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution. I hope that every state that elects judges in partisan elections will consider reforms."

I certainly concur with Justice O'Connor's comment and I would suggest that it should apply to our nominally nonpartisan Supreme Court elections as well. Michigan has an immediate need for standards of recusal for our Supreme Court, but this Legislature should look beyond standards for recusal. It should be mandatory for sponsors of candidate-focused issue advertising to identify their contributors in the public record, so questions of recusal can be properly identified and considered. A policy of 'Don't ask, don't tell' has no ethical underpinnings as a substitute for transparency. And we should have a full public funding program for candidates for the Supreme Court, so candidates can have a viable campaign that is demonstrably free of special interest money. In so doing, much of the cause for concern about recusal could be eliminated. The American Bar Association recommends public funding for states that elect their Supreme Court in contested elections, and the Representative Assembly of the State Bar of Michigan passed a resolution five years ago that similarly endorsed public funding. This is a policy whose time has come.

In order to facilitate a public funding system for Supreme Court campaigns, this Legislature should respect the directive of more than two million tax filers and fully restore the State Campaign Fund. That fund may have been rendered obsolete for gubernatorial campaigns, but a fully restored fund could nicely accommodate a system of full public funding for our state's highest court.

Finally, I feel compelled to note that the conversation about money and judicial disqualification should go beyond campaign finances. Judges and justices should recuse themselves from cases in which they have substantial personal financial interests at stake. But since Michigan is one of only three states that do not require elected officials to disclose personal financial interests, this, too, is currently a matter of personal conscience, instead of public oversight and standards.

I am grateful that the Committee is taking up these important issues. We have a recusal problem, but that problem is only a symptom of a campaign finance system that is an incubator for conflicts of interest. All it will take to perpetuate this toxic system is for a few good men and women to do nothing. Please, give this situation the attention it deserves. Thank you.